

Crossed Destinies: International Economic Courts and the Protection of Cultural Heritage

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Abstract

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. However, these phenomena can also jeopardize cultural heritage. Foreign direct investments in the extraction of natural resources have the ultimate capacity to change cultural landscapes and erase memory; trade in cultural goods can induce cultural homogenization. In parallel, legally binding and highly effective regimes demand states to promote and facilitate foreign direct investment and free trade.

This article investigates the distinct interplay between the promotion of economic integration and the protection of cultural heritage before two separate international dispute resolution systems: *i.e.* investment treaty arbitral tribunals and the World Trade Organization Dispute Settlement Mechanism. It addresses the question as to whether international economic ‘courts’ pay adequate attention to the need of protecting cultural heritage, contributing to the coalescence of consistent narratives and emerging general principles of law. Has a cultural administrative law emerged requiring the protection of cultural heritage and an adequate balance between the same and the promotion of economic interests in international law? Are there specific contributions arising from each of the two dispute settlement mechanisms?

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¹ M. Tullius Cicero, *Tusculanae disputationes*, I, 2, 4 (‘Honour supports the arts.’)

I. Introduction

Cultural heritage is a multifaceted concept which includes both tangible (*i.e.* monuments, sites, cultural landscapes etc.), and intangible cultural resources (*i.e.*, music, cultural practices, food preparation etc.). While culture represents inherited values, ideas, and traditions, which characterize social groups and their behaviour, 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 – *i.e.*, intangible cultural heritage, and underwater cultural heritage – rather than approaching it holistically.²

The protection of cultural heritage is a fundamental public interest. Cultural heritage is perceived as a strategic resource of sustainable development that is, development which meets the needs of the present and future generations. 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.³ 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.⁴

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 investment facilitates the interaction between different cultures and development may be conceived as a process for expanding cultural freedom.⁵ As a result, there can be positive synergies between the promotion of trade and foreign direct investment on the one hand and the protection of cultural heritage on the other.

However, this is not always the case. Economic globalization and international economic governance can also jeopardize cultural heritage. Asymmetry in flows and exchanges of cultural goods can lead to cultural homogenization. In parallel, investments in the extractive industries have the ultimate capacity of changing cultural landscapes. At the same time, legally binding and highly effective regimes demand states to promote foreign direct investments and free trade.

² Manlio Frigo, 'Cultural Property v. Cultural Heritage: A "Battle of Concepts" in International Law?', 86 *International Review Red Cross* 367 (2004) 367 ff..

³ Amartya Sen, 'How Does Culture Matter?', in Vijayendra Rao and Michael Walton (eds.) *Culture and Public Action* (Palo Alto, CA: Stanford University Press, 2004) 37–58.

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

⁵ See generally Amartya Sen, *Development as Freedom* (New York: Knopf, 1999).

The privileged regime created by international economic law within the boundaries of the host state has increasingly determined a tension between the promotion of economic integration and cultural sovereignty, meant as the regulatory autonomy of the host state in the cultural field. Trading nations and investors have increasingly claimed that cultural policies breach international economic law provisions. In particular, they have alleged violation of the Most Favored Nation Treatment (MFN), national treatment, ban on performance requirements, and others. International disputes relating to the interplay between 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 brought claims before two separate international dispute resolution systems: the World Trade Organization (WTO)⁶ dispute settlement mechanism and investment treaty arbitral tribunals respectively. For the purpose of this discussion, these two systems are examined in parallel. Arbitral tribunals and WTO dispute settlement panels essentially do share the same functions by settling international disputes in accordance with parallel subsets of international economic law. Like WTO panels and the Appellate Body, arbitral tribunals are asked to strike a balance between economic and non-economic concerns. On the other hand, 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).⁷ However, this does not mean that these two systems should be treated as the same. Rather, their differences ought to be recognized. While only states can file claims before the WTO panels and the Appellate Body, investor–state arbitration can be pursued by foreign investors directly without any intervention of the home state. Furthermore, arbitral tribunals can authorize damages to the foreign investors, while remedies at the WTO only have prospective character and involve states only. Moreover, there may be specific contributions arising from each of the two systems.

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, the European Union (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.⁸ Canada and Norway brought the seal ban before the WTO, contending that the ban

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

⁷ Agreement on Trade-Related Investment Measures, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 UNTS 186.

⁸ 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.

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 per cent 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...’.⁹ 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 inheritance?¹⁰ 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.¹¹

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 business concerns.¹² This tension 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. Because culture is a fluid concept, it should not

⁹ *Joseph Charles Lemire v. Ukraine*, Decision on Jurisdiction and Liability, ICSID Case No. ARB/06/18, 14 January 2010, para. 406.

¹⁰ Language is a controversial issue in Ukraine: since its independence in 1991 and for almost two decades Ukrainian has been its only official language, despite the presence of linguistic minorities. When a 2012 bill elevated languages spoken by at least 10 per cent of a region to the status of ‘regional language’, uproar arose in the Parliament. ‘Ukraine in Uproar Over Status of Russian Language’, *Reuters*, 28 May 2012. On 22 February 2014, the Ukrainian Parliament repealed the 2012 bill. Palash R. Ghosh, ‘Watch Your Tongue: Language Controversy One of Fundamental Conflicts in Ukraine’, *International Business Times*, 3 March 2014. Clearly, if a US company wanted more English songs to be played, that is different from Russian minorities wanting Russian language songs to be played. Yet, the controversy shows that arguments in support of economic freedom can conflate with arguments in support of linguistic diversity against monolingualism. This is not to say that states should not adopt measure to protect national languages: since the collapse of the former Soviet Union, English has grown exponentially in Central and Eastern Europe. To prevent the linguistic hegemony of English and the parallel devaluation of national language(s), several states have adopted measures to govern broadcasting. See Stephen May, *Language and Minority Rights – Ethnicity, Nationalism and the Politics of Language*, II ed., (New York and London: Routledge 2012), 206–44. In turn, this shows the complexity of language policies.

¹¹ *Joseph Charles Lemire v. Ukraine*, Decision on Jurisdiction and Liability, para. 407.

¹² See generally John J. Jackson, *Sovereignty, the WTO and the Changing Fundamentals of International Law* (Cambridge: Cambridge University Press 2009); Joost Pauwelyn, *Conflict of Norms in Public International Law; How WTO Law Relates to Other Rules of International Law* (Cambridge: Cambridge University Press 2003).

be frozen in time. 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.¹³

Moreover, notwithstanding a growing regulation of the field, international cultural law remains vague. For instance, the Convention on Cultural Diversity requires the protection of cultural diversity, but it does not offer detailed rules.¹⁴ Furthermore, the measures adopted by the state parties to comply with the Convention can be contradictory. Consider the *Lemire* case. Would cultural diversity be better promoted by allowing the foreign company to transmit foreign songs or by requiring the compulsory broadcasting of national music? *In casu*, the Arbitral 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 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 law can make it difficult for adjudicators to ascertain the legitimacy of such measures.

Because there is no 'World Heritage Court', cultural heritage related disputes have been attracted and settled by international economic *fora*. The WTO panels, the Appellate Body and arbitral tribunals scrutinise cultural policies to determine whether the latter are enacted in the public interest or for protectionist purposes and 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 which present cultural elements due to ever increasing economic integration, the interaction between the protection of cultural heritage and economic globalization deserves further scrutiny.¹⁵

When should economic interests yield to the protection of cultural heritage? At their core, cultural heritage related disputes involve society's most cherished values that are definitive of a nation's 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 encapsulates the common interest of mankind –

¹³ 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.')

¹⁴ Convention on the Protection and Promotion of the Diversity of Cultural Expressions, 20 October 2005, in force 18 March 2007, in UNESCO, Records of the General Conference, 33rd session, Paris, 3–21 October 2005 (2 vols, 2005), vol. I, at 83.

¹⁵ For a seminal study, see Tania Voon, *Cultural Products and the World Trade Organization* (Cambridge: Cambridge University Press 2011).

transcending borders and stressing the common bonds which link the international community as a whole.¹⁶ 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.¹⁷

The review by an international tribunal of domestic regulations 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 may cause a regulatory chill is a matter of debate.

On the other hand, the interaction between international economic law and other sets of law raises the question as to whether the former is a ‘self-contained’ system.¹⁸ The increased proliferation of treaties and specialization of different branches of international law make some overlapping between the latter unavoidable. General treaty rules on hierarchy—namely *lex posterior derogat priori*¹⁹ and *lex specialis derogat generali*²⁰ may not be wholly adequate to govern the interplay between treaty regimes because the given bodies of law do not exactly overlap; rather, they have different scopes, aims and objectives.²¹

Moreover, when adjudicating cultural heritage related economic disputes, the question arises as to whether international economic courts can take into account and/or apply other bodies of law in addition to international economic law. Investment treaty arbitral tribunals and the WTO panels and Appellate Body are of limited jurisdiction and cannot adjudicate on the eventual violation of cultural heritage law. Yet, when interpreting a treaty they can take account of other international obligations of the parties according to customary rules of treaty interpretation as restated by the Vienna

¹⁶ Francesco Francioni, ‘Public and Private in the International Protection of Global Cultural Goods’, 23 *European Journal of International Law* 719 (2012) at 719 ff (considering the protection of cultural heritage as a global public good.).

¹⁷ Petros C. Mavroidis, ‘Free Lunches? WTO as Public Good, and the WTO’s View of Public Goods’, 23 *European Journal of International Law* 731 (2012), at 731 ff.; Barnali Choudhuri, ‘International Investment Law as a Global Public Good’, 17 *Lewis & Clark Law Review* 481 (2013) 481 ff (considering the promotion of trade and foreign direct investments as public goods)

¹⁸ Joel P. Trachtman, ‘The Domain of WTO Dispute Resolution’, 40 *Harvard International Law Journal* 333 (1999) 333 ff.; Pauwelyn, above n 11.

¹⁹ Vienna Convention on the Law of Treaties (VCLT), opened for signature 23 May 1969, in force 27 January 1980, 1155 UNTS 331, Article 30,

²⁰ The concept *lex specialis derogat legi generali* is ‘a generally accepted technique of interpretation and conflict resolution in international law’. It indicates that ‘whenever two or more norms deal with the same subject matter, priority should be given to the norm that is more specific’. 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), at p. 2.

²¹ Donald McRae, ‘International Economic Law and Public International Law: The Past and the Future’, 17 *Journal of International Economic Law* 627 (2014) at 635.

Convention on Law of Treaties (VCLT).²² That is how the cultural international obligations of states can be considered in the adjudication of disputes before international economic ‘courts’. Nonetheless, the relevant UNESCO instruments do not set out a hierarchical relationship between international cultural law and other components of public international law.²³ Unless a cultural norms constitutes *jus cogens*,²⁴ it is difficult to foresee and to govern the interaction of different legal regimes.

Given their institutional mandate that is to settle trade and investment disputes, there is a risk that the WTO dispute settlement mechanism and investment treaty tribunals respectively water down or overlook noteworthy cultural aspects. International adjudicators may be perceived as detached from local communities and their cultural concerns. They may not have specific expertise in cultural heritage law as their appointment requires expertise in international (economic) law. Furthermore, due to the emergence of a *jurisprudence constante* in international trade and investment law respectively, there is a risk that tribunals do conform to these *de facto* precedents without necessarily considering analogous cultural heritage related cases adjudicated before other international courts and tribunals. This is not to say that consistency in decision-making is undesirable; obviously it can enhance the coherence and predictability of the system contributing to its legitimacy. Yet, the selection of the relevant precedents matters as it can have an impact on the decision.

Have international economic *fora* paid any attention to cultural heritage? Are they imposing standards of good cultural governance, by adopting general administrative law principles, such as proportionality, due process, reasonableness and others? The critical assessment of such jurisprudence is a fertile endeavour as it may help in detecting common patterns, leading to the coalescence of general principles of law and/or customary law requiring an equilibrate balance between the protection of cultural heritage and the protection of economic interests in international law.

This article proceeds as follows. *First*, it highlights the main features of cultural heritage law. *Second*, the different types of cultural heritage related disputes are highlighted. *Third*, the article investigates whether investment treaty tribunals and WTO panels and AB are contributing to the emergence of general principles of law requiring the protection of cultural heritage. *Finally* some conclusions will be drawn.

II. Towards a Multipolar Cultural Law

²² VCLT, Art. 31(3)(c).

²³ See *e.g.* Article 20 of the Convention on Cultural Diversity.

²⁴ For discussion, see Valentina Vadi, ‘When Cultures Collide: Foreign Direct Investment, Natural Resources and Indigenous Heritage in International Investment Law’, 42 *Columbia Human Rights Law Review* 797 (2011) at 857 ff.

Cultural governance – meant as the multi-level and multi-polar regulation of cultural heritage – has emerged as a new frontier of study and has come to the forefront of legal debate.²⁵ Cultural governance constitutes a good example of legal pluralism as a multiplicity of different bodies govern cultural heritage at national, regional and international levels.²⁶ While states maintain primary responsibilities in the cultural field, other actors have come to play an important role with regard to cultural heritage, ranging from international administrative bodies to private actors; from national courts and tribunals to international economic *fora*.

Two dualisms traditionally characterized cultural heritage law:²⁷ the distinction between public law and private law on the one hand and the division between domestic and international law on the other. However, these traditional boundaries have become blurry in contemporary cultural heritage law, as both private and public traits and national and international dimensions constantly interact in several different ways. Cultural law has been increasingly regulated at the national and international level by both public and private actors. The United Nations Educational, Scientific and Cultural Organization (UNESCO)²⁸ has played a leading role in the making of cultural law. It has produced conventions, non-binding (but influential and morally suasive) declarations, and guidelines which have gradually extended the scope of cultural heritage law. These instruments have raised awareness of the importance of heritage protection and spurred the development of domestic cultural policies.²⁹ Private actors have been active in governing aspects of international cultural law too.³⁰ All of these instruments channel

²⁵ See, e.g., Barbara T. Hoffmann (ed.) *Art and Cultural Heritage – Law, Policy and Practice* (Cambridge: Cambridge University Press 2006); James A.R. and Ann M. Nicgorski (eds.) *Cultural Heritage Issues: The Legacy of Conquest, Colonization and Commerce* (Leiden: Martinus Nijhoff 2009).

²⁶ Diana Zacharias, *The International Regime for the Protection of World Cultural and Natural Heritage – A Contribution to International Administrative Law* (Shaker: Aachen 2007).

²⁷ The same dualisms also characterize other branches of law including environmental law, labour law and even for that matter international economic law itself. See Trachtman, ‘The International Economic Law Revolution’, 17 *University of Pennsylvania Journal of International Law* (1996) 33 (pinpointing out that the rise of international economic law has led to breaking down of public and private international law distinctions); Alex Mills, ‘The Public-Private Dualities of International Investment Law and Arbitration’, in Chester Brown and Kate Miles, (eds.), *Evolution in International Investment Law and Arbitration* (Cambridge: CUP 2011), 97–116.

²⁸ UNESCO Constitution, London, 16 November 1945, in force on 4 November 1946. 4 UNTS 275 (1945).

²⁹ 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).

³⁰ For instance, non-governmental associations have adopted a number of instruments on the protection of monuments. See e.g. the Athens Charter for the Restoration of Historic Monuments 1931, adopted at the First International Congress of Architects and Technicians of Historic Monuments, Athens 1931, available at <http://www.icomos.org/en/charters-and-texts/179-articles-en-francais/ressources/charters-and-standards/167-the-athens-charter-for-the-restoration-of-historic-monuments> (Accessed 1 December 2014).

cultural concerns into the fabric of international law and influence policy making and adjudication, due to their almost global ratification.

While private actors often file claims against states, cultural heritage related disputes may well constitute inter-state disputes. For instance, foreign investors can (and have) file(d) claims against the host state alleging that cultural policies adopted by the latter amount to a disguised discrimination of their investment or other breaches of investment treaty provisions. The cultural interests at stake may present a complexity unknown in other areas of the law, presenting a mixture of private and public interests which at times coincide (*i.e.*, in which case, requiring the protection of the cultural item), and at times conflict (*i.e.*, when the private interests clash with collective entitlements).³¹

There is a sort of mimesis and dialectic between the private and public dimensions of cultural law. On the one hand, there is an increasing awareness that cultural resources require public intervention and due to the existence of undeniable public interests. On the other hand, public law looks to private law in order to learn from its arguments, dispute settlement mechanisms and so on. Private funding is also needed to recover and protect cultural heritage. In parallel, there is a sort of mimesis and dialectic between the local and global dimension of cultural governance. Global governance favors experts over non-experts. Under global cultural governance, decision-making processes tend to be elitist and opaque and express top-down approaches. Such approaches may not necessarily be responsive to local needs. The need to humanize cultural heritage law has been advocated by human rights bodies, which condemned the forced eviction of local communities from heritage sites.³² Local governance on the other hand, may emphasize local needs including those of economic growth which, in certain cases, may sensibly diverge from international standards.

The different approaches to the conservation of cultural heritage are well reflected in the traditional debate between nationalists and internationalists in cultural heritage law.³³ While internationalists perceive cultural heritage as expressing a common human culture, wherever its place and location, nationalists perceive it as part of the national culture.³⁴ Even assuming that relevant UNESCO Conventions incorporate a mixture of both approaches, as it has been persuasively argued,³⁵ questions remain in those

³¹ See generally Joseph L. Sax, *Playing Darts with a Rembrandt: Public and Private Rights in Cultural Treasures* (University of Michigan Press 1999).

³² *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya* (Endorois Decision), African Commission on Human and Peoples' Rights, Decision on Communication 27/6/2003, adopted at the 46th Ordinary Session held from 11–25 November 2009 in Banjul, The Gambia.

³³ See John Henry Merryman, 'Two Ways of Thinking about Cultural Property Law', 80 *American Journal of International Law* 831 (1986) at 831 ff.

³⁴ *Ibid.*, 831–2.

³⁵ Raechel Anglin, 'The World Heritage List: Bridging the Cultural Property Nationalism-Internationalism Divide', 20(2) *Yale Journal of Law and the Humanities* 241 (2008) at 241 ff. (with reference to the World Heritage Convention).

cases in which the two interests – internationalist and nationalist – diverge. 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, national authorities (and adjudicators) face the dilemma as to whether to comply with international law or to accord to the preferences of the local constituencies. Of further interest is the question how this overlapping or collision of interests relates to the admission and operation of trade and foreign investments. Is there any difference in using the local public interest or the global interest as a parameter in the interpretation of international economic law and the adjudication of the relevant disputes?

III. Cultural Heritage Related Disputes

Cultural heritage related conflicts of an economic type arise when the protection of cultural heritage affects the economic interests of traders and investors. 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.³⁶ For instance, mining or oil and gas development threaten more than one-quarter of all cultural heritage sites.³⁷ 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; preservation policies are not uniform and rely on different assumptions as to what is worth being protected, why and how.³⁸

Cultural heritage disputes can be classified as cultural heritage disputes in a narrow sense, or cultural heritage disputes in the broad sense. The former center on the destiny of a given cultural artefact. The latter deal 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 but rather an action against the cultural object is undertaken in order to enforce other judgments or arbitral awards related to the most diverse circumstances including damages for dismissed foreign

³⁶ *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).

³⁷ Natasha Affolder, 'The Private Life of Environmental Treaties', 103 *American Journal of International Law* 510 (2009) 510 ff.

³⁸ See Christopher Koziol, 'Historic Preservation Ideology: A Critical Mapping of Contemporary Heritage Policy Discourse', 1 *Preservation Education and Research* 41 (2008) at 42 (highlighting that preservationists have long discussed whether a site is more important for reasons intrinsic to that site or because of its role in the formation of the cultural identity of a given population).

investments.³⁹ 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 law perspective as they tend to be investigated almost exclusively from the perspectives of other branches of law including international economic law.

Cultural heritage disputes have been adjudicated through a variety of mechanisms including diplomatic efforts, negotiations, mediation, conciliation, arbitration and judicial proceedings.⁴⁰ Given the structural imbalance between the vague and non-binding dispute settlement mechanisms provided by international cultural law and the highly effective and sophisticated dispute settlement mechanisms available under international economic law, cultural heritage disputes involving investors' or traders' rights have often been brought before international economic *fora*. Obviously, this does not mean that these are the only available tribunals, let alone the superior tribunals 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. Given its scope, this study focuses on the jurisprudence of the WTO bodies and arbitral tribunals. Are arbitral tribunals, the WTO panels and the AB the appropriate *fora* to resolve such cases? Some scholars consider that arbitral tribunals, WTO panels and the AB make policy trade-offs in the way that other tribunals do, contributing to the development of international law. Other scholars, however, contend that 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.

This section explores a selected sample of cultural heritage related international economic disputes,⁴¹ to investigate the question as to whether these cases have adequately dealt with the cultural values at stake.

A. Non-Discrimination

Since European citizens perceive seal hunting as cruel, because of the means through which the seals are hunted, the EU adopted a comprehensive regime governing seal products.⁴² The EU seal regime prohibits the importation and sale in the EU of any seal product except: (a) those derived from hunting conducted in a traditional fashion by Inuit and other indigenous communities

³⁹ See *e.g.* Nout van Woudenberg, *State Immunity and Cultural Objects on Loan* (Leiden: Brill 2012).

⁴⁰ See *generally* Elizabeth Varner, 'Arbitrating Cultural Property Disputes', 13 *Cardozo Journal of Conflict Resolution* 477 (2012) at 477.

⁴¹ Due to space limits it is not possible to examine all of the recent disputes and this article maintains a necessarily sketchy and preliminary nature.

⁴² 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.

and which contribute to their subsistence;⁴³ 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.⁴⁴ In addition, seal products for personal use may be imported but may not be placed on the market.⁴⁵ The EU allowed the exception for indigenous hunt because of the international law commitments of its member states and of the United Nations Declaration on the Rights of Indigenous Peoples.⁴⁶

Canada and Norway brought claims against the EU before the WTO Dispute Settlement Body arguing, *inter alia*, that the indigenous communities condition (IC condition) and the marine resource management condition (MRM condition) violated the non-discrimination obligation under Article I:1 and III:4 of the GATT 1994.⁴⁷ According to Canada and Norway, such conditions accord seal products from Canada and Norway treatment less favourable 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.⁴⁸ 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 are expected to conform to the requirements under the IC exception...’⁴⁹ Therefore, according to the complainants, the regime would *de facto* discriminate against Canadian and Norwegian imports of seal products,⁵⁰ as it would restrict virtually all trade in seal products from Canada and Norway within the EU.⁵¹ 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,⁵² they could prevent products derived from seals killed humanely by commercial hunters from being placed on the market.⁵³

The panel found that the seal products produced by indigenous peoples and those not hunted by indigenous peoples were like products.⁵⁴ The panel acknowledged the existence of a number of international law instruments, including the United Nations Declaration on the Rights of Indigenous Peoples focusing on the preservation of cultural heritage.⁵⁵ The panel also referred to

⁴³ *Ibid.*, Article 3(1).

⁴⁴ *Ibid.*, Article 3(2)(b).

⁴⁵ *Ibid.*, Article 3(2)(a).

⁴⁶ *Ibid.*, point 14.

⁴⁷ General Agreement on Tariffs and Trade 1994, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 UNTS 187.

⁴⁸ *European Communities—Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/R and WT/DS401/R, 25 November 2013, Reports of the Panel, para. 7.2.

⁴⁹ *Ibid.* paras. 7.161 and 7.164.

⁵⁰ *Ibid.* para. 7.141.

⁵¹ *Ibid.* para 7.46.

⁵² *Ibid.* para. 7.4.

⁵³ *Ibid.* para. 7.226.

⁵⁴ *Ibid.* para. 7.136.

⁵⁵ *Ibid.* para. 7.292.

a number of WTO countries adopting analogous Inuit exceptions.⁵⁶ These sources were taken into account as ‘factual evidence’.⁵⁷ Despite the reference to these instruments, however, the panel concluded that the design and application of the IC measure was not even-handed because the IC exception was available *de facto* to Greenland.⁵⁸ Therefore, the panel held, *inter alia*, that the exception provided for indigenous communities under the EU Seal Regime accorded more favourable treatment to seal products produced by indigenous communities than that accorded to like domestic and foreign products.⁵⁹ The panel concluded that the same exception, *inter alia*, 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.⁶⁰

Finally, the panel examined the question as to 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’.⁶¹ Therefore the panel found that the EU seal regime was necessary to protect public morals. Yet, it determined that the regime had a discriminatory impact that could not be justified under the *chapeau* of Article XX(a) of the GATT 1994.⁶²

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 *inter alia* confirmed that the EU seal regime *de facto* discriminated like products under Articles I:1 (Most Favored Nation) and III:4 (National Treatment) of the GATT 1994. The AB also confirmed that the ban on seal products can 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, criticising the way the exception for Inuit hunts has been designed and implemented.⁶³ *Inter alia*, the AB noted that the IC exception contained no anti-circumvention clause,⁶⁴ and pinpointed that ‘seal products derived from ...commercial hunts could potentially enter the EU market under the IC exception’.⁶⁵ The AB concluded that the EU Seal Regime was not justified under Article XX(a) of the GATT 1994.⁶⁶

⁵⁶ Ibid. para. 7.294.

⁵⁷ Ibid. footnote 475.

⁵⁸ Ibid. para. 7.317

⁵⁹ Ibid. para. 8(2).

⁶⁰ Ibid. para. 8(3)(a).

⁶¹ Ibid. para. 7.409.

⁶² Ibid. para. 7.651.

⁶³ *European Communities–Measures Prohibiting the Importation and Marketing of Seal Products*, Reports of the Appellate Body, para. 5.339.

⁶⁴ Ibid. para. 5.327.

⁶⁵ Ibid. para. 5.328.

⁶⁶ Ibid. para. 6.1(d)(iii).

Therefore, the EU will have to refine the seal regime to demonstrate good faith, insert anti-circumvention rules and thus comply with the *chapeau* requirements. Ultimately, the flaws found by the panel and AB were not with the ban itself, but with the specific implementation of the ban's exception for indigenous peoples.

In *Parkerings-Compagniet AS v. Republic of Lithuania*,⁶⁷ Parkerings, a Norwegian enterprise, filed a claim before an ICSID Tribunal, claiming that Lithuania breached the Most Favoured Nation (MFN) clause as a result of allegedly preferential treatment to a Dutch competitor.⁶⁸ Parkerings had concluded an agreement with the Municipality of Vilnius (Lithuania) for the construction of parking facilities.⁶⁹ Because of technical difficulties and the growing public opposition due to the cultural impact of the investor's project on the city's Old Town – a world heritage site – the municipality terminated the agreement and subsequently signed another contract with a Dutch company for the completion of the project. The successful contractor would not excavate under the Old Town.⁷⁰

The Tribunal dismissed this claim, finding that Parkerings and the Dutch competitor were not in *like* circumstances.⁷¹ The project presented by Parkerings included excavation works under the Cathedral.⁷² 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)⁷³ *justified* the refusal of the project,⁷⁴ holding 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'.⁷⁵ While the Tribunal did not mention any hierarchy among different international law obligations, it concretely balanced the different norms.

The Tribunal also noted that circumstances in a country in transition could not justify legitimate expectations with regard to the stability of the investment environment⁷⁶ and that legislative changes may be seen as a normal business risk (in this case due to the transition from a former Soviet Union state to candidate to EU membership). Nonetheless, this 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

⁶⁷ *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/08, Award, 11 September 2007.

⁶⁸ *Ibid.* para. 203.

⁶⁹ *Ibid.* para. 204.

⁷⁰ *Ibid.* para. 284.

⁷¹ *Ibid.* para. 396.

⁷² *Ibid.* para. 392.

⁷³ Convention Concerning the Protection of the World Cultural and Natural Heritage. Paris, 16 November 1972. 1037 UNTS 151, 11 ILM 1358.

⁷⁴ *Parkerings-Compagniet AS v. Republic of Lithuania*, para. 385 and paras. 381–382.

⁷⁵ *Ibid.* para. 392.

⁷⁶ *Ibid.* paras. 335–6.

criticism.⁷⁷ Therefore, the Arbitral Tribunal dismissed all the claims in their entirety, requiring each party to bear its own costs.⁷⁸

B. Interpretation and the Applicable Law

The cases *Border Timbers Limited and others v. Republic of Zimbabwe*,⁷⁹ and *Bernhard von Pezold and others v. Republic of Zimbabwe*,⁸⁰ concern plantations in Zimbabwe, owned by foreign investors and compulsorily acquired by the government of Zimbabwe as part of its land reform programme. The Claimants allege unlawful expropriation of their properties. An NGO and four indigenous communities requested the permission to file a written submission as *amicus curiae* to the Arbitral Tribunals.⁸¹ Allegedly, the plantations are located on the ancestral territories of indigenous peoples.⁸² The indigenous communities submitted that ‘the outcome of the present 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’ collective and individual rights’.⁸³ 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’.⁸⁴ According to the petitioners, ‘Arbitral Tribunals’ mandate derives from “powers delegated to it by Contracting Parties with concrete human rights obligations under international law”.⁸⁵

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 are of particular cultural significance to those communities’, and ‘therefore granted access to those parts of the Estate to the communities’.⁸⁶ The claimants also argued that ‘reference to “international law” in the applicable BITs does not mean that

⁷⁷ Ibid. para. 464.

⁷⁸ Ibid. para. 464.

⁷⁹ *Border Timbers Limited, Border Timbers International (Private) Limited, and Hangani Development Co. (Private) Limited v. Republic of Zimbabwe*, ICSID Case No. ARB/10/25, pending.

⁸⁰ *Bernhard von Pezold and others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, pending.

⁸¹ *Bernhard von Pezold and others v. Republic of Zimbabwe* (ICSID Case No. ARB/10/15) and *Border Timbers Limited, Border Timbers International (Private) Limited, and Hangani Development Co. (Private) Limited v. Republic of Zimbabwe* (ICSID Case No. ARB/10/25), Procedural Order No. 2, 26 June 2012.

⁸² Ibid. para. 18.

⁸³ Ibid., para 21.

⁸⁴ Ibid. para. 25.

⁸⁵ Ibid. para. 58 (referring, to Article 26 of the UN Declaration on the Rights of Indigenous Peoples, concerning lands possessed by indigenous peoples and other customary law.)

⁸⁶ Ibid. para. 32.

the whole body of substantive international law is applicable'.⁸⁷ On its part, the Respondent had no objection to the NGO being allowed to make submissions 'provided they ... do not impinge on or amount to a challenge to the sovereignty and territorial integrity of the Republic of Zimbabwe'.⁸⁸

On 26 June 2012, the Tribunal rejected the petition.⁸⁹ Despite acknowledging that the indigenous tribes have 'some interest in the land over which the Claimants assert full legal title', and that 'it may therefore well be that the determinations of the Arbitral Tribunals in these proceedings will have an impact on the interests of the indigenous communities',⁹⁰ the Tribunal held that the 'apparent lack of independence or neutrality of the petitioners [wa]s a sufficient ground for denying the application'.⁹¹

Moreover, the Tribunal agreed with the Claimants that the applicable law 'does not incorporate the universe of international law into the BITs or into disputes arising under the BITs'.⁹² Since neither Party put the identity and/or treatment of the indigenous communities under international law in issue in the proceedings,⁹³ the Tribunal considered that the matter fell outside the scope of the dispute as it was constituted.⁹⁴ The Tribunal added that 'Whether or not the proposed ... submission would have the effect of impinging on the Respondent's territorial sovereignty is unclear'.⁹⁵ The Tribunal also stated that 'the Petitioners provided no evidence or support for their assertion that international investment law and international human rights law are interdependent such that any decision of these Arbitral Tribunals which did not consider the content of international human rights norms would be legally incomplete'.⁹⁶ This seems an infelicitous statement, which relates to the notorious debate as to whether *iura novit curia* applies to international investment arbitration. International investment treaties and the ICSID Convention do not specifically provide for this principle. Yet, a few arbitral tribunals and ICSID Annulment Committees have held that this principle applies to investment treaty arbitration⁹⁷ and scholars have similarly advocated its use in this context.⁹⁸

⁸⁷ Ibid. para. 39.

⁸⁸ Ibid. para. 5.

⁸⁹ Ibid. para. 64.

⁹⁰ Ibid., para 62.

⁹¹ Ibid. para. 56.

⁹² Ibid. para. 57.

⁹³ Ibid.

⁹⁴ Ibid. para. 60.

⁹⁵ Ibid. para. 59.

⁹⁶ Ibid., para 58.

⁹⁷ See e.g. *BP Exploration Co (Libya) Ltd. v. The Government of the Libyan Arab Republic*, 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.')

⁹⁸ Stephan W. Schill, 'Crafting the International Economic Order: The Public Function of Investment Treaty Arbitration and Its Significance for the Role of Arbitrator', 23 *Leiden JIL* (2010) 401–30, 422.

Other arbitral tribunals, however, have referred to the relevant international instruments and took them into account. For instance, in the notorious *Pyramids* case, which involved the denial of a construction project in front of the Pyramids for understandable cultural reasons, loss of profits was not awarded because of the unlawfulness of the proposed economic activity under cultural heritage law.⁹⁹ Notwithstanding the previous approval of the investment at stake, Egypt cancelled the contract and the area was added to the World Heritage List. The ICSID Tribunal noted that the site had been added to the List *after* the cancellation of the project. Therefore, it found contractual liability and sustained the claimants' argument that the particular public purpose of the expropriation could not change the obligation to pay fair compensation. However, it reduced the amount of such award (or payment), stating that only the actual damage (*damnum emergens*), and not the loss of profit (*lucrum cessans*), could be compensated.¹⁰⁰ Indeed, it stated: 'sales in the areas registered with the World Heritage Committee under the UNESCO Convention would have been illegal under [...] international law [...] [T]he allowance of *lucrum cessans* may only involve those profits which are legitimate.'¹⁰¹

In the *Glamis Gold* case, which concerned the development of a gold mine in Southern California, 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 which refers to the protection of cultural heritage sites that are not listed on the World Heritage List. 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".'¹⁰²

IV. Critical Assessment: A Clash of Cultures?

Like 'castles of crossed destinies',¹⁰³ 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 respectively, the arguments in support of free trade and foreign direct investment are intertwined with cultural heritage claims. The case studies analysed here epitomize the clash between international economic law and state sovereignty. These cases also show that there may be both synergy and collision between economic interests and the protection of cultural heritage.

⁹⁹ *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 8 ICSID Review-Foreign Investment Law Journal 328 (1993) at 328 ff.

¹⁰⁰ *Ibid.*, para. 157.

¹⁰¹ *Ibid.*, para. 190.

¹⁰² *Glamis Gold Ltd. v. United States of America*, ICSID Award, NAFTA Chapter 11, 8 June 2009, footnote 194.

¹⁰³ Italo Calvino, *Il castello dei destini incrociati* (Torino: Einaudi, 1973).

On the one hand, the seal products dispute shows that free trade can enhance indigenous peoples' cultural practices, and that trade can be a mechanism of economic subsistence and cultural empowerment.

Yet, there is a friction between the non-discrimination principle, as applied in international trade law, and positive measures, *i.e.* those exceptions or measures adopted by States to protect specific sectors of society. In parallel, the interplay between international investment law and cultural entitlements presents mixed outcomes. On the one hand, when respondent states have used cultural heritage arguments in their pleadings, these have been taken into account by adjudicators. International economic *fora* do refer to cultural heritage not because of its intrinsic value. Rather, they have taken it into account when the host state connected the protection of cultural heritage to state sovereignty and the public interest. On the other hand, when the parties make no reference to cultural arguments, the arbitral tribunals have tended to consider such claims as outside the subject matter of the dispute. If arbitral tribunals went beyond their mandate, their award could be annulled.

Are the WTO adjudicative bodies and investment treaty tribunals operating as open, rather than self-contained, regimes under public international law? Some scholars and practitioners have pinpointed that 'trade and other societal values incorporated in the WTO framework ought to be recognized as equals; a liberal trade bias to interpret each and every rule in the WTO package is to be excluded.'¹⁰⁴ Similar arguments have been made in the context of investment treaty arbitration, highlighting that '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.'¹⁰⁵ Neither the WTO or international investment governance are 'mono-cultures';¹⁰⁶ rather they deal with a variety of issues and sectors. Moreover, customary canons of treaty interpretation require systematic interpretation.¹⁰⁷

At a procedural level, the arguments of local communities, including indigenous peoples, can (and sometimes have) be(en) espoused by their home government. While local communities can (and have) present(ed) *amicus curiae* briefs reflecting their specific interests, arbitral tribunals, WTO panels and the Appellate Body are not legally obliged to consider such briefs – rather they have the capacity to do so should they deem it appropriate. There may be legitimate reasons for declining to consider such briefs, for instance if the applicants are not independent or raise legal issues which had not been raised by the parties and are outside the scope of the dispute.

More substantively, international economic *fora* are tribunals of limited jurisdiction and cannot adjudicate on eventual infringements of cultural

¹⁰⁴ Marco C.E.J. Bronckers, 'More Power to the WTO?', 4 *Journal of International Economic Law* 41 (2001), 41 ff.

¹⁰⁵ 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.

¹⁰⁶ Bronckers, above n 104, at 45.

¹⁰⁷ VCLT, Article 31(3)(c).

heritage law. Arbitral tribunals, WTO panels and the AB are not deciding whether cultural heritage is protected or not. Rather, they are ascertaining 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.¹⁰⁸ The *Lemire* Tribunal found that the State action was not expropriatory: rather it considered it to be a legitimate exercise of the state power to protect cultural inheritance. This does not mean, however, that in other cases, these claims have no relevance. 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...’.¹⁰⁹ Therefore, arbitral tribunals, WTO panels and the AB cannot adjudicate the land claims of indigenous peoples, as these tribunals have no mandate to adjudicate such claims.¹¹⁰ In the seal products dispute, the defendant referred to the cultural entitlements of indigenous peoples.¹¹¹ The Panel and Appellate Body’s reports considered the arguments of the claimant and defendant carefully – as it is customary.¹¹² Yet, the rehearsal of these arguments does not necessarily mean that the Panel and the AB endorse them.

The existence of highly sophisticated dispute settlement mechanisms in international economic law eclipsing the values of other regimes, such as international cultural law, which lack a comparable mechanism. These cases show that economic globalization can affect non-economic matters, and that international economic *fora* may not be the most appropriate *fora* for disputes presenting cultural issues. At the institutional level, there seems to be ‘a strict separation of powers between the competent international organizations’.¹¹³ The panel and the Appellate Body reports confirm previous jurisprudence on the interpretation of the agreements covered by the WTO and do not represent a significant departure from the WTO *acquis*. Very rarely have exceptions been successfully invoked by defendants in the adjudication of international trade disputes.¹¹⁴

The relationship between international economic law and other branches of international law, including international cultural law, should be addressed in

¹⁰⁸ *Compañia del Desarrollo de Santa Elena SA v. Republic of Costa Rica*, ICSID Case No. ARB/96/1, Award, 17 February 2000, 39 ILM (2000) 1317; *Unglaube, Marion 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.

¹⁰⁹ DSU, Article 3(2).

¹¹⁰ 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’).

¹¹¹ See e.g. *EC–Seal Products*, AB Reports, para. 5.143.

¹¹² *EC–Seal Products*, Panel Reports, para. 7.294 and AB Reports, footnote 1559 (both quoting the arguments of the parties).

¹¹³ Rostam Neuwirth, ‘The Future of the “Culture and Trade Debate”: a Legal Outlook’, 47(2) *Journal of World Trade* 391 (2013), at 407.

¹¹⁴ Juscelino F. Colares, ‘A Theory of WTO Adjudication: From Empirical Analysis to Biased Rule Development’, 42 *Vanderbit Journal of Transnational Law* 383 (2009) 383 ff.

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 law. It is not a question of direct application of international cultural law;¹¹⁵ rather international economic law *fora* are called to incidentally evaluate the regulatory measures adopted by states to determine whether such measures can be justified even if *prima facie* they appear to be inconsistent with provisions of international economic law.

V. The Emergence of General Principles of Law Requiring the Protection of Cultural Heritage

The governance of cultural heritage can (and has) affect(ed) the economic interests of a number of 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 investment treaty tribunals respectively. This section addresses the question as to whether international economic *fora* are contributing 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’,¹¹⁶ general principles of law are a primary source of international law.¹¹⁷ The Statute of the ICJ empowers the court, if occasion should arise, to apply the ‘general principles of law recognised by civilised nations’.¹¹⁸ Although the Statute applies to the International Court of Justice (ICJ), the relevant provisions have been deemed to reflect customary international law:¹¹⁹ therefore other international law 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

¹¹⁵ See Paolo Picone and Aldo Ligustro, *Diritto dell’Organizzazione Mondiale del Commercio* (Padova: CEDAM 2002) 633. In investment disputes, however, the applicable law can be the law of the host state. If the applicable law is the law of the host state and the host state is a party to a multilateral cultural treaty, then international cultural law will become relevant as part of the applicable law. For in depth analysis, see Valentina Vadi, *Cultural Heritage in International Investment Law and Arbitration* (Cambridge: Cambridge University Press 2014) 252.

¹¹⁶ Rudolph B. Schlesinger, ‘Research on the General Principles of Law Recognized by Civilized Nations’, 51(4) *American Journal of International Law* 734 (1957), at 739.

¹¹⁷ Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Cambridge: Cambridge University Press 1953).

¹¹⁸ 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.

¹¹⁹ J.L. Brierly, *The Law of Nations: An Introduction to the International Law of Peace* (H. Waldock ed. 6th ed. New York: OUP 1963) 56.

law constitute a critical element of international law, helping adjudicators to settle a given dispute, filling in the gaps in treaty and customary law and allowing international law to evolve and respond to new challenges.¹²⁰ General principles of law have a flexible, subsidiary and dynamic nature as they fill gaps in legal norms, contributing to the development of international law. In addition, general principles can be a source of higher law, *i.e. jus cogens*.¹²¹

Not only do general principles of law fill the possible gaps left open by treaty and custom, but they can also contribute to a dogmatic construction of international law as a unitarian 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’.¹²² Some authors contend that ‘it is largely due to general principles that international law can be defined as a system’.¹²³ Some principles such as *pacta sunt servanda* provide the foundations of the international legal system,¹²⁴ expressing a ‘belief in a universal *ratio iuris*’ or ‘common heritage’ of international law,¹²⁵ and ‘form[ing] the irreducible essence of all legal systems’.¹²⁶ Jeremy Waldron suggests that principles expressing ‘a sort of consensus among judges, jurists and lawmakers around the world’ constitute a common law of mankind.¹²⁷ International courts and tribunals use general principles of law to reinforce their legal arguments.

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),¹²⁸ or an 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 behaviour and in fact ‘go beyond legal positivism, according to which states are bound by their will only’.¹²⁹ Yet, if one conceives general principles as expressing a common juridical heritage of mankind, then rather than representing a delimitation of state autonomy, general principles of law constitute its highest expression.¹³⁰ Certainly, the identification and application of general principles of law gives significant

¹²⁰ Christina Voigt, ‘The Role of General Principles in International Law and Their Relationship to Treaty Law’, 31 *Retfærd Årgang* 3 (2008), at 5.

¹²¹ M. Cherif Bassiouni, ‘A Functional Approach to General Principles of International Law’, 11 *Michigan Journal of International Law* 768 (1990), at 780.

¹²² Antonio Cassese, *International Law*, 2nd ed. (Oxford: Oxford University Press 2005) 188.

¹²³ Voigt, above n 120, at 5.

¹²⁴ *Ibid.*, 12.

¹²⁵ Giorgio Del Vecchio, *Sui principi generali del diritto* (Milano: Giuffrè 1958) 11.

¹²⁶ Frances T. Freeman Jalet, ‘The Quest for the General Principles of Law Recognized by Civilized Nations’, 10 *University of California Los Angeles Law Review* 1041 (1963) at 1044.

¹²⁷ Jeremy Waldron, ‘Foreign Law and the Modern *Jus Gentium*’, 119 *Harvard Law Review* 129 (2005), 132.

¹²⁸ Cheng, above n 117, at 24.

¹²⁹ Dissenting Opinion, Judge Tanaka, *South West African Cases* (Second Phase), ICJ Reports 1966, 298.

¹³⁰ Del Vecchio, above n 125, at 69.

discretion to international adjudicators. One could argue that in certain cases, the determination of legal principles of law has amounted to judicial law-making,¹³¹ giving rise to a sort of pretorian law.¹³²

Admittedly the difference between general principles of law and customary law is often not clear. General principles are recognized by states but they do not require general practice by the same. Custom refers to what is a general practice among states and accepted by them as law. In legal terms, panel and AB reports as well as awards are not state practice; thus they cannot contribute to the emergence of customary international law directly. However, state arguments before the WTO and arbitral tribunals and state compliance with reports and awards may constitute state practice, thus contributing to the emergence of customary rules. Reports and arbitral awards can be considered subsidiary means for determining what the law is – in other words, if adjudicators have found something to be an international customary norm, that ruling can be cited to. Consistent decisions can also 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 close to world heritage sites referring to the relevant UNESCO Convention.¹³³ In other cases, arbitrators have settled disputes relating to investments in areas valued as sacred by indigenous peoples,¹³⁴ or in sectors related to indigenous cultural heritage.¹³⁵ This jurisprudence provides some elements from which customary law and/or general principles of international law may be detected. These cases open the door to further questions about the objectives of international economic law, and the debated question of the unity of fragmentation of international law.

Detecting the eventual emergence of a general principle of international law requiring the protection of cultural heritage in times of peace, and the equilibrate balancing of interests in such protection, is a theoretical endeavour with significant practical outcomes. While some research has been done with

¹³¹ But see Jaye Ellis, 'General Principles and Comparative Law', 22(4) *European Journal of International Law* 949 (2011), at 949 (arguing that recourse to general principles does not amount to judicial law-making).

¹³² 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').

¹³³ See Valentina Vadi, 'Culture Clash? World Heritage and Investors' Rights in International Investment Law and Arbitration', 28 *ICSID Review-Foreign Investment Law Journal* 1 (2013) 1.

¹³⁴ *Glamis Gold Ltd v. United States of America*, ICSID Award, 8 June 2009.

¹³⁵ *Grand River Enterprises Six Nations Ltd et al. v. United States of America*, ICSID UNCITRAL NAFTA Chapter 11, Award, 12 January 2011.

regard to the existence of the principle requiring the protection of cultural heritage in wartime,¹³⁶ the parallel question as to whether such principle exists in times of peace has not received scholarly attention.¹³⁷ Ascertaining the existence of general principles and/or customary international law would be a significant outcome in that general principles and customary international law are binding on states irrespective of their adherence to specific international law treaties and this would facilitate the consideration of cultural heritage in the adjudication of transnational disputes.

Cultural international obligations can be considered by arbitral tribunals according to customary rules of treaty interpretation, as restated by Article 31(3)(c) of the Vienna Convention on the Law of Treaties. These rules require arbitral tribunals to take account of other international obligations of the parties. In turn, the scrutiny of the relevant cases may help ascertain whether the current legal framework provides adequate protection to cultural heritage and/or whether amendments may be advisable.

While each state retains the right to regulate within its own territory, international law poses vertical constraints on such right, ‘introducing global interests into the decision-making processes of domestic authorities [...]’.¹³⁸ 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.’¹³⁹ The review by an international tribunal of domestic regulations can improve good cultural governance and the transparent pursuit of legitimate cultural policies. *Cultural governance* refers to the need to regulate human activities and their implications on cultural heritage so as to protect the cultural interests of present and future generations and entails a number of legislative, executive and administrative functions. *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.¹⁴⁰ Most governments will have to consider the impact of cultural policies on foreign investors and traders before enacting such measures, to avoid potential claims and subsequent liability.¹⁴¹

At the same time, the WTO panels, the AB, and arbitral tribunals 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

¹³⁶ Roger O’Keefe, *The Protection of Cultural Property in Armed Conflict* (Cambridge: Cambridge University Press 2011).

¹³⁷ In international law, the distinction between the state of war and the state of peace is relevant as it determines the applicable legal norms.

¹³⁸ Stefano Battini, ‘The Procedural Side of Legal Globalization: The Case of the World Heritage Convention’, 9 *International Journal of Constitutional Law* 340 (2011), at 343.

¹³⁹ *Ibid.*, 364.

¹⁴⁰ Anél A. Du Plessis and Christa Rautenbach, ‘Legal Perspectives on the Role of Culture in Sustainable Development’, 13 *Potchefstroom Electronic Law Journal* 1 (2010), at 27, 48 and 62.

¹⁴¹ Eyal Benvenisti, ‘Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders’, 107 *American Journal of International Law* 295 (2013), at 295.

latter.¹⁴² It is not appropriate for these mechanisms to ‘second-guess the correctness of the ... decision-making of highly specialized national regulatory agencies’.¹⁴³ For instance, in the *Glamis Gold* Case, the Arbitral Tribunal accorded deference to the legislative measures aimed at protecting indigenous cultural heritage. The Arbitral 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 a qualified domestic agency’,¹⁴⁴ and that ‘governments must compromise between the interests of competing parties.’¹⁴⁵

At the same time, international economic courts scrutinize the given national measures to ascertain their compliance with the state international economic law obligations. Thus, they are not to pay total deference before domestic cultural policies, simply accepting the determinations of the relevant national authorities as final. Rather, they assess whether or not the competent authorities have complied with their international economic law obligations in making their determinations. As one Arbitral Tribunal held, ‘[...] “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.’¹⁴⁶ Similarly Wälde and Kolo caution against ‘not so holy alliances between protectionist interest and environmental idealism’.¹⁴⁷

Having said that, the review of cultural heritage related disputes by arbitral tribunals and the WTO dispute settlement mechanism may also jeopardize the protection of cultural heritage. 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. International economic *fora* do have a limited mandate and may not have adequate expertise to deal with cultural heritage. Moreover, good governance can be a patronising concept, unless substantive principles of international cultural law are taken into account.¹⁴⁸

¹⁴² See, e.g., DSU, Article 11. Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 33 ILM 1125 (1994).

¹⁴³ *Chemtura Corporation (formerly Crompton Corporation) v. Canada*, Award, 2 August 2010, para. 134.

¹⁴⁴ *Glamis Gold Ltd v. United States of America*, ICSID Award, 8 June 2009, para. 779.

¹⁴⁵ *Ibid.*, para. 803.

¹⁴⁶ *ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary*, ICSID Case ARB/03/16, Award, 2 October 2006, para. 432.

¹⁴⁷ Thomas Wälde and Abba Kolo, ‘Environmental Regulation, Investment Protection and “Regulatory Taking” in International Law’, 50 *International and Comparative Law Quarterly* 811 (2001), 820.

¹⁴⁸ See e.g. Kate Miles, *The Origins of International Investment Law* (Cambridge: Cambridge University Press 2013), at 219 (noting that ‘the current framing of investor-state arbitration as the embodiment of good governance and the rule of law is representative solely of the perspective of political and private elites’ and adding that ‘it will remain so without the incorporation of substantive principles from other areas of international law...’).

More generally, one may wonder whether the fact that cultural heritage disputes are adjudicated before international economic law *fora* determines a sort of institutional bias. 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.’¹⁴⁹ Empirical studies have also shown that there is a consistently high rate of complainant success in WTO dispute resolution¹⁵⁰ and authors have theorized that ‘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.’¹⁵¹

VI. Towards a *Lex Administrativa Culturalis*?

Has a *lex administrativa culturalis* or cultural administrative law progressively emerged as a transnational legal order completely autonomous from national and international legal orders? And, if so, is this desirable or otherwise? The existence of a discrete number of cultural heritage related disputes tests the hypothesis of the coalescence of a cultural administrative law as an archetype of global administrative law. The expression *lex administrativa culturalis* would refer to a part of transnational law relating to the administration of cultural heritage and including the body of jurisprudence rendered by economic courts dealing with some aspects of cultural heritage.

The question relates to the more general question as to whether a global administrative law is coming into being.¹⁵² The concept of a global administrative law (GAL) or *lex administrativa communis*¹⁵³ can be defined as the coalescence of ‘principles of administrative, comparative and international law under different legal systems’.¹⁵⁴ Global administrative law would include procedural principles such as the rule of law, due process, and good governance values including transparency, participation and accountability.¹⁵⁵

¹⁴⁹ Trachtman, above n 18, 333.

¹⁵⁰ John Maton and Carolyn Maton, ‘Independence under Fire: Extra Legal Pressures and Coalition Building in WTO Dispute Settlement’, 10 *Journal of International Economic Law* 317 (2007), at 317.

¹⁵¹ Colares, above n 114, at 388.

¹⁵² *Ibid.*

¹⁵³ See generally Javier Robalino-Orellana and Jaime Rodríguez-Arana Muñoz (eds.) *Global Administrative Law – Towards a Lex Administrativa* (London: Cameron May 2010).

¹⁵⁴ See Gus Van Harten and Martin Loughlin, ‘Investment Treaty Arbitration as a Species of Global Administrative Law’, 17 *European Journal International Law* (2006), at 121–150.

¹⁵⁵ Carol Harlow, ‘Global Administrative Law: The Quest for Principles and Values’, 17 *European Journal of International Law* 187 (2006), at 187–214.

Several scholars suggest that global administrative law is coming into being.¹⁵⁶ They highlight that its primary function is that of controlling the public power, promoting respect for the rule of law, good governance and human rights. According to some authors, investment treaty law and arbitration on the one hand and WTO law and adjudication on the other can be conceptualized as species of global administrative law and review.¹⁵⁷ The analogy is based on several arguments. *First*, the WTO panels, the Appellate Body and arbitral tribunals have an *international/global* character, their authority deriving from international treaties. *Second*, international economic courts, like *administrative* courts, settle disputes arising from the exercise of public power by state authorities.¹⁵⁸ These tribunals are given the power to review and control such an exercise of public power settling what are essentially regulatory disputes. *Third*, the jurisdiction of these tribunals extends to *legal* disputes.¹⁵⁹ *Finally*, panellists, AB Members and arbitrators borrow key administrative principles guiding the conduct of public administrations such as reasonableness, proportionality, duty to give reasons, procedural fairness, efficiency and others, as useful parameters for evaluating the conduct of states and assessing their compliance with the relevant treaties.

Yet, other scholars have argued that not only is ‘a universal set of administrative law principles... difficult to identify’, but that it may be undesirable.¹⁶⁰ For instance, according to Harlow, the coalescence of global administrative law can have ‘troubling implications for democracy’ because it would be ‘made operative through unpublicized trade treaties and transnational machinery for dispute resolution’.¹⁶¹ She also contends that the GAL project may betray ‘cultural imperialism’, deriving from Western traditions and affecting ‘the interests and the distinctive cultural traditions’ of developing countries.¹⁶²

More specifically, the conceptualization of the WTO dispute settlement mechanism and investment treaty arbitration as forms of global administrative review may prove to be fragile as ‘the defining features of global administrative law are rather fluid’.¹⁶³ Without a clear understanding

¹⁵⁶ Benedict Kingsbury, Nico Krisch and Richard B. Stewart, ‘The Emergence of Global Administrative Law’, 68 *Law & Contemporary Problems* 15 (2008), at 15.

¹⁵⁷ Van Harten and Loughlin, above n. 154, (positing that ‘[investment treaty arbitration] may in fact offer the only exemplar of global administrative law, strictly construed, yet to have emerged.’) See also Andrew D. Mitchell and Elizabeth Sheargold, ‘Global Governance: The World Trade Contribution’, 46 *Alberta Law Review* 1061 (2008–2009), at 1061–1080 (assessing the WTO’s contribution to global administrative law.); Kingsbury, Krisch and Stewart, above n. 156, at 15 (suggesting WTO law as a potential site in which GAL may be developed).

¹⁵⁸ Stephan Schill, ‘Crafting the International Economic Order: The Public Function of Investment Treaty Arbitration and its Significance for the Role of the Arbitrator’, 23 *Leiden Journal of International Law* 401 (2010) at 401–30.

¹⁵⁹ ICSID Convention, Article 25.

¹⁶⁰ See Harlow, above n 155.

¹⁶¹ *Ibid.* 188.

¹⁶² *Ibid.* 189 and 210.

¹⁶³ *Ibid.*, 121–2.

of what is meant by global administrative law and review, any attempt to classify investment arbitration and the WTO dispute settlement mechanism as forms of such review remains a theoretical exercise. There is no such thing as a centralized system of administration in international law; rather states retain their administrative functions. Furthermore, trade and foreign investments are usually governed by a series of norms which are not limited to administrative law, but include international treaties, customs, general principles of law. In addition, arbitral tribunals have expressly denied being administrative courts. For instance, in *Generation Ukraine v. Ukraine*, the Arbitral Tribunal clarified that it was an international tribunal, applying international law to a question of international responsibility.¹⁶⁴ This questions the idea of a global administrative law.¹⁶⁵ Finally, the use of the arbitration model and the WTO dispute settlement mechanism is aimed at depoliticizing disputes, avoiding potential national court bias and/or unilateral sanctions and ensuring the advantages of effective, impartial and legal dispute settlement mechanisms.¹⁶⁶

Drawing from the previous analysis, one might conclude that international investment arbitration and the WTO dispute settlement mechanism present some elements of global administrative review (*i.e.*, review of administrative acts), but that they also lack some of its features (at the end of the day the administrative acts which are under review belong to the national sphere).¹⁶⁷

Conclusions

The linkage between cultural governance and international economic law has increasingly come to the fore. At the substantive level, international economic law provides an extensive protection to investors' and trading nations' rights in order 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 trade and investment law provisions. Therefore, foreign investors and trading nations can seek compensation for the impact of such regulation on their economic interests. Because international cultural treaties do not include compulsory dispute settlement mechanisms, cultural heritage related disputes have gravitated towards international economic 'courts'. The magnetism of the WTO dispute settlement mechanism and arbitral tribunals has been a mixed blessing.

¹⁶⁴ *Generation Ukraine v. Ukraine*, Award (Merits), 16 September 2003, 44 ILM 404, paras. 20.29–20.33.

¹⁶⁵ Jorge A. Barraguirre, 'Los Tratados Bilaterales de inversión (TBIs) y el Convenio CIADI – La evaporación del derecho administrativo doméstico?', 3 *Res Publica Argentina* 114 (2007) at 114.

¹⁶⁶ See Ibrahim F.I. Shihata, 'Towards a Greater Depoliticization of Investment Disputes: The Role of ICSID and MIGA', 1 *ICSID Review–Foreign Investment Law Journal* 1 (1986) at 4.

¹⁶⁷ See Anthea Roberts, 'Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System', 102 *American Journal of International Law* 45 (2013), at 121.

On the one hand, cultural heritage related economic disputes put cultural governance to a test, in that they show its (lack of) dedicated heritage courts and tribunals. Concerns remain with regard to the effectiveness of cultural governance, as international economic *fora* have a limited mandate and cannot adjudicate on the eventual violation of international cultural law. There is a risk that investment treaty tribunals, WTO panels and the Appellate Body dilute or neglect significant cultural aspects, eventually emphasizing economic interests. These tribunals may not constitute the ideal *fora* for settling cultural heritage related disputes. Arbitral tribunals and the WTO dispute settlement mechanism lack of institutional and/or procedural connection with other international institutions such as UNESCO and have limited jurisdiction. The institutional structure of the WTO and the ICSID, 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. Trade law and investment law should not be used to *enforce* cultural heritage law.¹⁶⁸ This is not to say that arbitral tribunals and the WTO dispute settlement mechanism can avoid dealing with cultural heritage in some instances or that they are failing to properly account for cultural heritage issues. From a legal perspective, 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. The Appellate Body clarified that GATT ‘is not to be read in clinical isolation from public international law’.¹⁶⁹ And the same is surely the case as regards international investment law.¹⁷⁰ Rather customary rules of treaty interpretation, as restated by Article 31(3)(c) of the VCLT, bridge the gap between different legal spaces. Other interpretive criteria, such as the *lex posterior* and *lex specialis* rules can also offer additional tools for connecting different subsystems of international law, albeit a mechanical use of these criteria should be avoided, as different branches of international law have different aims and objectives and they do not completely overlap. Some arbitral tribunals have shown a sensitive approach to cultural issues, holding that cultural concerns can constitute a legitimate distinction rather than discrimination, or taking cultural elements into account in their interpretation of international economic law. The

¹⁶⁸ For an analogous argument concerning trade law and human rights, see Christopher McCrudden, ‘International Economic Law and the Pursuit of Human Rights: A Framework for Discussion of the Legality of ‘Selective Purchasing’ Laws under the WTO Government Procurement Agreement’, 2(1) *Journal of International Economic Law* 3 (1999), 47

¹⁶⁹ *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’).

¹⁷⁰ James Crawford, ‘International Protection of Foreign Direct Investment: Between Clinical Isolation and Systematic Integration’, in Rainer Hofmann and Christian J. Tams (eds.), *International Investment Law and General International Law: From Clinical Isolation to Systemic Integration?* (Baden/Baden: Nomos, 2011), p. 22.

pathways of separate subsets of international law are increasingly intersecting.

On the other hand, the review of domestic regulations by international tribunals can improve good governance and the transparent pursuit of legitimate cultural policies. The WTO dispute settlement mechanism and arbitral tribunals are imposing schemes of good governance by requiring the respect of international economic law provisions — including the prohibition of discrimination — and by adopting general principles of law, such as due process. The scrutiny of arbitral tribunals 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, proportionality and reasonableness can contribute albeit indirectly to the protection of cultural heritage and ensure an appropriate balance between public and private interest. Although these requirements are not *per se* specific to the cultural field but are equally applicable in adjudications relating to other fields such as environmental protection, public health, and other, their application to the cultural field help shaping cultural heritage law.

Arbitral tribunals and the WTO dispute settlement mechanism can contribute to the emergence of general principles of law requiring the protection of cultural heritage in times of peace. They require that a suitable balance be struck between public and private interests. This jurisprudence can reverberate beyond the four corners of international economic law, influencing other international 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 and the respect of principles such as legality, fairness and good faith in cultural governance as well as the prohibition of discriminatory, arbitrary, or unreasonable measures.

The article also discussed the questions of whether international economic law is a form of global administrative law and whether the WTO dispute settlement mechanism and investment arbitration are forms of the same. GAL remains, itself, a contested concept that is difficult to pin down. This makes it more difficult to rely on it as a way to conceptualize international economic law in general or international economic law as it relates to cultural heritage. The WTO dispute settlement mechanism and investment arbitration have some elements of global administrative review, but not all elements one might look for. Whether these developments have given rise to a cultural administrative law, remains open to debate. This is even more so, in light of the lively controversy as to whether GAL might be useful or rather – as Harlow suggests – affect cultural diversity.

Certainly, by taking elements of cultural heritage law into account, state practice in compliance with the relevant reports and arbitral awards can contribute to the emergence of general principles of law requiring the protection of cultural heritage and an equilibrate balance between the public

and private interests. 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.