

1) Global v. Local: The Protection of Indigenous Heritage in International Economic Law

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Introduction

Indigenous cultural heritage plays an essential role in the building of the identity of indigenous peoples and thus its protection has profound significance for their dignity and the realization of their human rights. Although the recognition of indigenous peoples' rights and cultural heritage has gained some momentum at the international law level since the adoption of the 2007 United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP),¹ law and policy tend to favour macroeconomic notions of growth regardless of actual or potential infringement of indigenous entitlements.² Many of the estimated 370 million indigenous peoples around the world have lost, or are under imminent threat of losing, their ancestral lands, because of the exploitation of natural resources.³

While the clash between economic development and indigenous peoples' rights is by no means new, this chapter approaches this well known theme from a new perspective by focusing on international economic law. This article questions whether local indigenous ways of life can prevail over international economic governance. The protection of indigenous heritage has intersected with international trade law determining interesting clashes between indigenous culture and free trade. In parallel, a potential tension exists when a state adopts cultural policies interfering with foreign investments as such policies may be deemed to

¹ United Nations Declaration on the Rights of Indigenous Peoples, A/RES/61/295 (2007).

² L Barrera-Hernández "Indigenous Peoples, Human Rights and Natural Resource Development: Chile's Mapuche Peoples and the Right to Water" (2005) 11 *Annual Survey of International & Comparative Law* 1.

³ N Pillay "Let us Ensure that Development for Some is not to the Detriment of the Human Rights of Others", Statement by the United Nations High Commissioner for Human Rights, <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=11284&LangID=E> (2011), accessed September 26th 2015.

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amount to indirect expropriation or a violation of other investment treaty provisions. The key question of this study is whether international economic law has embraced a pure *international economic culture* or if, on the other hand, it is open to encapsulating cultural concerns in its *modus operandi*.

Until recently, international economic law had developed only limited tools for the protection of cultural heritage through dispute settlement.⁴ However, recent arbitral awards have shown a growing awareness of the need to protect indigenous cultural heritage within investment disputes. The incidence in the number of cases in which arbitrators have balanced the different values at stake is increasing.⁵ In parallel, at the World Trade Organization (WTO), the recent case concerning the seal products ban adopted by the E.U. has brought to the fore a veritable clash of cultures between moral concerns about animal welfare on the one hand, and indigenous heritage and free trade on the other.

This chapter proceeds as follows. *First*, this chapter addresses the following issue:— since indigenous heritage is “local” by definition, should its governance be purely local or should it pertain to international law? The latter approach is to be preferred in the light of the UNDRIP and relevant international law instruments. The international norms protecting indigenous cultural heritage will be scrutinised and particular reference will be made to the UNDRIP. *Second*, the international economic governance shall be sketched out. Reference to the World Trade Organization and investment law regimes and their effective and sophisticated dispute settlement mechanisms will be made. *Third*, relevant case studies will be analysed and critically assessed. *Fourth*, this chapter offers some legal options to better reconcile the different interests at stake. *Fifth*, some conclusions shall be drawn. It is argued that the UNDRIP contributes significantly to current discourse on indigenous heritage. This does not mean that further steps should not be taken. On the contrary, the collision between the protection of economic interests and indigenous entitlements in international economic law makes the case for strengthening the current regime protecting indigenous heritage. In particular, the participation of indigenous peoples in the decisions which affect their rights and heritage is crucial.

⁴ See generally V Vadi “When Cultures Collide: Foreign Direct Investment, Natural Resources and Indigenous Heritage in International Investment Law” (2011) 42 *Columbia Human Rights Law Review* 797-889.

⁵ *Ibid.*

2. Global v Local: The International Protection of Indigenous Heritage

As indigenous heritage is “local” by definition, should its governance be purely local or should it pertain to international law? Indigenous communities are geographically rooted in given *loci*, yet politically situated between the national and the international spheres. Geographically, indigenous peoples are “*indigenous*” “because their ancestral roots are embedded in the lands on which they live ... much more deeply than the roots of more powerful sectors of society living on the same lands.”⁶ They are “culturally distinctive societies that find themselves engulfed by settler societies born of the forces of empire and conquest”.⁷ They have been living in a given territory for immemorial time even before the establishment of the nation state under whose sovereignty they live today.⁸

Politically, indigenous peoples are situated between the national and the international arenas. For years, indigenous peoples have been considered to be mere components of states rather than “legal unit[s] of international law”.⁹ They were regulated under domestic law only.¹⁰ As

⁶ J Anaya *International Human Rights and Indigenous Peoples* (Aspen Publishers, 2009).

⁷ J Anaya, *Indigenous Peoples in International Law* (Oxford: Oxford University Press 1996).

⁸ Art. 1 of the ILO Convention 169 concerning Indigenous and Tribal Peoples in Independent Countries defines “indigenous peoples” “on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonization or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions”.

⁹ *Cayuga Indians (Gr. Brit.) v. United States*, 6 Review of International Arbitral Awards 173 (1926) 176 (stating that an Indian tribe “is not a legal unit of international law”).

¹⁰ S Wiessner “Indigenous Self-Determination, Culture, and Land: A Reassessment in Light of the 2007 UN Declaration on the Rights of Indigenous Peoples” in E Pulitano (ed) *Indigenous Rights in the Age of the UN Declaration* (Cambridge: Cambridge University Press, 2012) pp 31-63 at 38. See also W Twining, *General Jurisprudence: Understanding Law from a Global Perspective* (Cambridge: Cambridge University Press, 2008) p 362 (calling the assumption that domestic law consists of the state law and that public international law consists of the law of sovereign states as the “Westphalian duo”); R Dibadj, “Panglossian Transnationalism” (2008) 44 *Stanford Journal of International Law* 253–299 at 256 (noting that as “a product of the Westphalian state-centered

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Daes puts it, “[i]nternational law knew no other legal subjects than the state ... and had no room for indigenous peoples.”¹¹

Historically, however, indigenous peoples have played a role in international relations, signed treaties and being recognised as nations. The issues of “[indigenous] rights and sovereignty are rooted in the first encounters between the [tribes] and the colonial powers of the sixteenth and seventeenth centuries.”¹² “Weakened by years of warfare, disease, and increasingly scarce natural resources”, indigenous peoples likely assented to various treaties with colonial powers “to insulate themselves against further ... encroachments and preserve what remained of their heritage and traditional way of life”.¹³ Due to the failures of these early treaties and national law to address indigenous peoples’ rights adequately, international law has increasingly regulated indigenous peoples’ matters in the past four decades, reaffirming their rights and various entitlements. The momentum for the resurgence of indigenous rights at the international level was given by the emergence of the human rights paradigm in the aftermath of WWII and the decolonization process. There has been a paradigm shift in international law; and indigenous peoples have been deemed as “legal subjects under international law”.¹⁴

At the international level, indigenous peoples’ rights have been protected and promoted in two complementary ways: on the one hand, the protection and promotion of indigenous peoples’ rights remain embedded in the human rights framework. On the other hand, indigenous peoples have supported the creation of special forums and bodies which exclusively deal with their situation” as well as “the elaboration ...of

system of world law”, international law “maintains that the states are the only subjects of international law...”)

¹¹ E-I Daes “Indigenous Peoples’ Rights to their Natural Resources” in A Constantinides and N Zaikos (eds) *The Diversity of International Law* (Leiden/Boston: Martinus Nijhoff, 2009).

¹² AF Kinney “The Tribe, the Empire, and the Nation: Enforceability of Pre-Revolutionary Treaties with Native American Tribes” 39 *Case Western Reserve Journal of International Law* (2007-2008) 898-99 (referring to the situation of indigenous tribes in Virginia).

¹³ *Ibid.* at 902 (noting that these treaties “remained hardly more than empty words”, proving to be “little more than a cessation of open hostilities”).

¹⁴ For a seminal study, see RL Barsch, “Indigenous Peoples in the 1990s: From Object to Subject of International Law” (1994) 7 *Harvard Human Rights Journal* (1994) 33. See also J Gilbert, *Indigenous Peoples’ Land Rights under International Law: From Victims to Actors* (Ardstley: Transnational Publishers, 2006).

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instruments which only focus on [their] rights”.¹⁵ For instance, the creation of the United Nations Permanent Forum for Indigenous Issues (UNPFII) reflects the efforts of indigenous peoples “to create space for themselves and their issues within the United Nations human rights machinery”.¹⁶ Analogously, both the 1989 International Labour Organization Convention Concerning Indigenous and Tribal Peoples in Independent Countries (ILO Convention No. 169)¹⁷ and the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)¹⁸ are special instruments for the protection of indigenous peoples.

While a number of international law instruments protect different aspects of indigenous heritage,¹⁹ indigenous culture plays a central role in the UNDRIP. Drafted with the very active participation of indigenous representatives, the Declaration constitutes the summa of two decades of preparatory work.²⁰ While this landmark instrument is currently not binding, this may change in the future to the extent that its provisions reflect customary international law.²¹ The Declaration constitutes a

¹⁵ K Göcke “Protection and Realization of Indigenous Peoples’ Land Rights at the National and International Level” 5 *Goettingen Journal of International Law* (2013) 124.

¹⁶ S Sargent “Transnational Networks and United Nations Human Rights Structural Change: The Future of Indigenous and Minority Rights” (2012) 16 *International Journal of Human Rights* 123-151 at 136 (also noting that the membership composition of the UNPFII – of state and indigenous representatives on equal footing – “is a unique achievement in international indigenous rights, and indeed, in international law”. Ibid. at 139).

¹⁷ International Labour Organization Convention Concerning Indigenous and Tribal Peoples in Independent Countries (ILO Convention No. 169), 27 June 1989, 28 ILM 1382.

¹⁸ United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (13 September 2007). The Declaration was approved by 143 nations, but was opposed by United States, Canada, New Zealand and Australia. However these four nations subsequently endorsed the Declaration.

¹⁹ For an overview, see eg M Hadjiioannou “The International Human Right to Culture: Reclamation of the Cultural Identities of Indigenous Peoples under International Law” (2005) 8 *Chapman Law Review* 201.

²⁰ Above n 11 at 31.

²¹ On the legal status of the Declaration, see M Barelli, “The Role of Soft Law in the International Legal System: The Case of the United Nations Declaration on the Rights of Indigenous Peoples” (2009) 58 *ICLQ* 957 (arguing that “regardless of its non-binding nature, the Declaration has the potential effectively to promote and protect the rights of the world’s indigenous peoples” and that “the relevance of a soft law instrument cannot be aprioristically dismissed”. Ibid. at 983).

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significant achievement for indigenous peoples worldwide.²² Not only does it re-empower indigenous peoples, but it shifts discourse on their rights from the local to the international level with a cogency which was missing before. As Stavenhagen notes, “The Declaration provides an opportunity to link the global and local levels, in a process of *glocalization*”.²³

Indigenous culture is a key theme of the Declaration.²⁴ Many articles are devoted to different aspects of indigenous culture; and the word “culture” appears no less than 30 times in its text.²⁵ Not only does the UNDRIP recognise the dignity and diversity of indigenous peoples’ culture but it also acknowledges its essential contribution to the “diversity and richness of civilization and cultures which constitute the common heritage of mankind”.²⁶ The Declaration recognises the right of indigenous peoples to practice their cultural traditions²⁷ and maintain their distinctive spiritual and material relationship with the land which they have traditionally owned, occupied or otherwise used.²⁸

For indigenous peoples, land is the basis not only of economic livelihood, but also the source of spiritual and cultural identity.²⁹ Indigenous peoples maintain cultural and spiritual ties with the ancestral territory they have traditionally occupied,³⁰ not only due to the presence of

²² E Pulitano “Indigenous Rights and International Law: An Introduction”, in E Pulitano (ed) *Indigenous Rights in the Age of the UN Declaration* (Cambridge: Cambridge University Press, 2012) 1-30 at 25.

²³ R Stavenhagen “Making the Declaration Work” in C Charters and R Stavenhagen (eds) *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples* (Copenhagen: IWGIA, 2009) p. 357.

²⁴ See generally S Wiessner “The Cultural Rights of Indigenous Peoples: Achievements and Continuing Challenges” (2011) 22 *European Journal of International Law* 121 at 139.

²⁵ See Y Donders “The UN Declaration on the Rights of Indigenous Peoples. A Victory for Cultural Autonomy?” in I Boerefijn and J Goldschmidt (eds) *Changing Perceptions of Sovereignty and Human Rights* (Antwerp/Oxford/Portland: Intersentia, 2008) p. 99.

²⁶ UNDRIP, preamble.

²⁷ UNDRIP, Article 11.

²⁸ See eg UNDRIP, preamble, Articles 8, 11, 12.1 and 13.1.

²⁹ J Gilbert “Custodians of the Land- Indigenous Peoples, Human Rights and Cultural Integrity” in M Langfield, W Logan and M Craith (eds) *Cultural Diversity, Heritage and Human Rights* (Oxon: Routledge, 2010) pp 31-44 at p. 31.

³⁰ Inter-Am. Ct. H.R., *Mayagna (Sumo) Awas Tigni Community v. Nicaragua*, Judgment of 31 August 2001, IACtHR Series C, No. 79, 75, para. 149 (clarifying that “For indigenous communities, relations to the land are not merely a matter of

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sacred sites but also because of the intrinsic sacred value of the territory itself.³¹ They “see the land and the sea, all of the sites they contain, and the knowledge and the laws associated with those sites, as a single entity that must be protected as a whole...”³² Because of this holistic approach of indigenous peoples, a UN study insists that “all elements of heritage should be managed and protected as a single, interrelated and integrated whole”.³³ Moreover, other experts have stressed that “Indigenous culture, religion and spirituality are so connected with the land that deprivation of land is tantamount to deprivation of indigenous identity and culture”.³⁴

Among the different theoretical models that have been proposed to deal with indigenous peoples’ rights, the cultural integrity approach “emphasizes the value of traditional cultures in and of themselves as well as for the rest of society” focusing on cultural entitlements, which are firmly rooted in the human rights catalogue.³⁵ In sum, the cultural integrity model focuses on cultural considerations to protect indigenous peoples’ identity, and acknowledges the dynamic nexus between indigenous peoples and their lands. More importantly, cultural integrity is essential to indigenous sovereignty. As a Native American scholar points out, indigenous sovereignty relies on a continued cultural integrity: “to the degree that a nation loses its sense of cultural identity, to that degree it suffers a loss of sovereignty”.³⁶

Some scholars criticise this approach, contending that an excessive emphasis on the cultural entitlements of indigenous peoples can reduce their political rights and limit their claims to self-determination.³⁷

possession and production but a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations”).)

³¹ Inter-Am. Ct. H.R., *Case of the Saramaka People v. Suriname*, Judgment on Preliminary Objections, Merits, Reparations and Costs, 28 November 2007, (ser. C) No. 172, at para. 82.

³² C O’Faircheallaigh ‘Negotiating Cultural Heritage? Aboriginal Mining Company Agreements in Australia’ (2003) 39 *Development and Change* 25-51 at 27.

³³ E-I Daes *Study on the Protection of the Cultural and Intellectual Property of Indigenous Peoples*, Sub-Commission on Prevention of Discrimination and Protection of Minorities, UN Doc. E/CN.4/Sub 2/1993/28.

³⁴ E Stamatopoulou, “Indigenous Peoples and the United Nations: Human Rights as a Developing Dynamic” 16 *Human Rights Quarterly* (1994) at 76.

³⁵ L Westra *Environmental Justice and the Rights of Indigenous Peoples* (London: Earthscan, 2008) p. 10.

³⁶ V Deloria Jr. “Self-Determination and the Concept of Sovereignty” in JR Wunder (ed) *Native American Sovereignty* (New York: Garland, 1996) p 118.

³⁷ See generally C Cutler “The Globalization of International Law, Indigenous Identity, and the ‘New Constitutionalism’,” in W Coleman (ed) *Property*,

According to these authors, over-emphasizing culture risks undermining self-determination. Nonetheless, if one deems the cultural integrity approach as complementary to other approaches, such an approach is of fundamental importance to understanding and better protecting the culture and human rights of indigenous peoples.

Instead, a real limitation of the legal framework protecting indigenous cultural heritage is the absence – aside from the classical human rights mechanisms – of a special international court or tribunal, where indigenous peoples can raise complaints regarding measures which affect them.³⁸ In fact, while (national and regional) courts and (international) monitoring bodies have been extremely important in the process of articulation and implementation of indigenous rights,³⁹ the lack of a dedicated world court allows indigenous heritage related cases to be attracted by international (economic) *fora* with limited if no mandate to adjudicate indigenous claims. The UNDRIP does not change this situation. Therefore, notwithstanding the major political merits of the Declaration, “UNDRIP does not definitively resolve, but at best temporarily mediates, multiple tensions.”⁴⁰

3. International Economic Governance and the Diaspora of indigenous Culture related Disputes before International Economic *Fora*.

International economic law is a well-developed field of study within the broader international law framework and is characterised by well-developed and sophisticated dispute settlement mechanisms. While the

Territory, Globalization: Struggles over Autonomy (Vancouver: University of British Columbia Press, 2010).

³⁸ Human rights may be claimed before national courts and regional human rights courts, as well as through particular complaint mechanisms at the UN level. I Watson and S Venne “Talking Up Indigenous Peoples’ Original Intent in a Space Dominated by State Interventions” in E Pulitano (ed.) *Indigenous Rights in the Age of the UN Declaration* (Cambridge: Cambridge University Press, 2012) pp 87-109 at p 106.

³⁹ G Pentassuglia, “Towards a Jurisprudential Articulation of Indigenous Land Rights” 22 *European Journal of International Law* (2011) 165-202;

⁴⁰ See K Engle, “On Fragile Architecture: The UN Declaration on the Rights of Indigenous Peoples in the Context of Human Rights” (2011) 22 *European Journal of International Law* 141-163 at 163 (contending that “Most of the work that has been done on the declaration since its passage has been far from critical” and concluding that “If we are willing to examine it critically, the UNDRIP may have the potential to become an important site for the ongoing struggle over the meaning of human rights ...”).

dispute settlement mechanism of the World Trade Organization⁴¹ has been defined as the “jewel in the crown” of this organization,⁴² investment treaty arbitration has become the most successful mechanism for settling investment-related disputes.⁴³

The creation of the WTO Dispute Settlement Body determined a major shift from the political consensus-based dispute settlement system of the GATT 1947⁴⁴ to a rule-based, architecture designed to strengthen the multilateral trade system.⁴⁵ The WTO Dispute Settlement Mechanism (DSM) is compulsory, exclusive and highly effective.⁴⁶ Panels and the Appellate Body interpret and apply the WTO treaties, preserving the rights and obligations of the WTO members. Accordingly, they cannot add to or diminish the rights and obligations provided in the covered agreements.⁴⁷ Their decisions are binding on the parties, and the Dispute Settlement Understanding (DSU)⁴⁸ provides remedies for breach of WTO law.

At the procedural level, only WTO member states have *locus standi* in the DSM, *i.e.* individuals cannot file claims before panels and the Appellate Body.⁴⁹ When cultural heritage-related trade disputes emerge, Article 23.1 of the DSU obliges Members to subject the dispute exclusively to WTO bodies.⁵⁰ In *US–Section 301 Trade Act*, the Panel held that members “have to have recourse to the DSU DSM to the

⁴¹ The World Trade Organization was established in 1994. Marrakesh Agreement Establishing the World Trade Organization, Apr. 15th 1994. 33 ILM 1144 (1994).

⁴² A Narlikar *The WTO: A Very Short Introduction* (Oxford: Oxford University Press, 2005).

⁴³ S Franck “Development and Outcomes of Investor-State Arbitration” (2009) 9 *Harvard Journal of International Law* 435-489.

⁴⁴ General Agreement on Tariffs and Trade, 30 October 1947, 55 UNTS 194.

⁴⁵ SP Crowley and JH Jackson, “WTO Dispute Procedures, Standard of Review, and Deference to National Governments” (1996) 90 *American Journal of International Law* 193.

⁴⁶ P Van Den Bossche *The Law and Policy of the World Trade Organization* (Cambridge: Cambridge University Press, 2nd edn, 2008).

⁴⁷ DSU, Article 3.2.

⁴⁸ Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 UNTS 401, 33 ILM 1226 (1994) [hereinafter DSU].

⁴⁹ H Andersen “Protection of Non-Trade Values in WTO Appellate Body Jurisprudence: Exceptions, Economic Arguments, and Eluding Questions” (2015) 18 *Journal of International Economic Law* 385-405, at 391.

⁵⁰ DSU, Article 23.1.

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exclusion of any other system”.⁵¹ In *Mexico–Soft Drinks* the Appellate Body clarified that the provision even implies that “that Member is entitled to a ruling by a WTO panel”.⁵² Pursuant to WTO settled case law and Art. XXIII: 1 of the GATT 1994, each WTO Member which considers any of its benefits to be prejudiced under the covered agreements can bring a case before a panel.

In parallel, as there is no single comprehensive multilateral investment agreement, investors’ rights are defined by a plethora of bilateral and regional investment treaties, customary law and general principles of law. International investment law provides extensive protection to investors’ rights in order to encourage foreign direct investment (FDI) and to foster economic development. At the substantive level, investment treaties provide for *inter alia*: adequate compensation for expropriated property; protection against discrimination; fair and equitable treatment; full protection and security; and assurances that the host country will honor its commitments regarding the investment.

At the procedural level, investment treaties provide investors direct access to an international arbitral tribunal. This is a major novelty in international law, as customary international law does not provide such a mechanism. The use of the arbitration model is aimed at depoliticizing disputes, avoiding potential national court bias and ensuring the advantages of confidentiality and effectiveness.⁵³ Arbitral tribunals review state acts in the light of their investment treaties, and this review has been compared to a sort of administrative review. Authors postulate the existence of a global administrative space in which the strict dichotomy between domestic and international has largely broken down.⁵⁴ Under this theoretical framework, investor–state arbitration has been conceptualised

⁵¹ WTO Panel Report, *US–Section 301 Trade Act, United States–Section 301-310 of the Trade Act of 1974*, WT/DS152/R, adopted January 27th 2000, DSR 2000:II. para 7.43.

⁵² WTO Appellate Body Report, *Mexico–Taxes on Soft Drinks, Mexico–Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/AB/R adopted March 24th 2006, para 52.

⁵³ IFI Shihata “Towards a Greater Depoliticization of Investment Disputes: The Role of ICSID and MIGA” (1986) 1 *ICSID Review–Foreign Investment Law Journal* 1-25.

⁵⁴ N Krisch and B Kingsbury “Introduction: Global Governance and Global Administrative Law in the International Legal Order” (2006) 17 *European Journal of International Law* 1.

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as a global administrative law (GAL) creature,⁵⁵ which impels states to conform to GAL principles and to adopt principles of good governance.

Given the structural imbalance between the vague and non-binding dispute settlement mechanisms provided by human rights treaties, and the highly effective and sophisticated dispute settlement mechanisms available under international economic law, cultural disputes involving investors' or traders' rights have often been brought before international economic law *fora*. Obviously, this does not mean that these are the only available *fora*, let alone the superior *fora* for this kind of dispute. Other *fora* are available such as national courts, human rights courts, regional economic courts and the traditional state-to-state *fora* such as the International Court of Justice or even inter-state arbitration. Some of these dispute settlement mechanisms may be more suitable than investor-state arbitration or the WTO dispute settlement mechanism to address cultural concerns. Given its scope, this study focuses on the jurisprudence of the WTO bodies and arbitral tribunals.

One may wonder whether the fact that cultural disputes tend to be adjudicated before international economic law *fora* determines a sort of institutional bias. Treaty provisions can be vague and their language encompasses a potentially wide variety of state regulation that may interfere with economic interests. Therefore, a potential tension exists when a state adopts regulatory measures interfering with foreign investments or free trade, as regulation may be considered as violating substantive standards of treatment under investment treaties or the WTO covered agreements and the foreign investor may require compensation before arbitral tribunals or spur the home state to file a claim before the WTO organs.

More specifically, with regard to the WTO DSB, "it is quite uncontroversial that an adjudicatory system engaged in interpreting trade-liberalizing standards would tend to favor free trade".⁵⁶ According to some empirical studies, there is a consistently high rate of complainant success in WTO dispute resolution⁵⁷ and authors have theorised 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

⁵⁵ G Van Harten and M Loughlin "Investment Treaty Arbitration as a Species of Global Administrative Law" (2006) 17 *European Journal of International Law* 121-150 at 121.

⁵⁶ JP Trachtman "The Domain of WTO Dispute Resolution" (1999) 40 *Harvard International Law Journal* 333.

⁵⁷ J Maton and C Maton "Independence under Fire: Extra Legal Pressures and Coalition Building in WTO Dispute Settlement" (2007) 10 *Journal of International Economic Law* 317.

regulatory competencies”.⁵⁸ In particular, given the fact that about 80% of the cases have been settled in favor of the claimant, Colares highlighted that “the DSB has evolved WTO norms in a manner that consistently favors litigants whose interests are generally aligned with the unfettered expansion of trade.”⁵⁹

This study questions whether the same “institutional bias” is present in investor–state arbitration. Some scholars contend that such mechanism is biased in favor of corporate and economic interests, and “excludes consideration of vital non-commercial interests”.⁶⁰ Certainly, given the architecture of the arbitral process, significant concerns arise in the context of disputes involving indigenous heritage. While arbitration structurally constitutes a private model of adjudication, investment disputes present public law aspects.⁶¹ Arbitral awards ultimately shape the relationship between the state, on the one hand, and private individuals on the other.⁶² Arbitrators determine matters such as the legality of governmental activity, the degree to which individuals should be protected from regulation, and the appropriate role of the state.⁶³

Investor–state arbitration, however, distinguishes between two types of non-state actors: 1) foreign investors; and 2) the FDI impacted non-state actors, including indigenous peoples.⁶⁴ While indigenous peoples do have access to local courts, and eventually, regional human rights courts, the resolution of disputes arising from the investment within the territory of the host state is delegated to an international dispute settlement mechanism, thus undercutting the authority of national courts to deal with

⁵⁸ JF Colares “A Theory of WTO Adjudication: From Empirical Analysis to Biased Rule Development” (2009) 42 *Vanderbilt Journal of Transnational Law* 383 at 388.

⁵⁹ *Ibid*, at 387.

⁶⁰ R Broad, “Corporate Bias in the World Bank Group’s International Centre for Settlement of Investment Disputes – A Case Study of a Global Mining Corporation Suing El Salvador” (2015) 36 *University of Pennsylvania Journal of International Law* 854.

⁶¹ G Van Harten “The Public-Private Distinction in the International Arbitration of Individual Claims against the State” (2007) 56 *International & Comparative Law Quarterly* 371-393 at 372.

⁶² G Van Harten *Investment Treaty Arbitration and Public Law* (Oxford: Oxford University Press 2007) p 70.

⁶³ M Sornarajah, “The Clash of Globalizations and the International Law on Foreign Investment” (2003) 10 *Canadian Foreign Policy* 1.

⁶⁴ N Gal-Or “The Investor and Civil Society as Twin Global Citizens: Proposing a New Interpretation in the Legitimacy Debate” (2008-2009) 32 *Suffolk Transnational Law Review* 271-301.

investment disputes.⁶⁵ Furthermore, court decisions in the host state upholding complaints brought by private parties against a foreign investor may be challenged by the investor before an arbitral tribunal on the grounds that they constitute wrongful interference with the investment.⁶⁶

The increasing impact of FDI on the social sphere of the host state has raised the question of whether the principle of access to justice, as successfully developed to the benefit of investors through the provision of binding arbitration, ought to be matched by a corresponding right to a remedial process for individuals and groups adversely affected by the investment in the host state.⁶⁷ While the recognition of multinational corporations (MNCs) as “international corporate citizens” has progressed,⁶⁸ by comparison, the procedural rights of indigenous peoples have remained unchanged. The paradox is that the foreign company and indigenous peoples lie at the opposite ends of the same spectrum: the company is characterised by its foreignness; indigenous peoples are characterised by their indigeneity,⁶⁹ descending from those who inhabited the area before colonization. At the same time, however, indigenous peoples have clearly defined rights under international law.⁷⁰ The following section addresses the question as to whether indigenous peoples’ cultural entitlements play any role in the context of international disputes before international economic *fora*.

4. When Cultures Collide

As mentioned, many of the estimated 370 million indigenous peoples around the world have lost, or are under imminent threat of losing, their ancestral lands, because of the exploitation of natural resources.⁷¹ Conflicts and disputes over the use of indigenous lands have escalated

⁶⁵ F Francioni “Access to Justice, Denial of Justice, and International Investment Law” in P-M Dupuy, F Francioni and E-U Petersmann (eds) *Human Rights in International Investment Law and Arbitration* (Oxford: OUP, 2009) p 72.

⁶⁶ *Ibid*, p 72.

⁶⁷ *Ibid*, p 71.

⁶⁸ P Muchlinski “Global Bukovina Examined: Viewing the Multinational Enterprise as a Transnational Law Making Community” in G Teubner (ed) *Global Law Without a State* (London: Dartmouth, 1997) p 79.

⁶⁹ M Langfield “Indigenous Peoples are Not Multicultural Minorities’ Cultural Diversity, Heritage and Indigenous Human Rights in Australia” in M Langfield, W Logan and M Craith (eds) *Cultural Diversity, Heritage and Human Rights*, (Oxford: Routledge 2010) pp 135-152.

⁷⁰ Above n 5 at 797-889.

⁷¹ Above n 4.

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apace across the world.⁷² In parallel, free trade may destabilise indigenous communities commodifying their cultural heritage, transforming their lifestyle and affecting their traditional cultural practices.⁷³ Indigenous peoples consider that trade liberalization and FDI “are creating the most adverse impacts on [their] lives” through environmental degradation, forced relocation and deforestation among others.⁷⁴ For instance, in an open letter to the President of the World Bank, they state: “For the World Bank and the WTO, our forests are a marketable commodity. But for us, the forests are a home, our source of livelihood, the dwelling of our gods, the burial grounds of our ancestors, the inspiration of our culture”.⁷⁵ The letter concludes with the request not to exploit their forests.

The clash between economic interests and indigenous peoples’ entitlements can (and has) be(en) explored from a number of different angles. Due to space limits, this chapter focuses on one of the many aspects of the collision between indigenous rights and economic globalization: the clash between the protection of indigenous cultural heritage and the promotion of economic interests in international economic law.

Indigenous cultural heritage is based on a holistic understanding of natural resources, cultural practices and human development. According to General Comment 23, “culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples. [Culture] may include such traditional activities as fishing or hunting The enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions that affect them. . . . The protection of these rights is directed to ensure the survival and continued development of the cultural, religious and social identity of the minorities

⁷² C Rodriguez-Garavito “Ethnicity.gov: Global Governance, Indigenous Peoples, and the Right to Prior Consultation in Social Minefields” 18 *Indiana Journal of Global Legal Studies* (2011) 266.

⁷³ See eg CG Gonzalez “An Environmental Justice Critique of Comparative Advantage: Indigenous Peoples, Trade Policy, and the Mexican Neoliberal Economic Reforms” (2010-2011) 32 *University of Pennsylvania Journal of International Law* 723 and KC Kennedy “Trade and Foreign Investment in the Americas: The Impact on Indigenous Peoples and the Environment” (2006) 14 *Michigan State Journal of International Law* 139.

⁷⁴ See Indigenous Peoples’ Seattle Declaration, on the occasion of the Third Ministerial meeting of the World Trade Organization, November 30th–December 3rd 1999.

⁷⁵ A Pha “WTO Collapse: Win for People”, *Guardian*, December 8th 1999.

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concerned, thus enriching the fabric of society as a whole.”⁷⁶ By contrast, an entire culture has developed around international economic law. The international economic culture is characterised by efficiency, productivity, and exploitation of natural resources in the pursuit of economic profit and development. Not only are conflicts between indigenous rights and economic interests of investors and traders frequent, but they occur on all continents of the world.⁷⁷ Moreover, “indigenous peoples potentially suffer a disproportionate burden in such a conflict” due to the loss of the important non-economic benefit associated with their cultural identity.⁷⁸ After exploring a recent case adjudicated before an arbitral tribunal, this section focuses on the seals products dispute adjudicated before the WTO DSM.

(a) Indigenous Cultural Heritage and the Promotion of Foreign Investments

The development of natural resources is increasingly taking place in, or very close to, traditional indigenous areas.⁷⁹ While development analysts point to extractive projects as anti-poverty measures, and advocate FDI as a major catalyst for development,⁸⁰ “for the most part, the peoples in the areas where the resources are located tend to bear a disproportionate share of the negative impacts of development through reduced access to resources and direct exposure to pollution and environmental degradation”.⁸¹ In particular, rising investment in the extractive industries can have a devastating impact on the life and culture of the indigenous peoples involved.⁸²

The linkage between economic globalization and indigenous peoples’ rights has been discussed by administrative and constitutional courts at the national level,⁸³ and by human rights bodies at the regional and

⁷⁶ UN Human Rights Comm., *General Comment No. 23: The Rights of Minorities* (art. 27), paras 7, 9, UN Doc. CCPR/C/21/Rev.1/Add.5, April 8th 1994.

⁷⁷ M Krepchev “The Problem of Accomodating Indigenous Land Rights in International Investment Law” 6 *Journal of International Dispute Settlement* (2015) 43.

⁷⁸ Ibid.

⁷⁹ See generally above n 3.

⁸⁰ OECD, *Foreign Direct Investment for Development*, (OECD, Paris 2002) p. 3.

⁸¹ Above n 3, at 6.

⁸² K Tienhaara “What You Don’t Know Can Hurt You: Investor-State Disputes and The Protection of the Environment in Developing Countries” (2006) 6 *Global Environmental Politics* 73-100.

⁸³ T Chapman “Corroboree Shield: A Comparative Historical Analysis of (the Lack of) International, National and State Level Indigenous Cultural Heritage

international level.⁸⁴ This jurisprudence and the relevant literature are extensive; what is less known is the emerging jurisprudence of arbitral tribunals dealing with elements of indigenous cultural heritage. Given the impact that arbitral awards can have on indigenous peoples' lives, scrutiny and critical assessment of these arbitrations is of the utmost relevance. In general terms, investment disputes with indigenous cultural elements are characterised by the need to balance the protection of indigenous cultural heritage and the promotion of foreign investments by the host state.

To date, several investment disputes have involved indigenous cultural heritage elements.⁸⁵ For reasons of space, it is not possible to examine all these awards in the context of this contribution; this section will thus examine and critically assess two investment disputes concerning indigenous heritage.

In April 2015, a Costa Rican company and several Dutch investors, all shareholders of an ecotourism project called Cañaveral in Panama, filed a claim against Panama at the International Center for the Settlement of Investment Disputes.⁸⁶ The company contests decisions taken by the Panamanian National Land Management Agency concerning the question as to whether the claimants' property is located within the protected area inhabited by the Gnöbe Buglé indigenous peoples in Western Panama.⁸⁷ According to the claimants, Panama's treatment of their investment runs counter earlier authorizations of the same.

Ngöbe land originally extended from the Pacific Ocean to the Caribbean Sea.⁸⁸ Since Christopher Columbus and his crew contacted the tribes in 1502, Spanish *conquistadores* forced the Ngöbes into less desirable territories in the west.⁸⁹ Nowadays these communities live in a "comarca", i.e., a specially designated area where their collective property

Protection" (2008) 5 *Macquarie Journal of International & Comparative Environmental Law* 81-96

⁸⁴ L. Westra *Environmental Justice and the Rights of Indigenous Peoples* (London: Earthscan 2008).

⁸⁵ Above n 5.

⁸⁶ *Álvarez y Marín Corporación S.A. Mr. Cornelis Willem van Noordenne, Estudios Tributarios AP S.A., Stichting Administratiekantor Anbadi, Mr. Bartus van Noordenne v. Republic of Panama*, ICSID Case No. ARB/15/14, registered on 20 April 2015.

⁸⁷ C. Trevino, "Panama Faces New ICSID Arbitration Over Thwarted Hotel Tourism Development" *Investment Arbitration Reporter*, 24 April 2015.

⁸⁸ P.D. Young, *Ngawbe: Tradition and Change among the Western Guaymí of Panama* (University of Illinois Press: Urbana 1971) pp. 38-42.

⁸⁹ *Ibid.*

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rights are recognised by the state.⁹⁰ The laws establishing these indigenous regions recognise the right of indigenous peoples to collective ownership of land within these zones and grant indigenous tribes a certain autonomy. These laws have been acknowledged as being “one of the foremost achievements in terms of the protection of indigenous rights in the world.”⁹¹

Although “national laws ... dealing with indigenous affairs provide a vital foundation on which to continue building upon and strengthening the rights of indigenous peoples in Panama”, the Special Rapporteur noted that “this foundation is fragile and unstable in many regards.”⁹² In particular, he highlighted that “Titles have yet to be awarded for the areas adjacent to the Ngobe-Bugle *comarca* in Bocas del Toro Province, which were designated for demarcation within a period of two years under Act No. 10 of 1997 ... and these lands continue to be threatened, particularly by tourism and real estate development.”⁹³ According to the National Land Management Agency “delays in according official recognition to collective lands and in issuing titles to them have chiefly been due to the claims made by landowners and settlers to the lands to be demarcated”.⁹⁴

As the case is still at a very early phase, and not even the notice of claim is publicly available, it is not possible to foresee whether the case will be settled or how the arbitral tribunal will decide it. Certainly, however, the investment law obligations of the state towards foreign investors do not justify violations of its human rights obligations towards indigenous peoples. In the *Sawhoyamaxa* case,⁹⁵ the Inter-American Court of Human Rights held Paraguay liable of violating various human rights of the *Sawhoyamaxa* indigenous community under the American Convention on Human Rights. These communities claimed that Paraguay had, *inter alia*, violated their right to property, by failing to recognise their title to ancestral lands.⁹⁶ For its part, Paraguay had attempted to justify its

⁹⁰ Inter Am. Ct H.R., *Case of the Kuna Indigenous People of Madungandi and Embera Indigenous People of Bayano and Their Members v. Panama*, Preliminary Objections, Merits, Reparations and Costs. Judgment, 14 October 2014. Series C No. 284, para. 59.

⁹¹ UN General Assembly, Human Rights Council, Report of the Special Rapporteur on the Rights of Indigenous Peoples, James Anaya, *The Status of Indigenous Peoples' Rights in Panama*, 3 July 2014, para. 13.

⁹² *Ibid.* para. 27.

⁹³ *Ibid.* para. 29.

⁹⁴ *Ibid.* para. 35.

⁹⁵ Inter-American Court of Human Rights, *Case of the Sawhoyamaxa Indigenous Community v. Paraguay*, Judgment of 29 March 2006, Merits, Reparations and Costs.

⁹⁶ *Ibid.* para. 2.

conduct contending that the lands in question belonged to German investors and were protected under the Germany-Paraguay bilateral investment treaty (BIT).⁹⁷ According to the government, the BIT prohibited the expropriation of foreign investors' lands.

However, after noting the linkage between land rights and the culture of indigenous peoples⁹⁸ the Court clarified that the investment law obligations of the state did not exempt the state from protecting and respecting the property rights of the Sawhoyamaxa.⁹⁹ Rather, the Court noted that compliance with investment treaties should always be compatible with the human rights obligations of the state.¹⁰⁰ Moreover, the Court pointed out that the relevant BIT did not prohibit expropriation; rather it subjected it to several requirements, including the existence of a public purpose and the payment of compensation.¹⁰¹ Therefore, the Court found a violation of Article 21 of the Convention¹⁰² and ordered the government to return the "traditional lands" to the Sawhoyamaxa community. In 2014, Paraguay passed an expropriation law expropriating certain foreign-owned lands.¹⁰³ Two ranching companies, Kansol S.A. and Roswell Company S.A. challenged the expropriation before the Paraguayan Supreme Court on the grounds of "unconstitutionality".¹⁰⁴ However, the claim was rejected.¹⁰⁵

(b) Indigenous Culture and the Protection of Free Trade: The EU Seals Disputes

For the Inuit, a group of culturally similar indigenous peoples inhabiting the Arctic regions of Greenland, Canada, and Alaska, not only is seal hunting an integral part of their culture and identity, but it also contributes

⁹⁷ Ibid. para. 115(b).

⁹⁸ Ibid. para. 118 (noting that "The culture of the members of indigenous communities reflects a particular way of life, of being, seeing and acting in the world, the starting point of which is their close relation with their traditional lands and natural resources, not only because they are their main means of survival, but also because they form part of their worldview, of their religiousness, and consequently, of their cultural identity".)

⁹⁹ Ibid. para. 140.

¹⁰⁰ Ibid.

¹⁰¹ Ibid.

¹⁰² Ibid. para. 144.

¹⁰³ D Hill, "Paraguay's Supreme Court Issues 'Historic' Land Ruling" *The Guardian*, 14 October 2014.

¹⁰⁴ Ibid.

¹⁰⁵ Ibid.

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to their livelihood.¹⁰⁶ In Canada, indigenous peoples' income from sealing "represents between twenty-five and thirty-five percent of their total annual income".¹⁰⁷ The hunt is part of their culture and supports subsistence.

However, as Europeans perceive the seals hunt as cruel and inhuman, because of the means through which the seals are hunted, the EU adopted a comprehensive regime governing seal products.¹⁰⁸ The E.U. seal regime prohibits the importation and sale in the E.U. of any seal product except: (a) those derived from hunts traditionally conducted by Inuit and other indigenous communities, which contribute to their subsistence;¹⁰⁹ 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.¹¹⁰ In addition, seal products for personal use may be imported but may not be placed on the market.¹¹¹ The E.U. allowed the exception for indigenous hunt because of the international law commitments of its member states and of the UNDRIP.¹¹²

Nonetheless, Inuit groups contested the ban. Although the regulation allows seal products to be placed on the market where they result from hunts traditionally conducted by Inuit and other indigenous communities in recognition of the fact that sealing is an important part of the Inuit

¹⁰⁶ On the contemporary role of seal hunting in Inuit identity, see K. Rodgers and W. Scobie, "Sealfies, Seals and Celebs: Expressions of Inuit Resilience in the Twitter Era" (2015) 7 *Interface* 70-97, 78 (highlighting how indigenous peoples "demonstrated the salience, continuity, and importance of seal hunting in their communities" over social media and emphasizing how "the classic barriers of geographic, political and economic marginalization can be displaced by digital technologies").

¹⁰⁷ X Luan and J Chaisse "Preliminary Comments on the WTO Seals Products Dispute: Traditional Hunting, Public Morals and Technical Barriers to Trade" (2011) 22 *Colorado Journal of International Environmental Law & Policy* 79 at 82.

¹⁰⁸ 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.

¹⁰⁹ *Ibid.*, Article. 3(1).

¹¹⁰ *Ibid.*, Article 3(2)(b).

¹¹¹ *Ibid.*, Article 3(2)(a).

¹¹² *Ibid.*, preamble, point 14: "The fundamental economic and social interests of Inuit communities engaged in the hunting of seals as a means to ensure their subsistence should not be adversely affected. The hunt is an integral part of the culture and identity of the members of the Inuit society, and as such is recognised by the United Nations Declaration on the Rights of Indigenous Peoples. Therefore, the placing on the market of seal products which result from hunts traditionally conducted by Inuit and other indigenous communities and which contribute to their subsistence should be allowed".

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lifestyle, according to indigenous peoples' representatives, the "Inuit exemption" will not prevent the market for seal products from collapsing. Since the Inuit people do not export seal products themselves, but export them via non-indigenous exporters, they allege that the derogation in their favor would remain an "empty box." Furthermore, they stress that the regulation was adopted without the participation of the Inuit.¹¹³ Therefore, they perceived the aboriginal exemption as inadequate to sustain cultural practices and praised the Canadian government for bringing the seal ban to the WTO.¹¹⁴

Canada and Norway brought claims against the E.U. before the WTO DSB, contending that the E.U. seal regime was inconsistent with the European Union's obligations under the General Agreement on Tariffs and Trade 1994 (GATT 1994)¹¹⁵ and under the Technical Barriers to Trade (TBT) Agreement.¹¹⁶ Canada and Norway argued, *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 1994.¹¹⁷ 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.¹¹⁸ In

¹¹³ E Barca "Canada's Annual Seal Slaughter just Ended. Should there be Another?" *Vancouver Observer*, June 19th 2010.

¹¹⁴ "Canada Calls for WTO Panel in Seal Dispute with EU", 15 *Bridges Weekly Trade News Digest*, February 18th 2011.

¹¹⁵ General Agreement on Tariffs and Trade 1994, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 UNTS 187.

¹¹⁶ Canada initiated dispute proceedings in November 2009; and sought the creation of a panel in February 2011, after consultations failed to yield a resolution. The EU rejected the first request, but, as per WTO rules, could not do so a second time. See *European Communities–Measures Prohibiting the Importation and Marketing of Seal Products* (WT/DS400/4) Request for the Establishment of a Panel by Canada, February 14th 2011, available at [http://www.worldtradelaw.net/pr/ds400-4\(pr\).pdf](http://www.worldtradelaw.net/pr/ds400-4(pr).pdf) . See also *European Communities –Measures Prohibiting the Importation and Marketing of Seal Products* (WT/DS401/5) Request for the Establishment of a Panel by Norway, March 15th 2011, available at [http://www.worldtradelaw.net/pr/ds401-5\(pr\).pdf](http://www.worldtradelaw.net/pr/ds401-5(pr).pdf) .

¹¹⁷ General Agreement on Tariffs and Trade 1994, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 UNTS 187.

¹¹⁸ *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.

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”.¹¹⁹ Therefore, according to the complainants, the regime would *de facto* discriminate against Canadian and Norwegian imports of seal products,¹²⁰ as it would restrict virtually all trade in seal products from Canada and Norway within the E.U.¹²¹ Moreover, the complainants argued that while the E.U. measures did not prevent products derived from seals killed inhumanely from being sold on the E.U. market,¹²² they could prevent products derived from seals killed humanely by commercial hunters from being placed on the market.¹²³

Canada pointed out that seal harvesting provided thousands of jobs in Canada’s remote coastal and northern communities where few economic opportunities existed and had been an important part of the Inuit way of life for centuries. Moreover, Canada maintained that the E.U.’s exemption for trade in traditional Inuit seal products would prove to be ineffective, particularly in the face of the collapse of the larger market, and the Inuit would suffer the effects. The trade ban would restrict virtually all trade in seal products within the European Union. According to Canada, the solution to this would be the restoration of full market access.

In parallel, Norway pointed out that none of the species hunted were endangered, and none were listed by the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES).¹²⁴ It added that such a ban infringed on WTO members’ right to trade in marine resources harvested in a sustainable manner.¹²⁵ Norway also claimed that since only certain countries have indigenous peoples, arguably the measure will have a disparate impact and therefore it does not treat all of the WTO member states equally.¹²⁶

The key question of the dispute was whether the seal products produced by indigenous peoples and those produced by non-indigenous

¹¹⁹ Ibid. paras. 7.161 and 7.164.

¹²⁰ Ibid. para. 7.141.

¹²¹ Ibid. para 7.46.

¹²² Ibid. para. 7.4.

¹²³ Ibid. para. 7.226.

¹²⁴ WTO, 2011 News Item, “WTO Adopts Report on US-China Dispute and Establishes Four Panels”, March 25th 2011, available at http://www.wto.org/english/news_e/news11_e/dsb_25mar11_e.htm.

¹²⁵ Ibid, p. 3.

¹²⁶ *European Communities- Measures Prohibiting the Importation and Marketing of Seal Products*, Request for the Establishment of a Panel by Norway.

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peoples were like products.¹²⁷ If so, as the two products were treated differently by the E.U. ban, there would be discrimination, which was prohibited under GATT Article III. In the assessment of likeness a key question was whether consumer preferences would matter in light of the *EC-asbestos* case.¹²⁸ “the seal products made by indigenous communities for subsistence purposes could well serve different consumer needs than those produced through larger operations and by non-indigenous peoples for commercial purposes”.¹²⁹ Finally, if the panel found that there was discrimination, it should examine the question as to whether the seal products regulation was justified under any of the exceptions under Article XX of the GATT 1994, and in particular under Article XX(a) on public morals.

The panel found that the seal products produced by indigenous peoples and those not hunted by indigenous peoples were like products.¹³⁰ The panel acknowledged the existence of a number of international law instruments, including the UNDRIP, focusing on the protection of cultural heritage.¹³¹ The panel also referred to a number of WTO countries adopting analogous Inuit exceptions.¹³² These sources were taken into account as “factual evidence”.¹³³ 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.¹³⁴ Therefore, the panel held, *inter alia*, that the exception provided for indigenous communities under the E.U. Seal Regime accorded more favourable treatment to seal products produced by indigenous communities than that accorded to like domestic and foreign products.¹³⁵ 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 E.U. to seal products derived from hunts

¹²⁷ See eg R Howse and J Langille “Permitting Pluralism: The Seal Products Dispute and Why the WTO Should Accept Trade Restrictions Justified by Non-instrumental Moral Values” (2011) 37 *Yale Journal of International Law* 367 at 402.

¹²⁸ *European Communities–Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, adopted April 5th 2001, DSR 2001:VII.

¹²⁹ Above n 128 at 403.

¹³⁰ *European Communities–Measures Prohibiting the Importation and Marketing of Seal Products*, Reports of the Panel, para. 7.136.

¹³¹ *Ibid.* para. 7.292.

¹³² *Ibid.* para. 7.294.

¹³³ *Ibid.* footnote 475.

¹³⁴ *Ibid.* para. 7.317

¹³⁵ *Ibid.* para. 8(2).

traditionally conducted by the Inuit was not accorded immediately and unconditionally to like products originating in Canada.¹³⁶

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”.¹³⁷ Therefore the panel found that the E.U. 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 Article XX(a) of the GATT 1994.¹³⁸

Immediately after the release of the reports, Canada, Norway and the E.U. each appealed certain legal interpretations developed in the panel reports. The Appellate Body *inter alia* confirmed that the E.U. 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 that 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.¹³⁹ The AB noted *inter alia* that the IC exception contained no anti-circumvention clause,¹⁴⁰ and pinpointed that “seal products derived from ... commercial hunts could potentially enter the E.U. market under the IC exception”.¹⁴¹ The AB concluded that the E.U. Seal Regime was not justified under Article XX(a) of the GATT 1994.¹⁴²

Therefore, the E.U. 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.

5. Critical Assessment

The contribution of the UNDRIP to current discourse on indigenous heritage and rights in international law is significant. Why should one focus on indigenous heritage while other pressing needs and indigenous

¹³⁶ Ibid. para. 8(3)(a).

¹³⁷ Ibid. para. 7.409.

¹³⁸ Ibid. para. 7.651.

¹³⁹ *European Communities–Measures Prohibiting the Importation and Marketing of Seal Products*, Reports of the Appellate Body, para. 5.339.

¹⁴⁰ Ibid. para. 5.327.

¹⁴¹ Ibid. para. 5.328.

¹⁴² Ibid. para. 6.1(d)(iii).

rights are at stake? There is one fundamental reason: because culture is so close to human dignity that without protection of indigenous cultural identity all of the other claims of indigenous peoples lose strength. Other claims are not replaced by cultural claims, but complemented and reinforced. The UNDRIP acknowledges and adopts this holistic understanding of indigenous peoples' rights. In fact, the protection of the cultural identity of indigenous peoples is its *raison d'être*¹⁴³ and "one can find the cultural rights angle in each article of the Declaration".¹⁴⁴

The significant achievements of the UNDRIP should not lead to the conclusion that further steps should not be taken. The UNDRIP constitutes the summa of decades of elaboration, and a milestone; at the same time it should also constitute the point of departure for further analysis and action. The analysed case studies highlight several different clashes: the clash between international economic law and domestic regulatory autonomy;¹⁴⁵ the clash between animal welfare and traditional cultural practices; and the clash between an international economic culture and a local indigenous culture. Of particular concern is the clash of cultures between the protection of indigenous heritage and the promotion of economic activities. Economic globalization can affect indigenous peoples' way of life. The collision between the protection of indigenous heritage and the promotion of economic interests in international economic law makes the case for strengthening the current regime protecting indigenous heritage. Participation of indigenous peoples in the decisions which can affect their rights is crucial.¹⁴⁶

International economic *fora* may not be the most appropriate *fora* for disputes adjudicating cultural heritage-related issues. At the procedural level, arbitral tribunals constitute an uneven playing field: while foreign investors have *locus standi* – i.e., the right to act or be heard – before these tribunals, indigenous peoples do not have direct access to these

¹⁴³ F Francioni "The Human Dimension of International Cultural Heritage Law: An Introduction" (2011) 22 *European Journal of International Law* 9 at 15.

¹⁴⁴ E Stamatopoulou "Taking Cultural Rights Seriously: The Vision of the UN Declaration on the Rights of Indigenous Peoples" in S Allen & A Xanthaki (eds) *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Hart Publishing 2011) at p. 392.

¹⁴⁵ P L Fitzgerald "Morality May Not Be Enough to Justify the EU Seal Products Ban: Animal Welfare Meets International Trade Law" (2011) 14 *Journal of International Wildlife Law & Policy* 85-136 at 89.

¹⁴⁶ See Art. 18 of the UNDRIP, "Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions".

dispute settlement mechanisms. Rather, their arguments need to be espoused by their home government. Nonetheless, “for a variety of reasons, states cannot be reasonably expected to adequately represent the ... rights of indigenous peoples.”¹⁴⁷ In fact, the land claims and cultural entitlements of indigenous peoples often compete with the economic development plans of both investors and states. Therefore, despite the formal premise of equality between the parties, there are structural power asymmetries between companies and indigenous communities that governments rarely mitigate. Not only does investor–state arbitration fail to take into account the eventual conflict of interest between the entitlements of indigenous peoples and the economic development plans of the state, but – like the WTO dispute settlement mechanism – it also confers distinct procedural advantages to foreign investors vis-à-vis other private actors.

While indigenous peoples can (and have) present(ed) friend of the court (*amicus curiae*) briefs reflecting their interests, investment tribunals and the WTO panels and Appellate Body are not legally obligated to consider such briefs – rather, they have the faculty to do so should they deem it appropriate.¹⁴⁸ The requests were granted if the friends of the

¹⁴⁷ W Shipley “What’s Yours is Mine: Conflict of Law and Conflict of Interest Regarding Indigenous Property Rights in Latin American Investment Dispute Arbitration” (2014) 11 *Transnational Dispute Management* 1.

¹⁴⁸ The first *amicus curiae* submissions by indigenous peoples before international economic law *fora* ie NAFTA arbitral tribunal and the WTO panel were made in the Softwood Lumber case. See “WTO Members Comment on Indigenous Amicus brief in Lumber Dispute” 2 *Bridges Trade BioRes*, 16th May 2002. Other *amicus curiae* submissions followed in subsequent arbitrations. See Quechan Indian Nation, Application for Leave to File a Non-Party Submission, *Glamis Gold Ltd. v. United States of America*, 19 August 2005. In the *Glamis Gold Ltd v. United States*, UNCITRAL (NAFTA) Award, 8 June 2009, para. 286. In the *Grand River* case, the Tribunal received a letter from the National Chief of the Assembly of First Nations, endorsing the UNDRIP “and the customary international law principles it reflects”, and calling for indigenous rights to be “taken into account whenever a NAFTA arbitration involves First Nations investors or investments.” See *Grand River Enterprise Six Nations Ltd. et al. v. United States of America*, Award, 12 January 2011, para. 60. The Tribunal did not explicitly qualify a letter from the National Chief of the Assembly of First Nations in Canada as an *amicus curiae* submission but noted that the claimants included the letter as “a supporting exhibit” and that “it was read and considered by the Tribunal”. *Ibid.* In some cases, arbitral tribunals have denied the participation of indigenous non-disputing parties. See *Bernhard von Pezold and Others v. Zimbabwe*, ICSID Case No. ARB/10/15, Procedural Order No. 2, 26 June 2012, para. 49 (stating that *amici curiae* should be independent of the parties

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court could demonstrate that they could assist tribunals without unduly delaying arbitrations.¹⁴⁹ As *amici curiae*, indigenous peoples cannot ask for final or interlocutory remedies to preserve their cultural entitlements and land rights before arbitral tribunals and the WTO DSM.

While foreign investors are emancipated from the need to invoke diplomatic protection from their home state, for indigenous peoples international law remain state-centered, as they remain subject to the procedural requirement that their claims be espoused by the state. While foreign investors are not required to exhaust the local remedies before recurring to investment treaty arbitration, indigenous peoples must exhaust the same before being able to pursue their own claims before an international tribunal.

Finally, there is gross discrepancy in the efficacy of the procedural mechanisms that enforce international economic law and human rights law respectively. Investors' and traders' claims "are adjudicated faster, sooner, and with greater potential for immediate state liability than the human rights claims of indigenous peoples, which must find their way through domestic courts".¹⁵⁰ For instance, the WTO DSM is subject to a rigorous timeframe. Furthermore, "any strictly pecuniary quantification of damages is likely to favor foreign investors" and traders at the expense of the competing interests of indigenous peoples.¹⁵¹ In fact, "permanent alterations to landscape" or alteration of traditional cultural practices incompatible with minimal subsistence requirements constitute irreparable harms to indigenous peoples but "may not be accorded significant weight by exclusively pecuniary measurements".¹⁵² Moreover, the perceived tendency of the international economic regime to externalize the costs of carrying out economic activity by placing them fully on states and the fear of costly litigation can chill the willingness of states to adopt measures protecting indigenous entitlements (regulatory chill).¹⁵³

Substantively, a clash of culture has emerged between competing sets of international norms governing indigenous rights and transnational economic activities respectively. Given the cultural connection of indigenous peoples to their lands, a number of international law instruments, including the UNDRIP, have recognised specific forms of use and enjoyment of property, based on the culture of indigenous

and "bring a perspective, particular knowledge or insight that is different from that of the parties.")

¹⁴⁹ L Bastin "Amici Curiae in Investor-State Arbitrations: Two Recent Decisions" 20 *Australian International Law Journal* (2013) 101.

¹⁵⁰ Above n 148 at 53.

¹⁵¹ *Ibid.*

¹⁵² *Ibid.*

¹⁵³ Above n 78, at 43-44.

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communities. The maintenance of traditional lifestyle is necessary for the physical and cultural survival of indigenous peoples.

International economic *fora* are not the best *fora*, let alone the unique *fora*, in which to adjudicate this collision of norms. They may not have a specific expertise on indigenous peoples' rights. Nor do they have the mandate to interpret and apply human rights treaties. They are tribunals of limited jurisdiction and cannot adjudicate on eventual infringements of indigenous peoples' rights. They lack the jurisdiction to hold states liable for breach of their human rights obligations. Rather, they can only determine if the protections in the relevant investment treaty or WTO covered agreement respectively have been breached.

However, this does not mean that these *fora* cannot take into account other international law obligations of the host state. The collision between international economic law and other fields of international law can be solved through international economic law itself albeit to a limited extent. Two avenues can facilitate the consideration of indigenous entitlements in international economic disputes.¹⁵⁴ First, as international investment treaties are periodically renegotiated, treaty drafters can expressly accommodate indigenous peoples' entitlements in the text of these treaties (i.e., a "treaty-driven approach").¹⁵⁵ For instance, Canada and New Zealand have inserted specific clauses protecting indigenous rights in their trade and investment agreements.¹⁵⁶ This explicit recognition of indigenous entitlements by international investment treaties can allow the state to protect indigenous groups without the fear of expensive investment claims. In parallel, investors can take into account the existence of protected groups when assessing the economic risks of the given investment.¹⁵⁷ Second, international economic courts can take into account indigenous entitlements within the current framework of international economic law (i.e., a "judicially driven approach").¹⁵⁸

International economic law is not a self-contained regime.¹⁵⁹ As a matter of treaty interpretation, Article 3.2 of the DSU enables panels and

¹⁵⁴ *Ibid.*, at 45.

¹⁵⁵ *Ibid.*

¹⁵⁶ See, for instance, Article 15.8 of the New Zealand-Thailand Closer Economic Partnership Agreement of 2005 (reaffirming the government's capacity to accord special or more favourable treatment to Maori people); Article 23 of the Protocol on Investment to the New Zealand-Australia Closer Economic relations Trade Agreement of 2011 (same); Canada-Peru Free Trade Agreement, 29 May 2008, Annex II, Reservations for Future Measures, Schedule of Peru.

¹⁵⁷ Above n 78, at 71.

¹⁵⁸ Above n 78, at 45.

¹⁵⁹ WTO AB Report, *United States-Standards for Reformulated and Conventional Gasoline (US-Gasoline)*, WT/DS2/AB/R, adopted 20th May 1996,

the AB to interpret WTO treaties in accordance with customary rules of treaty interpretation as reflected in Articles 31 and 32 of the Vienna Convention on the Law of Treaties (VCLT).¹⁶⁰ Analogous provisions appear in the text of several investment treaties. Notoriously, Article 31(3)(c) of the VCLT requires that “[t]here shall be taken into account, together with the context: ... any relevant rules of international law applicable in the relations between the parties”. Pursuant to Article 31(3)(c), ‘[e]very treaty provision must be read not only in its own context, but in the wider context of general international law, whether conventional or customary’.¹⁶¹ This provision expresses the principle of systemic integration within the international legal system, indicating that treaty regimes are themselves creatures of international law.¹⁶² Therefore, both WTO adjudicative bodies and arbitral tribunals have some interpretative space to consider other international treaties when they collide with international economic law. In fact, customary rules of treaty interpretation require that international law protecting indigenous peoples’ rights serve as interpretive context if they are relevant to the interpretation of the respective international economic law provisions.

However, only rarely have WTO adjudicative bodies looked outside the WTO framework. For instance, in the seal products dispute, reference to international law instruments was made, but such instruments played a limited role, if any, in the final decision. Arbitral tribunals appear to be more open to referring to other international law instruments, looking to human rights law for analogies, or as an aid in constructing the meaning of investment treaty provisions, albeit the weight of such references in the final decision remain unquantifiable.

Another way through which non-economic concerns can be inserted into the fabric of international economic law is offered by the relevant

at 17 (affirming that WTO treaties are “not to be read in clinical isolation from public international law”); *Asian Agricultural Products Ltd v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Award, 27 June 1990, para. 21 (highlighting that international investment law “is not a self-contained closed legal system . . . , but it has to be envisaged within a wider juridical context in which rules from other sources are integrated through implied incorporation methods, or by direct reference to certain supplementary rules, whether of international law character or of domestic law nature”).

¹⁶⁰ Vienna Convention on the Law of Treaties, adopted 23 May 1969, in force 27 January 1980) 1155 UNTS 331 (VCLT).

¹⁶¹ I Sinclair, *The Vienna Convention on the Law of Treaties* (Manchester: Manchester University Press, 1984), p. 139.

¹⁶² C McLachlan, ‘The Principles of Systematic Integration and Article 31(3)(c) of the Vienna Convention’, *International and Comparative Law Quarterly* 54 (2005), 279–320, at 280.

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exceptions. Article XX of the GATT 1994 includes a (closed) list of (limited) exceptions to fundamental trade standards. In some circumstances, the AB has sought guidance from other sources of law and international organizations to interpret and apply this provision. For instance, in the *Shrimp–Turtle* case, the AB referred to multilateral environmental agreements to define the scope of “exhaustible natural resources”.¹⁶³ Analogously, the general exceptions listed in Article XX can be interpreted in light of international human rights instruments such as the UNDRIP. In parallel, while a few investment treaties include general exceptions, they include language relating to the environment which could be interpreted extensively and evolutively so as to include indigenous entitlements.¹⁶⁴

Yet, only a few investment treaties include such a “general exceptions” clause. Most international investment agreements were concluded some decades ago, “when economic development was a primary concern over issues of environmental sustainability or cultural rights.”¹⁶⁵ Moreover, the restrictive requirements of the introductory part (*chapeau*) of Article XX have *de facto* limited the successful application of Article XX of GATT 1994. Notoriously, the *chapeau* of Article XX requires that the measures restricting trade must not be applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, and they must not constitute a disguised restriction on international trade.

Finally, if certain indigenous rights have acquired the status of *jus cogens* norms,¹⁶⁶ those norms should prevail in case of conflict with international economic law.¹⁶⁷ International public order requires international economic courts to consider whether the proceedings do not violate competing international law obligations of a peremptory character. Yet, the present role of *jus cogens* norms in the context of investment arbitration remains unsettled at best and peripheral at worst. Rarely have the parties contended that a norm of *jus cogens* has been violated, and even when they have done so, arbitral tribunals have declined to

¹⁶³ *Appellate Body Report, United States–Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, 6 November 1998, para. 130.

¹⁶⁴ Above n. 78, at 51.

¹⁶⁵ *Ibid.* at 67.

¹⁶⁶ For instance, the prohibition of systemic racial discrimination is a universal norm of *jus cogens* character. See *Barcelona Traction, Light and Power Company Limited (Belgium v. Spain)*, Preliminary Objections, Judgment of 24 July 1964, [1970] ICJ Reports 4, at 32 (listing the prohibition on systemic racial discrimination as a peremptory norm).

¹⁶⁷ VCLT Article 64 (stating that treaties which violate peremptory norms are null and void)

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adjudicate on the matter, stating that they have a limited mandate and cannot adjudicate on human rights claims.¹⁶⁸ Moreover, in some arbitrations, the host states have preferred to make reference only to domestic constitutional provisions rather than relying on the alleged *jus cogens* nature of the rights involved. This is not surprising, as such pleadings may be considered to contribute to state practice, and states are very careful in invoking *jus cogens* as the same arguments could be used against them in other contexts, i.e., before national constitutional courts, regional human rights courts and international monitoring bodies. For instance, with regard to indigenous peoples' rights, including the right to be consulted in matters affecting them or their religious rights, states have referred to domestic constitutional provisions.¹⁶⁹ The state's invocation of human rights to justify a given regulatory measure can serve as evidentiary record against the state itself in other proceedings, as it can be taken as an admission of its responsibilities towards indigenous peoples.

Conclusions

The effective protection of indigenous cultural heritage benefits all humanity. Today, a growing number of international law instruments highlight cultural diversity as the common heritage of mankind,¹⁷⁰ and the UNDRIP has furthered the "culturalization of indigenous rights",¹⁷¹ enunciating a number of cultural entitlements of indigenous peoples, and highlighting the linkage between the preservation of their cultural identity and the enjoyment of their human rights. Although the Declaration *per se* is not binding, it may be (come) so, insofar as it reflects customary international law. At the very least, the UNDRIP constitutes a standard that states should strive to achieve.

The interplay between the promotion of free trade and foreign direct investment on the one hand, and indigenous cultural heritage on the other

¹⁶⁸ *Biloune and Marine Drive Complex Ltd v. Ghana Investments Centre and the Government of Ghana* (UNCITRAL), Award on Jurisdiction and Liability, 27 October 1989, 95 ILR 184, at 203.

¹⁶⁹ *Glamis Gold, Ltd. v. United States of America*, ICSID/UNCITRAL, Award, 8 June 2009, para. 654.

¹⁷⁰ Universal Declaration on Cultural Diversity, November 2nd 2001, UNESCO Rec. Of. Gen. Conf., 31st sess., art. 1.

¹⁷¹ I Schulte-Tenckhoff "Treaties, Peoplehood, and Self-Determination: Understanding the Language of Indigenous Rights" in E Pulitano (ed) *Indigenous Rights in the Age of the UN Declaration* (Cambridge: Cambridge University Press, 2012) pp 64-86 at p 67.

in international economic law is an almost unexplored field.¹⁷² This study has shed some light on this complex connection. The analysed case studies provide a snapshot of the clash of cultures between international economic governance and indigenous heritage. They also highlight a fundamental clash between local and global dimensions of governance. Indigenous heritage is local; it belongs to specific places; economic governance has an international character. At the same time, indigenous heritage also belongs to the international discourse, while both foreign investments and international trade can have an impact on local polities, affecting local lifestyle and cultural entitlements.

Economic disputes concerning indigenous cultural heritage have been brought before international economic *fora*. Such disputes often involve the conflict between the protection of indigenous cultural heritage and the promotion of economic freedoms. These disputes can provide an important testing-ground for the degree to which international economic law protections owed by states to foreign investors and traders will be read by adjudicators in light of a state's parallel international law obligations to its own indigenous peoples.

International economic *fora* may not be the most suitable *fora* to settle this kind of dispute, in that they may face difficulties in finding an appropriate balance between the different interests concerned. They are courts of limited jurisdiction, and cannot adjudicate on state violations of indigenous peoples' entitlements. This does not mean, however, that they should (or do) not take cultural considerations into account. This chapter has explored various ways for integrating cultural threads into the fabric of international (economic) law. Indigenous cultural entitlements can be incorporated into the reasoning of international economic courts. Not only can these approaches promote the effectiveness of human rights instruments but they can also humanise and re-legitimise international economic law, fostering a sense of unity and complementarity between different competing subsets of international law.

In conclusion, FDI and free trade can represent a potentially positive force for development. Still, state policy and practice concerning economic activities must be mindful of its implications for the culture of indigenous peoples. Given the fact that international economic law adjudication can dramatically affect indigenous communities, international economic courts ought to hear the voices of these communities. Indigenous communities should not disappear in the

¹⁷² See, however, A Manuel and N Schabus "Indigenous Peoples at the Margin of the Global Economy: A Violation of International Human Rights and International Trade Law" (2005) 8 *Chapman Law Review* 229.

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jurisprudence of these dispute settlement mechanisms.¹⁷³ Given the possible conflicts of interest among state components and the specificities of indigenous peoples' culture, society and history, indigenous peoples should not be characterised as mere components of the state or as private actors and/or market participants. This chapter highlighted two different yet complementary avenues for integrating indigenous peoples' concerns into the fabric of international economic law. On the one hand, since international investment treaties are renegotiated periodically, there is scope for inserting *ad hoc* clauses within these treaties to protect indigenous entitlements. On the other hand, *de lege lata*, international economic law is not a self-contained regime, but should be interpreted and applied in the light of international law. This is required by customary rules of treaty interpretation as restated by the VCLT. In this manner, the UNDRIP becomes relevant. Yet, as Reisman put it almost twenty years ago, discussing the draft of the UNDRIP, "It remains to be seen whether the words in this noble instrument will be transformed into effective practice or will simply ... collec[t] the alligator tears that have been shed for centuries for the victims of cultural imperialisms."¹⁷⁴

¹⁷³ For an analogous argument with regard to local communities in the context of European integration, see F Nicola, "Invisible Cities in Europe" 35 *Fordham International Law Journal* (2011-2012) 1285.

¹⁷⁴ M Reisman "International Law and the Inner Worlds of Others" (1996) 9 *Saint Thomas Law Review* (1996) 25 at 30.

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