Local communities, cultural heritage and international economic law

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I. INTRODUCTION

What role do local communities play in the making of international economic law? Does local cultural heritage and values matter in the adjudication of international economic disputes? Where there is a conflict between the objective of global economic liberalization and the pursuit of local cultural policies, should the local give way to the global? Like other branches of international law, international economic law treats each state as one unit and does not typically focus on the different subparts within states. As a result, local communities do not appear in the text of international economic law treaties. Only recently have local communities gradually emerged in the adjudication of international economic disputes. Despite their gradual appearance, they still remain significantly absent or marginalised in mainstream international economic law discourse. This chapter aims to fill this gap in legal literature investigating the impact of economic globalization on local communities and the role that local communities play in international economic law and adjudication. The clash between local cultural values and international economic governance is one example of the tension between international law and state autonomy and of the subsequent local adaptation of, and/or local resistance to, international law standards. It illustrates the challenge of implementing international law at the local level.

Socio-legal approaches to international economic governance reveal that, substantively, a clash of culture can emerge between an international economic culture aimed at productivity and development and local cultural practices. Procedurally, international economic courts may not be the most appropriate tribunals for disputes adjudicating cultural heritage-related issues. After briefly discussing these findings, this chapter highlights two different yet complementary avenues for integrating local communities' concerns into the fabric of international economic law. On the one hand, *de lege ferenda*, since international

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investment treaties are renegotiated periodically, there is scope for inserting ad hoc clauses within these treaties to protect local communities. Analogously, World Trade Organization (WTO) law is not written in stone; rather, amendments and waivers are legal instruments to reconcile conflicting norms and interests. On the other hand, *de lege lata*, international economic courts can take into account local entitlements within the current framework of international economic law.

This chapter proceeds as follows. First, it explores the promises and pitfalls of socio-legal analysis in international economic law. In fact, socio-legal approaches can illuminate the relevance of social factors in the creation and implementation of international economic law. Second, the concepts of local communities and cultural heritage as well as their interplay will be sketched out. Third, the international economic governance will be briefly described. Reference to the WTO[1] and investment law regimes and their effective and sophisticated dispute-settlement mechanisms will be made. Fourth, the clash between local cultural values and international economic governance will be analysed and critically assessed. Finally, some conclusions shall be drawn.

II. SOCIO-LEGAL APPROACHES TO INTERNATIONAL ECONOMIC LAW

In the past decades, international economic law has come to the fore, becoming a sophisticated field of academic study and legal practice. The move from the periphery to the core of public international law has required the use of various methods of inquiry to map the field. Among these various methods, ranging from law and economics[2] to legal realism,[3] from critical theory[4] to global administrative law,[5] only recently have socio-legal approaches made their way into international economic law.[6]

[1] Marrakesh Agreement Establishing the World Trade Organization, 15 April 1994, 33 ILM 1144 (1994).
[2] Guido Calabresi, *The Future of Law & Economics – Essays in Reform and Recollection* (New Haven and London: Yale University Press, 2016).
[3] Gregory Shaffer, "A New Legal Realism: Method in International Economic Law Scholarship" in Colin B. Picker, Isabella Bunn and Douglas Arner, eds, *International Economic Law – The State and the Future of the Discipline* (Oxford: Hart Publishing, 2008).
[4] BS Chimni, "Critical Theory and International Economic Law" in John Linarelli, ed., *Research Handbook on Global Justice and International Economic Law* (Cheltenham: Edward Elgar, 2013).
[5] Benedict Kingsbury, Nico Krisch and Richard B. Stewart, "The Emergence of Global Administrative Law" (2005) 68 Law & Contemp Probs 15.
[6] Moshe Hirsch, "The Sociology of International Economic Law: Sociological Analysis of the Regulation of Regional Agreements in the World Trading System" (2008) 19 EJIL 277; Stephan W. Schill, "W(h)ither Fragmentation? On the Literature and Sociology of International Investment Law" (2011) 22 EJIL 875; Sergio Puig, "Social Capital in the Arbitration Market" (2014) 25 EJIL 387.

While socio-legal approaches are not the sole – let alone the ultimate – method for investigating international economic law (IEL), they contribute to illuminate this field of study. Socio-legal approaches can "offer valuable insights into IEL and broade[n] our understanding of social factors involved in the creation and implementation of IEL rules".[7] They can also have "implications for policy-making", and "suggest some better mechanisms for coping with the modern challenges faced by IEL".[8]

Socio-legal approaches to international economic law acknowledge that international economic activities and their regulation are social phenomena and have pervasive effects on everyday life.[9] As traders and investors "cross boundaries", "settle in new communities" and commercialize their products and services, international trade and foreign direct investments spread "knowledge, norms, and values".[10] Not only do socio-legal approaches investigate legal provisions, but they also examine the contexts in which legal texts operate.[11] In fact, international economic law is much more than the mere sum of its provisions.[12] Socio-legal approaches to IEL explore the role that both public and private actors play in international economic relations considering economic interactions as "part and parcel of social life".[13] Like other "law and …" linkages, the link between law and society can be a fertile one, allowing some cross-fertilization across international law and sociology – meant as the study of society.[14]

While seminal studies have investigated the role of multinational corporations,[15] international tribunals[16] and non-governmental organizations (NGOs)[17] in the making of global economic governance, very little attention has been paid to local communities. For centuries, law has consisted of the state law, and public international law has consisted of the

[7] Hirsch (note 6 above) at 278.
[8] Ibid.
[9] Amanda Perry-Kessaris, "What Does It Mean to Take a Socio-legal Approach to International Economic Law?" in Amanda Perry-Kessaris, ed., *Socio-Legal Approaches to International Economic Law* (Abingdon: Routledge, 2013) 3.
[10] Hirsch (note 6 above) at 280–1 (highlighting that "International economic relations are not only affected by socio-cultural factors, they often influence the socio-cultural features of the communities involved").
[11] Perry-Kessaris (note 9 above) at 6.
[12] Ibid. at 7.
[13] Ibid. at 9.
[14] See Moshe Hirsch, *Invitation to the Sociology of International Law* (Oxford: Oxford University Press, 2016).
[15] See Peter Muchlinski, *Multinational Enterprises and the Law* (New York: Oxford University Press, 2007) 82–9; Francesco Francioni, *Imprese Multinazionali, Protezione Diplomatica e Responsabilità Internazionale* (Milan: Giuffrè, 1979).
[16] Miguel Poiares Maduro, *We the Court We the Court: The European Court of Justice and the European Economic Constitution* (Oxford: Hart Publishing, 1998).
[17] Sergey Ripinsky and Peter Van den Bossche, eds, *NGO Involvement in International Organizations* (London: British Institute of International and Comparative Law, 2007).

law governing states.[18] International economic law was no exception to this state-centric approach. While states remain an important focus of international economic law, state sub-units have increasingly participated in international economic law regimes. In parallel, international economic law has a pervasive character, having an impact on the life of local communities. Moreover, current global economic trends can be fostered or resisted by local cultural aspirations. This chapter contributes to the emerging literature shedding light on the interplay between local communities and global economic governance. Due to space limits, it has an exploratory character.

III. WHY DO LOCAL COMMUNITIES MATTER?

Local communities can be defined as groups of individuals, living in a common location and organized around common values. "Local" indicates the fact that these communities are rooted in a "particular contexts of experience".[19] The word "community" derives from the Latin *communitas* (comprising *cum*, meaning "with/together", and *munus*, meaning "duty")[20] and refers to a social group and its "syste[m] of interests, values or beliefs".[21] Local communities are characterized by different types of links. Local communities are the first ambit in which human beings connect, they count for most in the daily lives of people, and create a sense of identity.

Local communities are not legal subjects of international law, as states formally remain the only subjects of international law.[22] If local communities by definition are not subjects of international law, why should they matter to international economic law discourse? If one accepts the conception of international economic law as a branch of international law aimed at fostering peaceful and prosperous relations among nations for the commonweal of the international community, then local communities matter because they are the social units or building stones of the international community itself. According to this view, international economic law would be rooted in, and express the aspirations of, the international community as a whole.

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[18] See William Twining, *General Jurisprudence: Understanding Law from a Global Perspective* (Cambridge: Cambridge University Press, 2008) 362 (calling this double assumption the "Westphalian duo").
[19] Roger Cotterell, "A Legal Concept of Community" (1997)12 CJLS 75 at 79.
[20] See Roberto Esposito, *Communitas. Origine e destino delle comunità* (Torino: Einaudi, 1998).
[21] Cotterell (note 19 above) at 78.
[22] Roger Cotterell, "Transnational Networks of Community and International Economic Law" in A. Perry-Kessaris, ed., *Socio-Legal Approaches to International Economic Law* (Abingdon: Routledge, 2013) 133 (noting that international law "builds from a heritage of thought that focuses on nation states as legal actors").

Exploring the human dimension of international economic law requires scholars not only to focus on macroeconomic notions of growth but also to consider the impact that international economic activities and their regulation have on the commonweal. In other words, "balancing economic and wider social – non-economic – values and interests requires that we no longer naturally exclude the latter from our conceptions of international economic law, and that we re-evaluate the values inherent to international economic law".[23] The very text of international economic law instruments refers to non-economic values.[24] For instance, the preamble to the WTO stresses the importance of "raising standards of living" and "sustainable development".[25] Therefore, the WTO should not be exclusively identified with trade liberation in goods and services; rather "liberalization is a means to an end, and not an end in itself".[26]

Even accepting the idea that local communities matter, and that international economic law should have a human face, states remain the interlocutors, makers and subjects of international economic law. States sign international treaties and have to comply with international law commitments. States represent their population, and *a fortiori*, also local communities. Why then should analysis focus on local communities as sub-units of states? What is the added value of focusing on local communities?

In most cases, states have filed claims before international economic law tribunals to defend key interests of their local communities. For instance, in the recent seal products dispute before the WTO panel and Appellate Body, Canada vigorously defended the economic and cultural interests of its coastal communities, in practising seal hunting and commercializing seal products, that had been affected by the EU ban on seal products.[27] In the *Glamis Gold* arbitration, concerning the development of a gold mine in California, the

[23] Cecilia J Flores Elizondo, "Reflexive International Economic Law – Balancing Economic and Social Goals in the Construction of Law" in A. Perry-Kessaris, ed., *Socio-Legal Approaches to International Economic Law* (Abingdon: Routledge, 2013) 127–8.
[24] Brigitte Stern, "The Future of international Investment Law: A Balance between the Protection of Investors and the States' Capacity to Regulate" in José E. Alvarez and Karl P. Sauvant, eds, *The Evolving International Investment Regime* (New York: Oxford University Press, 2011) 192 (noting that international investment agreements have multiple goals usually expressed in their preambles).
[25] Marrakesh Agreement Establishing the World Trade Organization, Preamble.
[26] Thomas Cottier, "Poverty, Redistribution, and International Trade Regulation" in Krista Nadakavukaren Schefer, ed., *Poverty and the International Legal System* (Cambridge: Cambridge University Press, 2013) 48 (suggesting that "the principal goals of the WTO are directed towards social justice in the new deal tradition").
[27] *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, Reports of the Panel, WT/DS400/R and WT/DS401/R (25 November 2013); *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, Appellate Body Report, WT/DS400/AB/R and WT/DS401/AB/R (22 May 2014).

United States vigorously and successfully defended the cultural interests of the indigenous tribes in protecting sacred sites.[28]

However, "States rarely comprise one homogenous legal culture", and people living in a state can be divided into different groups because of economic, social and cultural reasons.[29] In certain cases, states and given local communities may have diverging interests. While states may pursue aggressive developmental policies, local communities affected by such plans might prefer a more sustainable approach to developmental objectives.[30]

IV. INTERNATIONAL ECONOMIC GOVERNANCE

International economic law is a well-developed field of study and is characterized by sophisticated dispute-settlement mechanisms. While the dispute-settlement mechanism of the WTO has been defined as the "jewel in the crown" of this organization,[31] investment treaty arbitration has become the most successful mechanism for settling investment-related disputes.[32]

The creation of the WTO Dispute Settlement Body (DSB) determined a major shift from the political consensus-based dispute-settlement system of the GATT 1947 to a rule-based architecture designed to strengthen the multilateral trade system.[33] The WTO Dispute Settlement Mechanism (DSM) is compulsory, exclusive and highly effective.[34] Panels and the Appellate Body interpret and apply the WTO treaties, preserving the rights and obligations of the WTO members.[35] Their decisions are binding on the parties, and the Dispute Settlement Understanding (DSU)[36] provides remedies for breach of WTO law. Only WTO member states have *locus standi* in the DSM, i.e. individuals cannot file claims before

[28] *Glamis Gold, Ltd v United States of America*, Award of 8 June 2009, [2009] 48 ILM 1039 (International Centre for Settlement of Investment Disputes).
[29] See Colin B Picker, "Islands of Prosperity and Poverty: A Rational Trade Development Policy for Economically Heterogeneous States" in Yong Shik Lee, Gary Horlick, Won-Mog Choi and Tomer Broude, eds, *Law and Development Perspective on International Trade Law* (New York: Cambridge University Press, 2011).
[30] Yu Kanosue, "When Land is Taken Away: States Obligations under International Human Rights Law Concerning Large-Scale Projects Impacting Local Communities" (2015) 15 Hum Rts L Rev 643 at 657 (noting that land acquisitions by foreign investors can affect peasants and people living in rural areas).
[31] Amrita Narlikar, *The WTO: A Very Short Introduction* (Oxford: Oxford University Press, 2005).
[32] Susan Franck, "Development and Outcomes of Investor–State Arbitration" (2009) 9 Harv Int'l LJ 435.
[33] Steven P Crowley and John H Jackson, "WTO Dispute Procedures, Standard of Review, and Deference to National Governments" (1996) 90 AJIL193.
[34] Peter Van Den Bossche and Werner Zdouc, *The Law and Policy of the World Trade Organization* (Cambridge: Cambridge University Press, 2013).
[35] 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, art 3.2 (1994) [hereinafter "DSU"].
[36] Ibid.

panels and the Appellate Body.[37] When trade disputes emerge, Article 23.1 of the DSU obliges Members to subject the dispute exclusively to WTO bodies.[38]

In parallel, as there is no single comprehensive multilateral investment agreement, investors' rights are defined by a plethora of international investment agreements, 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. The use of the arbitration model is aimed at depoliticizing disputes, avoiding potential national court bias and ensuring the advantages of confidentiality and effectiveness.[39] Arbitral tribunals review state acts in the light of their investment treaties.

Given the structural imbalance between the vague and non-binding dispute-settlement mechanisms provided by international treaties protecting various types of cultural heritage,[40] on the one hand, and the highly effective and sophisticated dispute-settlement mechanisms available under international economic law, on the other, cultural disputes involving investors' or traders' rights have often been brought before international economic law *fora*.[41]

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

[37] Henrik Andersen, "Protection of Non-Trade Values in WTO Appellate Body Jurisprudence: Exceptions, Economic Arguments, and Eluding Questions" (2015) 18 J Int'l Econ L 385 at 391.
[38] DSU, art 23.1.
[39] Ibrahim FI Shihata, "Towards a Greater Depoliticization of Investment Disputes: The Role of ICSID and MIGA" (1986) 1I CSID Rev 1.
[40] On international cultural law and its dispute-settlement mechanisms, see Valentina Vadi, "The Cultural Wealth of Nations in International Law" (2012) 21 Tulane J Int'l & Comp L 87.
[41] Clearly, this does not mean that these are the only available *fora*, let alone the superior *fora* for this kind of dispute. Other *fora* are available such as national courts, human rights courts, regional economic courts and the traditional state-to-state *fora* such as the International Court of Justice or even inter-state arbitration. Some of these dispute-settlement mechanisms may be more suitable than investor–state arbitration or the WTO DSM to address cultural concerns.

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".[42] According to some empirical studies, there is a consistently high rate of complainant success in WTO dispute resolution[43] 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".[44] In particular, given the fact that about 80 percent 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".[45]

In the parallel domain of 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".[46] Certainly, given the architecture of the arbitral process, significant concerns arise in the context of disputes involving local communities and their cultural concerns. While arbitration structurally constitutes a private model of adjudication, investment disputes present public law aspects.[47] Arbitral awards ultimately shape the relationship between the state, on the one hand, and private individuals, on the other.[48] 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.[49]

Investor–state arbitration, however, distinguishes between two types of non-state actors: (1) foreign investors; and (2) the FDI impacted-local communities.[50] International

[42] Joel P Trachtman, "The Domain of WTO Dispute Resolution" (1999) 40 Harv Int'l LJ 333.
[43] John Maton and Carolyn Maton, "Independence under Fire: Extra Legal Pressures and Coalition Building in WTO Dispute Settlement" (2007) 10 J Int'l Econ L 317.
[44] Juscelino F Colares, "A Theory of WTO Adjudication: From Empirical Analysis to Biased Rule Development" (2009) 42Vand J Transnat'l L 383 at 388.
[45] Ibid. at 387.
[46] Robin Broad, "Corporate Bias in the World Bank Group's International Centre for Settlement of Investment Disputes – A Case Study of a Global Mining Corporation Suing El Salvador" (2015) 36 U Pa J Int'l L 851 at 854.
[47] Gus Van Harten, "The Public-Private Distinction in the International Arbitration of Individual Claims against the State" (2007) 56 ICLQ 371 at 372.
[48] Gus Van Harten, *Investment Treaty Arbitration and Public Law* (Oxford: Oxford University Press, 2007) 70.
[49] M Sornarajah, "The Clash of Globalizations and the International Law on Foreign Investment" (2003) 10 Can Foreign Pol'y 1.
[50] Noemi Gal-Or, "The Investor and Civil Society as Twin Global Citizens: Proposing a New Interpretation in the Legitimacy Debate" (2008–2009) 32 Suffolk Transnat'l L Rev 271.

investment treaties generally delegate the resolution of disputes arising from the investment within the territory of the host state to an international dispute-settlement mechanism, thus bypassing national courts.[51] 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.[52]

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 local communities adversely affected by the investment in the host state.[53] While the recognition of multinational corporations (MNCs) as "international corporate citizens" has progressed,[54] by comparison, the procedural rights of local communities have remained unchanged. The following section addresses the question as to whether cultural entitlements play any role in the context of international disputes before international economic fora.

V. A CLASH OF CULTURES?

Culture represents inherited values, ideas, beliefs and traditions which characterize social groups and their behaviour. Culture is not a static concept but rather a dynamic force, which evolves through time and shapes countries and civilizations. As such, culture has always benefited from economic exchange. International trade in recent times has spurred a more intense dialogue and interaction among nations: thus, it offers unprecedented opportunities for cultural exchange. In parallel, FDI can promote cultural diversity and provide the funds needed to locate, recover and preserve cultural heritage.

Nonetheless, economic globalization can also jeopardize cultural diversity and determine the erosion of cultural heritage. While states actively compete for FDI and liberalize trade to promote growth, foster competition and attract transfers of technology, FDI and trade can affect the cultural heritage and deeply held cultural practices of local

[51] Francesco Francioni, "Access to Justice, Denial of Justice, and International Investment Law" in Pierre-Marie Dupuy, Francesco Francioni and Ernst-Ulrich Petersmann, eds, *Human Rights in International Investment Law and Arbitration* (Oxford: Oxford University Press, 2009) 72.
[52] Ibid. at 72.
[53] Ibid. at 71.
[54] Peter Muchlinski, "Global Bukovina Examined: Viewing the Multinational Enterprise as a Transnational Law Making Community" in Gunther Teubner, ed., *Global Law Without a State* (London: Dartmouth, 1997) 79.

communities. While trade in cultural products can lead to cultural homogenization, certain investments, such as those in the extractive sector, have the ultimate capacity to change landscapes and erase memory.

Despite its significant relationship to international economic law, culture receives very limited attention in the text of trade and investment treaties. In the General Agreement on Tariffs and Trade 1947 (GATT),[55] two provisions address cultural matters. Article IV GATT allows WTO member states to establish screen quotas – i.e. policies requiring a minimum number of screening days of domestic movies each year to protect the national film industry – by exempting cinematographic films from the national treatment principle. Article XX(f) GATT allows member states to adopt or enforce measures to protect "national treasures of artistic, historic or archaeological value". Nonetheless, 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.

In international investment law, discussions about a cultural exception were pivotal to the Multilateral Agreement on Investment (MAI) negotiations. At the time, France and Canada had pursued the insertion of an exception to enable all parties to protect cultural diversity and enterprises engaged in cultural activities. The United States' opposition to such a clause, however, could not be overcome and the whole project ultimately failed.

This was not the end of "cultural exceptions" – the idea to treat cultural goods and services differently from commercial products and consider them as exceptions – in international investment law. Some international investment agreements present ad hoc provisions protecting relevant communities and/or their cultural interests. For instance, in the Annex of the US–Lithuania bilateral investment treaty (BIT), Lithuania reserved "the right to make or maintain limited exceptions to national treatment" with regard to, inter alia, "monuments of nature, history, archaeology and culture as well as the surrounding protective

[55] General Agreement on Tariffs and Trade (GATT 1947), 30 October 1947, 55 UNTS 194.

areas", and the land of the Curonian Spit – a landscape of sand dunes that is a World Heritage site.[56] More recently, the Trans-Pacific Partnership stipulates that:

> <quotation>[p]rovided that such measures are not used as a means of arbitrary or unjustified discrimination against persons of the other Parties or a disguised restriction on trade in goods, trade in services and investment, nothing in this agreement shall preclude the adoption by New Zealand of measures it deems necessary to accord more favourable treatment to Maori in respect of matters covered by this agreement, including in fulfilment of its obligations under the Treaty of Waitangi.[57]</quotation>

Until recently, international economic law had developed only limited tools for the protection of cultural heritage through dispute settlement. Cases like *UPS v Canada*[58] show that the existence of a cultural exception can facilitate the consideration of cultural concerns in international economic disputes. However, in the absence of a cultural exception, it seems more difficult to integrate cultural concerns into the fabric of international economic law.[59] Finding the proper balance between the need of investors and traders "for the rule of law" and due process, on the one hand, and states' desire to preserve their policy space to pursue their legitimate interests, on the other, is the key challenge that international economic law faces "in the interest of its own legitimacy".[60]

VI. CRITICAL ASSESSMENT

Socio-legal approaches to international economic law reveal the interplay between local communities and global economic governance. Not only are local communities "important

[56] Treaty between the Government of the United States of America and the Government of the Republic of Lithuania for the Encouragement and Reciprocal Protection of Investment, 14 January 1998, Annex at para 3 (entered into force 22 November 2001).
[57] Transpacific Partnership Agreement, 4 February 2016, art 29.6.1.
[58] *United Parcel Service of America Inc v Government of Canada*, 24 May 2007, 46 ILM 922 (2007).
[59] WTO Panel Report, *Canada – Certain Measures Concerning Periodicals*, WT/DS31/R (15 March 1997); WTO Appellate Body Report, *Canada – Certain Measures Concerning Periodicals*, WT/DS31/AB/R (30 June 1997).
[60] Karl P Sauvant and José E Alvarez, "Introduction – International Investment Law in Transition" in José E. Alvarez and Karl P. Sauvant, eds, *The Evolving International Law Regime* (Oxford: Oxford University Press, 2011) xlii.

sources and carriers of identities",[61] they also constitute "powerful units of analysis" because they "bring human beings to the centre of the analytical frame".[62] "Community lenses" applied to international economic law can contribute to the theoretical study of the field and suggest paths for improvement.[63] Socio-legal approaches reveal that, substantively, a clash of culture can emerge between an international economic culture aimed at productivity and development and local cultural practices. Procedurally, international economic fora may not be the most appropriate tribunals for disputes adjudicating cultural heritage-related issues. After briefly discussing these findings, this section proposes two avenues for facilitating the consideration of local communities' entitlements in international economic disputes: 1) a text-driven approach; and a 2) judicially driven approach.

At the substantive level, FDI and trade can have both positive and negative effects on the lives of local communities. Among the positive spillovers there is economic growth, competition, knowledge transfers and well-being. Development analysts point to trade and extractive projects as anti-poverty measures, and advocate trade and FDI as major catalysts for development.[64] However, "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".[65]

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, local communities do not have direct access to these dispute-settlement mechanisms. Rather, their arguments need to be espoused by their home government. Nonetheless, for a variety of reasons, states do not always adequately represent local communities.[66] In fact, the cultural entitlements of local communities often compete with the economic development plans of both investors and states. Therefore, despite the formal premise of equality between the parties, there are structural power asymmetries between MNCs and local communities that governments may not mitigate. Not only does investor–state arbitration fail to take into account the eventual conflict of interest between the cultural entitlements of local

[61] Ting Xu, "Global Legal Transplants through the Lens of Community" in Amanda Perry-Kessaris, ed., *Socio-Legal Approaches to International Economic Law* (Abingdon: Routledge, 2013) 170.
[62] Ibid. at 169–70.
[63] Cotterell (note 22 above) at 145.
[64] OECD, *Foreign Direct Investment for Development* (Paris: OECD, 2002) 3.
[65] Lila Barrera-Hernández, "Indigenous Peoples, Human Rights and Natural Resource Development: Chile's Mapuche Peoples and the Right to Water" (2005) 11 Ann Surv Int'l & Comp L 1 at 6.
[66] William Shipley, "What's Yours is Mine: Conflict of Law and Conflict of Interest Regarding Indigenous Property Rights in Latin American Investment Dispute Arbitration" (2014) 11 Transnat'l Disp Management 1.

communities and the economic needs of the state, but it also confers distinct procedural advantages to foreign investors vis-à-vis other private actors.

While local communities can (and have) present(ed) friends 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.[67] The requests are granted if the friends of the court can demonstrate that they could assist tribunals without unduly delaying arbitrations.[68] As *amici curiae*, local communities cannot ask for final or interlocutory remedies to preserve their cultural entitlements before arbitral tribunals and the WTO DSM.

Moreover, investors' and traders' claims "are adjudicated faster, sooner, and with greater potential for immediate state liability" than the claims of local communities before domestic courts.[69] Furthermore, "any strictly pecuniary quantification of damages is likely to favour foreign investors" and traders at the expense of the competing interests of local communities.[70] In fact, mere pecuniary valuation may not accord significant weight to "permanent alterations to landscape" or change of lifestyle.[71] Finally, the fear of costly litigation can prevent states from protecting the entitlements of local communities determining a regulatory chill.[72]

Two avenues can facilitate the consideration of local communities' entitlements in international economic disputes: (1) a "treaty-driven approach"; and (2) a "judicially driven approach".[73] First, the text-driven approach relies on the periodical renegotiation of the international economic law *acquis*. As international investment treaties are renegotiated from time to time, treaty drafters can expressly accommodate local communities' entitlements in the text of these treaties.[74] Analogously, WTO agreements are not written in stone; rather, rounds of negotiations regularly take place, and WTO members have adopted amendments and/or interpretative statements to better accommodate non-trade concerns into the fabric of

[67] In some cases, arbitral tribunals have denied the participation of non-disputing parties. See *Bernhard von Pezold and Others v Zimbabwe*, 26 June 2012, ICSID Case No. ARB/10/15 (2012) para 49 (stating that *amici curiae* should be independent of the parties and "bring a perspective, particular knowledge or insight that is different from that of the parties").
[68] Lucas Bastin, "*Amici Curiae* in Investor–State Arbitrations: Two Recent Decisions" (2013) 20 Austl Int'l LJ 101.
[69] William Shipley, "What's Yours is Mine: Conflict of Law and Conflict of Interest Regarding Indigenous Property Rights in Latin American Investment Dispute Arbitration" (2014) 1 TDM at 53.
[70] Ibid.
[71] Ibid.
[72] Mihail Krepchev, "The Problem of Accommodating Indigenous Land Rights in International Investment Law" (2015) 6 J Int'l Disp Settlement 42 at 43–4.
[73] Ibid. at 45.
[74] Ibid.

the WTO.[75] For instance, renegotiation of international investment agreements might take account of the requirements of free prior informed consent and benefit sharing. Such requirements, which have been developed in the context of indigenous peoples' rights, could be extended to other social groups, enabling local communities to participate in the decision-making that can affect them and share the benefits that derive from given economic activities. In parallel, investors should take into account the existence of protected groups when assessing the economic risks of the given investment[76] and consider incorporating local communities as part of multi-actor contracts.[77]

Second, the judicially driven approach relies on the interpretation and application of international economic law by arbitral tribunals, WTO panels and the Appellate Body (AB). International economic courts can take into account local entitlements within the current framework of international economic law.[78] Arbitral tribunals, WTO panels and the AB are tribunals of limited jurisdiction and lack the jurisdiction to hold states liable for breach of their human rights obligations. Rather, they can only determine whether the protections in the relevant investment treaty or WTO covered agreements, respectively, have been breached.

However, this does not mean that human rights should be irrelevant in the context of investment disputes. Arbitral tribunals, WTO panels and the AB can and should interpret international economic law in conformity with *jus cogens*[79] and a state's obligations under the United Nations Charter.[80] Some norms protecting human rights have acquired *jus cogens* status, such as the prohibitions of racial discrimination and of genocide. Moreover, international economic law is not a self-contained regime, but constitutes an important field of international law. As such, it should not frustrate the aim and objectives of the latter, which include the protection of human rights and fundamental freedoms as expressed, inter

[75] Joost Pauwelyn, "WTO Compassion or Superiority Complex?: What to Make of the WTO Waiver for 'Conflict Diamonds'" (2003) 24 Mich J Int'l L 1177 (critically assessing the WTO waiver for conflict diamonds); Isabel Feichtner, "The Waiver Power of the WTO: Opening the WTO for Political Debate on the Reconciliation of Competing Interests" (2009) 20 EJIL 615 (discussing the WTO waivers as tools for reconciling conflicting norms and interests).
[76] Krepchev (note 72 above) at 71.
[77] Ibironke T. Odumosu-Ayanu, "Governments, Investors and Local Communities: Analysis of a Multi-Actor Investment Contract Framework" (2014) 15 Melbourne J Int'l L 473.
[78] Krepchev (note 72 above) at 45.
[79] Vienna Convention on the Law of Treaties (VCLT), 23 May 1969, United Nations Treaty Series, vol. 1155 at 331, art. 53 (entered into force 27 January 1980) (recognizing a *jus cogens* norm as one "accepted and recognized by the international community of states as a whole as a norm from which no derogation is possible").
[80] On *jus cogens* and international investment law, see Andrea K. Bjorklund, "Mandatory Rules of Law and Investment Arbitration" (2007) 18 Am Rev Int'l Arb 175; Valentina Vadi, "*Jus Cogens* in International Investment Law and Arbitration" (2015) 46 Nethl YB Int'l L 357. On *jus cogens* in WTO adjudication, see Gabrielle Marceau, "WTO Dispute Settlement and Human Rights" (2002) 13 EJIL 753.

alia, in the Universal Declaration of Human Rights (UDHR),[81] the International Covenant on Civil and Political Rights (ICCPR)[82] and the Covenant on Economic, Social and Cultural Rights (ICESCR).[83] Rather, international economic courts should interpret international economic law taking into account "any relevant rules of international law applicable in the relations between the parties".[84]

Several international human rights rules refer to collective values and cultural entitlements. These provisions include both hard law and soft law.[85] Examples of binding cultural entitlements abound. For instance, Article 1 of both the ICCPR and the ICESCR recognizes the right of self-determination, i.e. the peoples' right to "freely determine their political status and freely pursue their economic, social and *cultural* development".[86] The same provision also clarifies that international economic cooperation is "based upon the principle of mutual benefit, and international law" and that "in no case may a people be deprived of its own means of subsistence".[87] Significantly, the principle of self-determination is commonly regarded as a *jus cogens* rule. For example, Article 27 of the ICCPR recognizes the individual right of persons belonging to ethnic, religious or linguistic minorities "to enjoy their own culture, to profess and practise their own religion, or to use their own language", "in community with the other members of their group". This provision is binding on the parties to the ICCPR.

There are even more instances of non-binding cultural entitlements. For instance, Article 27(1) of the UDHR states that "Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits".[88] Indigenous culture plays a central role in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).[89] Although neither the UDHR nor the UNDRIPare binding, and therefore include soft law norms, they can coalesce in customary international law and therefore become binding.

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[81] Universal Declaration of Human Rights (UDHR) (entered into force 10 December 1948).
[82] International Covenant on Civil and Political Rights (ICCPR), adopted and opened for signature by General Assembly Resolution 2200A (XXI) of 16 December 1966; 999 UNTS 171; 6 ILM 368 (entered into force 23 March 1976).
[83] International Covenant on Economic, Social and Cultural Rights (ICESCR), adopted and opened for signature by General Assembly Resolution 2200A (XXI) of 16 December 1966; 993 UNTS 3; 6 ILM 368 (3 January 1976).
[84] VCLT, art 31.3.c.
[85] Due to space limits, this section can provide only a limited number of examples of human rights law provisions recognizing cultural entitlements.
[86] ICCPR, art 1.1 and ICESCR, art 1.1 (emphasis added).
[87] ICCPR, art 1.2 and ICESCR, art 1.2.
[88] UDHR, art 27.1.
[89] United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) GA Res. 61/295, UN Doc. A/RES/61/295 (entered into force 13 September 2007).

In conclusion, while international economic law does not give too much attention to culture, at least when it comes to texts of the WTO covered agreements and international investment agreements, and therefore international economic courts have limited or no specific mandate to protect cultural entitlements, such entitlements are a significant component of human rights law., Arguably, provisions such as Article 27 of the UDHR, which provides the right of individuals to freely participate in the cultural life of the community and to enjoy and share cultural life, can influence the interpretation and application of international economic law. This is even more the case with regard to cultural entitlements that are binding or have a peremptory character.

VII. CONCLUSIONS

The clash between local cultural values and international economic governance is one example of the tension between international law and state autonomy and of the subsequent local adaptation of, and/or local resistance to, international law standards. 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 local communities. The interplay between the promotion of free trade and FDI, on the one hand, and the protection of local cultural heritage, on the other, highlights a fundamental clash between local and global dimensions of governance. Heritage is local and belongs to specific places and local communities: economic governance has an international character. At the same time, both foreign investments and international trade can affect the traditional lifestyle and cultural values of local communities.

Disputes involving the conflict between the protection of cultural heritage and the promotion of economic freedoms have been brought before international economic fora. International economic fora may not be the most suitable fora to settle this kind of dispute. They are courts of limited jurisdiction, and cannot adjudicate on state violations of local communities' entitlements. This does not mean, however, that they should (or do) not take cultural considerations into account. Rather, international economic courts ought to hear the voices of these communities.[90]

This chapter highlights two different yet complementary avenues for integrating local communities' concerns into the fabric of international economic law. On the one hand, *de*

[90] For an analogous argument in the context of European integration, see Fernanda Nicola, "Invisible Cities in Europe" (2011–12) 35 Fordham Int'l LJ 1285.

lege ferenda, since international investment treaties are renegotiated periodically, there is scope for inserting ad hoc clauses within these treaties to protect local communities. Analogously, WTO law is not written in stone; rather, amendments and waivers are legal instruments to reconcile conflicting norms and interests. On the other hand, *de lege lata*, international economic courts can take into account local entitlements within the current framework of international economic law.