

CULTURE CLASH? INDIGENOUS HERITAGE IN INTERNATIONAL ECONOMIC DISPUTES

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The life of the law is struggle ... The law is not mere theory but living force².
R. von Jhering

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),³ law and policy tend to favour macroeconomic notions of growth regardless of actual or potential infringement of indigenous entitlements.⁴ 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.⁵

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² R von Jhering *The Struggle for Law* (transl. J J Lalor) (Chicago 2nd ed, 1915).

³ United Nations Declaration on the Rights of Indigenous Peoples, A/RES/61/295 (2007).

⁴ 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.

⁵ N Pillay "Statement by the United Nations High Commissioner for Human Rights", (2011) http://www.un.org/en/events/indigenousday/message_unhchr.shtml, accessed July 5th 2012.

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, free trade and animal protection. In parallel, a potential tension exists when a state adopts cultural policies interfering with foreign investments as these may be deemed to 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.⁶ 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.⁷ In parallel, at the World Trade Organization, 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 will proceed as follows. *First*, the chapter addresses the question as to whether - being indigenous heritage "local" by definition - its governance is purely local or whether it pertains to international law. The latter approach is to be preferred in the light of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) and relevant international law instruments. The international norms protecting indigenous cultural heritage will be scrutinised and particular reference will be made to the Declaration on the Rights of Indigenous Peoples. *Second*, the international economic governance shall be sketched out. Reference to the World Trade Organization (WTO) 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 contribution 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 international economic law and indigenous entitlements makes the case for strengthening the current regime protecting indigenous heritage. In particular, the participation of indigenous peoples in the decisions which affect them and their heritage is crucial.

⁶ 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.

⁷ 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? As noted by Wiessner, prior to the 1970s indigenous peoples were not viewed as “legal unit[s] of international law”;⁸ rather they were regulated under domestic law.⁹ As Daes puts it, “International law knew no other legal subjects than the state...and had no room for indigenous peoples.”¹⁰ Due to the failures of 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. There has been a paradigm shift in international law; and indigenous peoples have been deemed as ‘legal subjects under international law’.¹¹ As Sargent points out, the creation of the Permanent Forum for Indigenous Issues (PFII) reflects the efforts of indigenous peoples “to create space for them and their issues within the United Nations human rights machinery”.¹²

While a plethora of international law instruments protect different aspects of indigenous heritage,¹³ indigenous culture plays a central role in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).¹⁴ The Declaration constitutes the summa of two decades of preparatory work and “a milestone of re-empowerment” of indigenous peoples.¹⁵ While this landmark human rights instrument is currently not

⁸ *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”).

⁹ 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.

¹⁰ 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).

¹¹ 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* (Ardsey: Transnational Publishers, 2006).

¹² 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.).

¹³ For an overview, see eg M Hadjioannou “The International Human Right to Culture: Reclamation of the Cultural Identities of Indigenous Peoples under International Law” (2005) 8 *Chapman Law Review* 201.

¹⁴ 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.

¹⁵ Above n 9 at 31.

binding, this may change in the future to the extent that its provisions reflect customary international law.¹⁶ The Declaration constitutes a significant achievement for indigenous peoples worldwide,¹⁷ as it brings indigenous peoples' rights to the forefront of international law 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*".¹⁸

Indigenous culture is a key theme of the Declaration.¹⁹ Many articles are devoted to different aspects of indigenous culture; and the word "culture" appears no less than 30 times in its text.²⁰ 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".²¹ The Declaration recognises the right of indigenous peoples to practice their cultural traditions²² and maintain their distinctive spiritual and material relationship with the land which they have traditionally owned, occupied or otherwise used.²³ For indigenous peoples, land is the basis not only of economic livelihood, but also the source of spiritual and cultural identity.²⁴ 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..."²⁵ Because of this holistic approach of indigenous peoples, a UN study insists that "all elements of

¹⁶ 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).

¹⁷ 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.

¹⁸ 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.

¹⁹ See generally S Wiessner "The Cultural Rights of Indigenous Peoples: Achievements and Continuing Challenges" (2011) 22 *European Journal of International Law* 121 at 139.

²⁰ 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.

²¹ UNDRIP, preamble.

²² UNDRIP, Article 11.

²³ See eg Declaration on the Rights of Indigenous Peoples, preamble, Articles 8, 11, 12.1 and 13.1.

²⁴ 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.

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

heritage should be managed and protected as a single, interrelated and integrated whole”.²⁶

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” and links environmental concerns to cultural entitlements which are firmly rooted in the human rights catalogue.²⁷ In sum, the cultural integrity model includes both environmental and cultural considerations to protect indigenous peoples’ identity, and acknowledges the dynamic nexus between indigenous peoples and their lands. More importantly, as a Native American scholar has pointed 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”.²⁸

Some scholars have criticised this approach contending that emphasizing the cultural entitlements of indigenous peoples *de facto* reduces their political rights and limits their claims to self-determination.²⁹ 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 understand and better protect 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 adjudicative mechanisms at the international level, where indigenous peoples can raise complaints regarding measures which affect them.³⁰ The UNDRIP does not change this situation. Therefore, notwithstanding the major political merits of the Declaration, as one author puts it “UNDRIP does not definitively resolve, but at best temporarily mediates, multiple tensions.”³¹

²⁶ 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.

²⁷ L Westra *Environmental Justice and the Rights of Indigenous Peoples* (London: Earthscan, 2008) p. 10.

²⁸ V Deloria Jr. “Self-Determination and the Concept of Sovereignty” in JR Wunder (ed) *Native American Sovereignty* (New York: Garland, 1996) p 118.

²⁹ See generally C Cutler “The Globalization of International Law, Indigenous Identity, and the ‘New Constitutionalism’,” in W Coleman (ed) *Property, Territory, Globalization: Struggles over Autonomy* (Vancouver: University of British Columbia Press, 2010).

³⁰ 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.

³¹ 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

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 dispute settlement mechanism of the World Trade Organization³² has been defined as the “jewel in the crown” of this organization,³³ investment treaty arbitration has become the most successful mechanism for settling investment-related disputes.³⁴

The creation of the WTO Dispute Settlement Body determined a major shift from the political consensus-based dispute settlement system of the GATT 1947³⁵ to a rule-based, architecture designed to strengthen the multilateral trade system.³⁶ The WTO Dispute Settlement Mechanism is compulsory, exclusive and highly effective.³⁷ The decisions of panels and the Appellate Body are binding on the parties, and the Dispute Settlement Understanding provides remedies for breach of WTO law.

At the procedural level, when cultural heritage related trade disputes emerge, Article 23.1 of the Understanding on Rules and Procedures Governing the Settlement of Disputes³⁸ obliges Members to subject the dispute exclusively to WTO bodies.³⁹ In *US – Section 301 Trade Act*, the Panel held that members “have to have recourse to the DSU DSM to the exclusion of any other system”.⁴⁰ In *Mexico – Soft Drinks* the Appellate Body clarified that the provision even implies that “that Member is entitled

the potential to become an important site for the ongoing struggle over the meaning of human rights ...”).

³² The World Trade Organization was established in 1994. Marrakesh Agreement Establishing the World Trade Organization, Apr. 15th 1994. 33 ILM 1144 (1994).

³³ A Narlikar *The WTO: A Very Short Introduction* (Oxford: Oxford University Press, 2005).

³⁴ S Franck “Development and Outcomes of Investor-State Arbitration” (2009) 9 *Harvard Journal of International Law* 435-489.

³⁵ General Agreement on Tariffs and Trade, 30 October 1947, 55 UNTS 194.

³⁶ SP Crowley and JH Jackson, “WTO Dispute Procedures, Standard of Review, and Deference to National Governments” (1996) 90 *American Journal of International Law* 193.

³⁷ P Van Den Bossche *The Law and Policy of the World Trade Organization* (Cambridge: Cambridge University Press, 2nd edn, 2008).

³⁸ 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].

³⁹ DSU, Article 23.1.

⁴⁰ 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.

to a ruling by a WTO panel”.⁴¹ 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 global treaty, investors’ rights are defined by a plethora of bilateral and regional investment treaties and by customary international law. International investment law provides an 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 *inter alia* for: 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.⁴² 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.⁴³ Under this theoretical framework, investor-state arbitration has been conceptualised as a global administrative law (GAL) creature,⁴⁴ 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

⁴¹ 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.

⁴² 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.

⁴³ 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.

⁴⁴ 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.

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. In a preliminary fashion, treaty provisions lack precise definition of these standards 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 international trade law 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”.⁴⁵ Recent empirical studies have also shown that there is a consistently high rate of complainant success in WTO dispute resolution⁴⁶ 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 regulatory competencies”.⁴⁷ 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.”⁴⁸

This study questions whether the same “institutional bias” is present in investor-state arbitration. 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 treaty arbitration can be viewed as public law adjudication.⁴⁹ Arbitral awards ultimately shape the relationship between the state, on the one hand, and private individuals on the other.⁵⁰ Arbitrators determine matters such as the legality of governmental activity,

⁴⁵ JP Trachtman “The Domain of WTO Dispute Resolution” (1999) 40 *Harvard International Law Journal* 333.

⁴⁶ 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.

⁴⁷ JF Colares “A Theory of WTO Adjudication: From Empirical Analysis to Biased Rule Development” (2009) 42 *Vanderbilt Journal of Transnational Law* 383 at 388.

⁴⁸ *Ibid.*, at 387.

⁴⁹ 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.

⁵⁰ G Van Harten *Investment Treaty Arbitration and Public Law* (Oxford: Oxford University Press 2007) p 70.

the degree to which individuals should be protected from regulation, and the appropriate role of the state.⁵¹

Investor-state arbitration, however, distinguishes between two types of non-state actors: 1) the investor engaged in foreign direct investment; and 2) the FDI impacted non-state actors.⁵² 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 investment disputes.⁵³ 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.⁵⁴

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.⁵⁵ While the recognition of MNCs as “international corporate citizens” has progressed,⁵⁶ 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,⁵⁷ descending from those who inhabited the area before colonization. At the same time, however, indigenous peoples have clearly defined rights under international law.⁵⁸ 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*.

⁵¹ M Sornarajah, “The Clash of Globalizations and the International Law on Foreign Investment” (2003) 10 *Canadian Foreign Policy* 1.

⁵² 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.

⁵³ 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.

⁵⁴ *Ibid*, p 72.

⁵⁵ *Ibid*, p 71.

⁵⁶ 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.

⁵⁷ 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.

⁵⁸ Above n 6 at 797-889.

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.⁵⁹ In parallel, free trade and the fluctuating global commodity prices may destabilise local communities, including indigenous communities which have long practised sustainable harvesting practices.⁶⁰ Indigenous peoples deem that trade liberalization and foreign direct investment “are creating the most adverse impacts on [their] lives ...” through environmental degradation, forced relocation and deforestation among others.⁶¹ In an open letter to the President of the World Bank, they stated: “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. We do not need you to save our forests. We will not let you sell our forests. So go back from our forests and our country”.⁶²

Self-determination, parallel sovereignty,⁶³ human dignity, the right to life and a number of human rights including cultural ones are all at stake here. Due to space limits, this chapter focuses on one of the many aspects of the collision between indigenous rights and economic globalization which has recently come to the fore: the clash between economic globalization and cultural practices relating to subsistence harvest. 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. [Cultural rights] 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 concerned, thus enriching the fabric of society as a whole.”⁶⁴

This section explores the clash of cultures between international economic law (be it investment law or trade law), and indigenous cultural

⁵⁹ Above n 5.

⁶⁰ 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.

⁶¹ See Indigenous Peoples’ Seattle Declaration, on the occasion of the Third Ministerial meeting of the World Trade Organization, November 30th- December 3rd 1999.

⁶² A Pha “WTO Collapse: Win for People”, *the Guardian*, December 8th 1999.

⁶³ F Lenzerini “Sovereignty Revised: International Law and Parallel Sovereignty of Indigenous Peoples” (2006) 42 *Texas International Law Journal* 154.

⁶⁴ 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.

heritage. First it explores a recent case adjudicated before an arbitral tribunal. It then focuses on the seals products dispute which is adjudicated before the WTO dispute settlement mechanism.

(a) *Reindeer Herding, 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.⁶⁵ While development analysts point to extractive projects as anti-poverty measures, and advocate FDI as a major catalyst for development,⁶⁶ as one author puts it, “[...] 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”.⁶⁷ Rising investment in the extractive industries can have a devastating impact on the livelihood of indigenous peoples and their culture.⁶⁸

The linkage between economic globalization and indigenous peoples’ rights has been discussed by administrative and constitutional courts at the national level,⁶⁹ and by human rights bodies at the regional and international level.⁷⁰ This case law and the relevant literature are extensive; what is less known is the emerging “case law” of arbitral tribunals dealing with elements of indigenous cultural heritage.⁷¹ Given the impact that arbitral awards can have on indigenous peoples’ lives and culture, scrutiny and critical assessment of this case law 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 by the host state and the property rights of foreign investors.

To date, several investment disputes have involved indigenous cultural heritage elements.⁷² 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 the *John Andre v. Canada case*. In *John Andre v. Canada*, a U.S.-based businessman lodged a Notice of Intent to arbitrate, alleging losses arisen from legislative measures affecting his

⁶⁵ See generally above n 4.

⁶⁶ OECD, *Foreign Direct Investment for Development*, (OECD, Paris 2002) p. 3.

⁶⁷ Above n 4, at 6.

⁶⁸ 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.

⁶⁹ T Chapman “Corroboree Shield: A Comparative Historical Analysis of (the Lack of) International, National and State Level Indigenous Cultural Heritage Protection” (2008) 5 *Macquarie Journal of International & Comparative Environmental Law* 81-96

⁷⁰ L Westra *Environmental Justice and the Rights of Indigenous Peoples* (London: Earthscan 2008).

⁷¹ Although there is no binding precedent in international law and, according to the ICJ Statute, judicial decisions are recognised only as *subsidiary* means of interpretation, in most cases, precedent can be persuasive.

⁷² Above n 6.

caribou-hunting outfitter in Northern Canada.⁷³ The claimant used to have 360 caribou hunting licenses (called Caribou Quota Tags), and organised hunting camps for tourists and hunters who would travel from locations outside Canada to the aboriginal land in Canada's North West Territories (NWT).⁷⁴ In 2007, the Government of the NWT decided to grant only seventy-five Caribou quota Tags per outfitter.⁷⁵ Outfitters with commitments to clients would be required to buy Caribou Quota Tags from their competitors.⁷⁶ The claimant complained that the relevant authorities cut the number of hunting licenses in a discriminatory manner.⁷⁷ As many of the local outfitters only used seventy-five to one hundred Caribou Quota Tags or less per year, the claimant alleged that the Government developed a strategy to minimise the negative effect on local outfitters and maximise the negative effects on the investor.⁷⁸ The investor thus claimed to have been targeted as a non-resident of Canada and to have been discriminated against on the basis of his U.S. nationality.⁷⁹

The press subsequently reported that while the ban initially also included the aboriginal caribou hunt, the NWT government and the Tlicho aboriginal government jointly agreed to keep a total hunting ban only for non-aboriginal hunters and commercial hunting outfitters.⁸⁰ In other words, while the sport hunting of caribou remains cancelled,⁸¹ the aboriginal subsistence hunting will be permitted.

This differential treatment may be justified under human rights law. The fall hunt allows the indigenous tribes to preserve their traditional culture and to rely on caribou meat in the winter. A number of cases at the international, regional, and national levels provide evidence of the recognition of indigenous peoples' cultural rights in this sense. In the *Kitok* case, the Human Rights Committee stated that reindeer husbandry, as a traditional livelihood of the indigenous Saami people, is an activity protected under ICCPR Article 27.⁸² In *Jouni Lansman v. Finland*, the Committee found that reindeer herding fits into the definition of cultural

⁷³ *John R. Andre v. Government of Canada*, Notice of Intent to Submit Claim to Arbitration Pursuant to Chapter Eleven of the North American Free Trade Agreement, para 8 (March 19th 2010), available at http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/JohnR_Andre_FiledNOI.pdf.

⁷⁴ *Ibid.*, para 12.

⁷⁵ *Ibid.*, para 51.

⁷⁶ *Ibid.*

⁷⁷ *Ibid.*, para 35.

⁷⁸ *Ibid.*, para 51.

⁷⁹ *Ibid.*, para 35.

⁸⁰ "New Plan for Canadian Bathurst Caribou Herd Management", *Eye on the Arctic*, June 2nd 2010, <http://eyeontheartic.rcinet.ca/en/news/canada/35-geopolitics/232-new-plan-for-canadian-bathurst-caribou-herd-management>.

⁸¹ "Debate over N.W.T. Caribou Hunting Goes Public" *CBC News*, February 9th 2010, <http://www.cbc.ca/canada/north/story/2010/02/09/nwt-caribou-debate.html>.

⁸² See *Ivan Kitok v. Sweden* (Comm'n No. 197/1985), UN Human Rights Comm., para 4.2, UN Doc. CCPR/C/33/D/197/1985, July 27th 1988.

activities.⁸³ In reaching this conclusion, the committee recognised that the subsistence activities of indigenous peoples are an integral part of their culture.⁸⁴

At the national level, in 1999, the High Court of Australia dismissed a charge against a member of an aboriginal tribe who had caught two young crocodiles in Queensland using a traditional harpoon.⁸⁵ Although the appellant did not have a hunting permit, the Court concluded that he was exempted from the obligation of obtaining a permit, since his act was based on a traditional aboriginal custom which deems catching young crocodiles of high spiritual significance.⁸⁶ The U.S. case of the Makah people who obtained permission to hunt whales also bears testimony to competing cultural and environmental interests in the aboriginal hunting debate.⁸⁷

More recently, the Canadian Inuit filed a lawsuit before the European Court of Justice to overturn a European Union (EU) regulation⁸⁸ banning the import of seal products into the E.U.⁸⁹ The regulation expressly recognises the hunt as “an integral part of the culture and identity of the members of the Inuit society”⁹⁰ and exempted the Inuit from the ban.⁹¹ Since the Inuit people did not export seal products themselves, but exported them via non-indigenous exporters, they alleged that the derogation in their favor would remain an “empty box.”⁹² Although the Court rejected the claim as inadmissible;⁹³ the case was interesting as it showed that

⁸³ *Jouni Lansman v. Finland* (Comm’n No. 671/1995), UN Human Rights Comm., para 10.2, UN Doc. CCPR/C/58/D/671/1995, November 22nd 1996.

⁸⁴ 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.

⁸⁵ *Yanner v Eaton* (1999) 166 ALR 258, 301 (Austl.). For commentary, see F Lenzerini “The Interplay between Environmental Protection and Human and Peoples’ Rights in International Law” (2002) 10 *African Yearbook of International Law* 63.

⁸⁶ *Yanner*, 166 ALR at 277.

⁸⁷ See D Wagner “Competing Cultural Interests in the Whaling Debate: An Exception to the Universality of the Right to Culture” (2004) 14 *Transnational Law & Contemporary Problems* 831; A Gillespie “Aboriginal Subsistence Whaling: A Critique of the Interrelationship between International Law and the International Whaling Commission” (2001) 12 *Colorado Journal of International Environmental Law & Policy* 77; BT Hodges “The Cracking Façade of the International Whaling Commission as an Institution of International Law: Norwegian Small-Type Whaling and the Aboriginal Subsistence Exemption” (2000) 15 *Journal of Environmental Law & Litigation* 295; A Matera “Whale Quotas: A Market-Based Solution to the Whaling Controversy” (2000) 13 *Georgetown International Environmental Law Review* 23; L Watters and C Dugger, “The Hunt for Gray Whales: The Dilemma of Native American Treaty Rights and the International Moratorium on Whaling” (1997) 22 *Columbia Journal of Environmental Law* 319.

⁸⁸ Council Regulation 1007/2009, 2009 O.J. (L 286) 36 (EC).

⁸⁹ See *Inuit Tapiriit Kanatami e.a. v. Parliament and Council*, Case T 18/10 R, http://curia.europa.eu/jcms/jcms/j_6/.

⁹⁰ *Ibid.*, at 37.

⁹¹ *Ibid.*

⁹² *Ibid.*, para 103.

⁹³ *Inuit Tapiriit Kanatami e.a. v. Parliament and Council*, Case T 18/10 R, Order of the General Court, September 6th 2011, para 94, available at <http://eur->

indigenous peoples may perceive aboriginal exemptions as inadequate to sustain cultural practices.

An “Aboriginal exemption” is a common feature of natural resource conservation legislation.⁹⁴ A number of international environmental treaties which protect certain species include derogations to their main principles to “accommodate the needs of traditional subsistence users of such species,”⁹⁵ thus protecting traditional hunting practices linked to the cultural heritage of the communities concerned.⁹⁶ For instance, the 1946 International Convention for the Regulation of Whaling, which superseded the 1931 Convention, retains aboriginal rights to subsistence whaling.⁹⁷

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

Indigenous cultural practices and the protection of free trade may clash with animal welfare. Animal welfare has only recently emerged as a subject matter of regulation at both regional and international levels and remains a work in progress.⁹⁸ Actually, animal welfare measures “are primarily the province of domestic law and typically reflect local values and customs rather than a broad international consensus”.⁹⁹ Can animal welfare trump the cultural practices of indigenous peoples and international trade law? The recent disputes concerning the EU ban on the trade of seals products brought by Canadian indigenous representatives and the Government of Canada before the European Court of Justice and the WTO dispute

[lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62010TO0018\(04\):EN:HTML](http://lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62010TO0018(04):EN:HTML) (last visited March 12th 2012).

⁹⁴ See E Mitchell and R Reeves “The Alaska Bowhead Problem: A Commentary” (1980) 33 *Arctic* 686 at 687.

⁹⁵ Convention on Conservation of Migratory Species art. 3, para 5, June 23rd 1979, 19 ILM 11.

⁹⁶ For instance, Article VII of the 1957 Convention on Conservation of North Pacific Fur Seals describes the aboriginal hunting practices that are exempted by the application of the Convention. Interim Convention on Conservation of North Pacific Fur Seals art. 7, February 9th 1957, 314 UNTS 105 (exempting certain indigenous people “who carry on pelagic sealing in canoes not transported by or used in connection with other vessels, and propelled entirely by oars, paddles, or sails, and manned by not more than five persons each, in the way hitherto practiced and without the use of firearms”). To prevent circumvention of the Convention, the exemption does not apply if the hunters are “in the employment of other persons or under contract to deliver the skins to any person.” *Id.*

⁹⁷ The International Convention for the Regulation of Whaling permits the taking of various baleen whales by aborigines, but stipulates that “the meat and products of such whales are to be used exclusively for local consumption by the aborigines.” International Convention for the Regulation of Whaling art. III(13)(b), December 2nd 1946, 161 UNTS 72, available at <http://www.iwcoffice.org/commission/schedule.htm>.

⁹⁸ See J Vapnek and M Chapman *Legislative and Regulatory Options for Animal Welfare Law*, FAO Legislative Study 104 (2010) at 83, available at <http://www.fao.org/docrep/013/i1907e/i1907e00.pdf>.

⁹⁹ See 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 96.

settlement mechanism respectively, highlight a clash of cultures between indigenous cultural heritage and free trade on the one hand and animal welfare on the other.

While existing law and policy frequently fail to strike a balance between economic development and other values, questions arise regarding the very values to be taken into account. The EU seals regime seems to be motivated by consumer preferences, rather than by the conservation of natural resources. European consumers perceive the seals hunt as cruel and inhuman. However, the EU regime is not absolute as it provides exemptions allowing traditional indigenous hunting practices and measures for the sustainable management of marine resources.

The seal products disputes have the potential to stimulate further debate on the linkage between culture, trade and animal welfare, and in addition, they put the international legal order under pressure raising issues of cultural diversity, fragmentation and legal pluralism. The fact that a single regulation may be in violation of multiple international commitments at both regional and international levels challenges the idea of separate and self-contained legal regimes, but also confirms the reality of legal pluralism.

On 17 August 2010, the European Commission published Commission Regulation (EU) No. 737/2010 laying down detailed rules for the implementation of Regulation (EC) No. 1007/2009 of the European Parliament and of the Council on trade in seal products. The 'EU Seal regime' prohibits the importation and sale in the EU of any seal product except: (a) those derived from hunts traditionally conducted by Inuit and other indigenous communities, which contribute to their subsistence; 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. In addition, seal products for personal use may be imported but may not be placed on the market. Admittedly, the EU allowed the exception for indigenous hunt because of the international law commitments of its member states and of the Declaration on the Rights of Indigenous Peoples.¹⁰⁰

The ban, however, has been contested by Inuit groups and the Canadian and Norwegian governments. 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 lifestyle, expressing cultural diversity, the Inuit themselves have made it clear that they strongly oppose the regulation. According to indigenous peoples' representatives,

¹⁰⁰ 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, 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".

the “Inuit exemption” will not prevent the market for seal products from collapsing. Furthermore, they stress that the regulation was adopted without the participation of the Inuit.¹⁰¹

After the European Court of Justice affirmed the legitimacy of the ban, representatives of indigenous peoples declared they perceived the ruling as “based on colonial perceptions of [their] sealing practices”¹⁰² and praised the Canadian government for bringing the seal ban at the WTO.¹⁰³

Parallel to the litigation before the European Court of Justice, the WTO Dispute Settlement Body¹⁰⁴ established two panels to investigate several disputes - all relating to the question as to whether the regulation banning imports of seal products complies with WTO rules.¹⁰⁵ The first dispute concerns measures taken by Belgium and the Netherlands that came into force on 28 April and 23 October 2007, respectively, and that prohibit the importation and the marketing of seal products.¹⁰⁶ In its communication to the DSB, Canada said that the Belgian trade ban prohibits the preparation for sale or delivery to consumers, transport for sale or delivery, possession for the purpose of sale, importation, distribution and transfer of seal products.¹⁰⁷ The Belgian import licensing requirement also imposes a requirement that an import license be issued for the importation of seal products.¹⁰⁸ Similarly, the Dutch trade ban prohibits the importation of and trade in all harp seal and hooded seal products, regardless of the animal's age.¹⁰⁹ This includes a prohibition against asking for the sale, the buying or acquisition, the holding for sale or in stock, the selling or offering for sale, the transportation or offering for transport, the delivery, the use for commercial profit, the renting or hiring, the exchange or offer in exchange, the trade or exhibiting for commercial purposes or the bringing or possessing within or outside the territory of the Netherlands, of harp seal and hooded seal products.¹¹⁰

¹⁰¹ E Barca “Canada's Annual Seal Slaughter just Ended. Should there be Another?” *Vancouver Observer*, June 19th 2010.

¹⁰² “EU seal ban decision to be appealed- Inuit leader says ruling is based on 'colonial perceptions'”, October 29th 2010, *CBC News*, available at <http://www.cbc.ca/news/canada/newfoundland-labrador/story/2010/10/29/nl-seal-ban-appeal-1028.html>.

¹⁰³ “Canada Calls for WTO Panel in Seal Dispute with EU”, *15 Bridges Weekly Trade News Digest*, February 18th 2011.

¹⁰⁴ “WTO Dispute Roundup: Panels Created on Seals”, *15 Bridges Weekly Trade News Digest*, March 30th 2011, available at ictsd.org/i/news/bridgesweekly/103196.

¹⁰⁵ Although Canada requested that two panels be established, it stated it would be pleased if the EU would agree to have the two panels joined once they have been established, so that the two disputes, which are closely related, can be heard by a single set of panelists.

¹⁰⁶ *European Communities- Certain Measures Prohibiting the Importation and Marketing of Seal Products*, Request for the Establishment of a Panel, by Canada, February 14th 2011, WT/DS369/2, available at [http://www.worldtradelaw.net/pr/ds369-2\(pr\).pdf](http://www.worldtradelaw.net/pr/ds369-2(pr).pdf).

¹⁰⁷ *Ibid*, p. 2.

¹⁰⁸ *Ibid*, p. 2.

¹⁰⁹ *Ibid*, p. 2.

¹¹⁰ *Ibid*, p. 2.

Canada contended that these measures were inconsistent with the European Union's obligations under the GATT 1994 and under the Technical Barriers to Trade (TBT) Agreement.¹¹¹ According to Canada, while the European Union ban may supersede the Belgian and the Dutch bans for the purposes of the application of European Union law, the two national bans had not been repealed and therefore remained in effect. This was why Canada made two separate panel requests. However, the Belgian and Dutch governments are in the process of repealing their laws so that they are limited to implementing the EU regulation, at which point Canada would be expected to drop its additional claims against the measures of the two countries.¹¹²

The second dispute brought by Canada against the EC concerned the EU regulation on seal products.¹¹³ Canada strongly rejected the rationale of the EU regulation arguing that seal harvesting in Canada was done humanely and that its sealing practices were “safe, sustainable, and economically legitimate.” While the Government of Canada affirmed it respected an individual's choice to support or oppose the seal harvest - it noted that several EU member states also allowed their citizens to participate in the hunting of seals - it said that trade restrictions could not be justified by relying on “myths and misinformation, and it encouraged people to form their opinions based on the facts”.¹¹⁴ The facts, according to Canada, were that the seal harvest was lawful, sustainable and humane, strictly regulated and guided by rigorous animal welfare principles that were internationally recognised by virtually all independent observers.¹¹⁵ Canada also stressed that the Canadian seal harvest helped to provide 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.

Canada maintained that there is every reason to believe that the EU's exemption for trade in traditional Inuit and Aboriginal seal products would prove to be ineffective, particularly in the face of the collapse of the larger

¹¹¹ Ibid, p. 2.

¹¹² See “WTO Dispute Roundup: Panels Created on Seals, China”, 15 *Bridges Weekly Trade News Digest*, March 30th 2011.

¹¹³ 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).

¹¹⁴ TWN Info Service on WTO and Trade Issues, March 3rd 2011, Third World Network, available at <http://www.twinside.org.sg/title2/wto.info/2011/twninfo110303.htm>

¹¹⁵ According to Canada, the methods used by Canadian sealers and prescribed in Canada's *Marine Mammal Regulations* are consistent with the recommendations of independent veterinarians and many of the conclusions of the European Union's own European Food Safety Authority report released in 2007. Canada also pointed out that it monitors the seal harvest closely, including ongoing aerial patrols, sophisticated vessel monitoring systems, at-sea and dockside vessel inspections, and regular inspections of processing facilities.

market, and the Inuit would suffer the effects. The effect of the trade ban, in combination with the implementing measure, would be to 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. Canada argued that each of the measures referred to is inconsistent with the European Union's obligations under the GATT 1994 and under the TBT Agreement.

The establishment of a panel to decide the legality of the EU's ban on seal products was requested also by Norway,¹¹⁶ arguing that none of the species hunted were endangered, and none were listed by CITES (the Convention on International Trade in Endangered Species of Wild Fauna and Flora).¹¹⁷ It added that such a ban infringes on WTO members' right to trade in marine resources harvested in a sustainable manner.¹¹⁸ Norway also claims 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.¹¹⁹ In its statement, the EU believed that the measures were neither protectionist nor discriminatory, and were fully in compliance with WTO rules. The EU also argued that the measures fell within the scope of the Agreement on the European Economic Area (EEA Agreement).¹²⁰

In April 2011 a single panel was established to examine the complaints by Canada and Norway upon request of the parties.¹²¹ While the case is still pending, commentators have questioned whether, in the seal products dispute, a panel could find that the seal products produced by indigenous peoples and those not hunted by indigenous peoples are like products.¹²² If so, as the two products are treated differently by the EU ban, there would be discrimination, which is prohibited under GATT Article III. The EU ban prohibits the imports and trade of seals products in the EU *tout court*, with

¹¹⁶ *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 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.

¹¹⁸ *Ibid*, p. 3.

¹¹⁹ Request for the Establishment of a Panel by Norway, *European Communities-Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS401/5 March 15th 2011.

¹²⁰ World Trade Organization, Dispute Settlement Body, Minutes of Meeting held in the Centre William Rappard on April 21st 2011, WT/DSB/M/295, at p. 11. The Agreement on the European Economic Area, which entered into force on January 1st 1994, brings together the 27 EU Member States and the three EEA EFTA States — Iceland, Liechtenstein and Norway — in a single market, referred to as the “Internal Market”.

¹²¹ World Trade Organization, Dispute Settlement Body, Minutes of Meeting held in the Centre William Rappard on April 21st 2011, WT/DSB/M/295, at p. 14.

¹²² 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.

the exception of indigenous peoples' hunting practices for subsistence purposes. When balancing indigenous peoples' subsistence and animal welfare, it goes without saying that the EU struck the balance in favour of indigenous peoples' subsistence and cultural practices. In the instant case, one could contend that consumer preferences matter, also in light of the *EC-asbestos* case:¹²³ "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".¹²⁴

However, if the panel found that there is discrimination, the panel should examine the question as to whether the seal products regulation is justified under any of the exceptions under Article XX of the GATT 1994, and in particular under Article XX(a) on public morals. As an animal welfare measure, the seal products regulation is not concerned with the physical qualities of the product, but with the way it is produced. The ban on seal products is imposed as a means to reduce the occasions when seals might be killed cruelly. However, the ban makes no distinction between seals that are killed cruelly and those who are killed more humanely. At the same time it allows traditional hunting practices (irrespective of the way they are pursued). Thus it may be counterintuitive but, possibly cruel hunting practices by indigenous communities may be allowed, while humane killings by commercial actors are not.

However, in GATT/WTO law processes and production methods (PPMs) are not taken into account in the analysis of likeness. Accordingly, a seal product is a seal product irrespective of the way the seals are killed. As Fitzgerald put it, "the conventional wisdom is that the process and production methods [...] used to create those goods are not relevant to the analysis".¹²⁵ Finally, it is worth pointing out that from a human rights perspective, the adequacy of the ban to deal with the traditional way of live of indigenous peoples is outside the jurisdiction of the WTO dispute settlement mechanism.¹²⁶

In conclusion, these cases show, once more that economic globalization can affect non-economic matters, and that international economic *fora* may not be the most appropriate *fora* for disputes presenting cultural and/or environmental issues. While the EU ban restricts trade, one may wonder whether it may be justified under WTO law. Other questions arise with regard to indigenous peoples' cultural heritage. Is the indigenous exemption adequate to ensure the conservation of indigenous cultural heritage?

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 rights are at stake? There is one fundamental reason: because culture is so close to

¹²³ *European Communities- Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, adopted April 5th 2001, DSR 2001:VII.

¹²⁴ Above n 122 at 403.

¹²⁵ Above n 99 at 100.

¹²⁶ Above n 122 at 404.

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, as Professor Francioni put it, the protection of the cultural identity of indigenous peoples is its *raison d'être*.¹²⁷ According to Stamatopoulou, "one can find the cultural rights angle in each article of the Declaration".¹²⁸

The significant achievements of the UNDRIP should not lead to the conclusion that further steps should not be taken. The UNDRIP well constitute 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. Of particular concern is the clash of cultures between the protection of indigenous heritage and the promotion of economic activities. The collision between international economic law and indigenous entitlements makes the case for strengthening the current regime protecting indigenous heritage. Participation of indigenous peoples in the decisions which affect them is crucial.¹²⁹

International economic *fora* constitute an uneven playing field: indigenous peoples do not have direct access to these *fora*; their arguments need to be espoused by their home government. While indigenous peoples can (and have) present(ed) amicus curiae briefs reflecting their interests, the investment tribunals and the WTO panels and Appellate Body are not legally obligated to consider such brief - rather they have the faculty to do so should they deem it appropriate.¹³⁰ More substantively, international economic *fora* are tribunals of limited jurisdiction and cannot adjudicate on eventual infringements of indigenous peoples' rights. In the seal products dispute and the *Andre v. Canada* case the arguments in support of free trade and foreign direct investment are intertwining with indigenous claims. In both disputes, however, it is uncertain whether the arbitral tribunal on the one hand, and the WTO panel on the other, will consider the indigenous exception as a legal *acquis* under human rights law.

As mentioned by commentators, "it is hard not to be emotional about the underlying issues";¹³¹ and 'photos of baby whitecoat seals remain icons

¹²⁷ F Francioni "The Human Dimension of International Cultural Heritage Law: An Introduction" (2011) 22 *European Journal of International Law* 9 at 15.

¹²⁸ 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.

¹²⁹ 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".

¹³⁰ 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.

¹³¹ S Lester "The WTO Seal Products Dispute: A Preview of Key Legal Issues" 14 *ASIL Insights*, January 13th 2010.

in the animal movement today”.¹³² On the one hand, the preservation of seals and reindeers is a legitimate policy objective; on the other, for those who hunt seals, the hunt is their livelihood. Among the hunters, indigenous peoples are entitled to hunt because of human rights considerations. In Canada, indigenous peoples’ income from sealing “represents between twenty-five and thirty-five percent of their total annual income”.¹³³ The hunt is part of their culture and supports subsistence. The analysed case studies, still pending at the time of this writing, highlight several different clashes: the clash between international economic law and domestic regulatory autonomy;¹³⁴ the clash between an international economic culture and a local indigenous culture; and the clash between animal welfare and traditional cultural practices. It remains to be seen how international economic for a will deal with these complex issues.

CONCLUSIONS

The effective protection of indigenous cultural heritage benefits all humanity. The UNDRIP has furthered the “culturalization of indigenous rights”,¹³⁵ enunciating a number of cultural entitlements of indigenous peoples, and highlighting the linkage between cultural identity and other human rights of indigenous peoples. 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 in international economic law is an almost unexplored field.¹³⁶ This study has shed some light on this complex connection; however, more in depth study is needed to map this interplay further. 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 regulation. 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; indeed a growing number of international law instruments highlight cultural diversity as the common heritage of

¹³² Above n 99, at 86.

¹³³ 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.

¹³⁴ Above n 99 at 89.

¹³⁵ 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.

¹³⁶ 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.

mankind.¹³⁷ In this sense, the UNDRIP has recognised the importance of indigenous culture.

Economic disputes concerning indigenous cultural heritage have been brought before international economic *fora*. Such disputes often present a constitutional dimension because they involve the conflict between fundamental rights, such as cultural rights, property rights, and others. Therefore, international economic *fora* may not be the most suitable *fora* to settle this kind of dispute. International economic *fora* 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.

In conclusion, this paper does not exclude that 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. As Reisman put it almost twenty years ago, discussing the draft of the UNDRIP, "It remains to be seen whether the words in these 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."¹³⁸

¹³⁷ Universal Declaration on Cultural Diversity, November 2nd 2001, UNESCO Rec. Of. Gen. Conf, 31st sess., art. 1.

¹³⁸ M Reisman "International Law and the Inner Worlds of Others" (1996) 9 *Saint Thomas Law Review* (1996) 25 at 30.

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