The third part of the book proposes legal methods to reconcile the possible tensions between cultural governance and economic interests in international law, both *de lege lata* (that is, interpreting the existing legal instruments) and *de lege ferenda* (that is, amending the existing law or proposing the adoption of substantive and procedural provisions). While arguably perfect solutions do not exist to completely reconcile the inevitable tension between cultural heritage and economic development, the next chapter provides specific suggestions for enhancing the current legal tools for resolving this tension.
CHAPTER 7

Challenges and Prospects

The present is not a potential past; it is the moment of choice and action.\(^1\)

SIMONE DE BEAUVIOR

1 Introduction

Far from being self-contained regimes,\(^2\) international cultural heritage law and international economic law have increasingly intersected. While these areas of international law reflect the increasing specialization of this field of law, they are not separate from international law; rather, they maintain continuity with their matrix. In fact, there seems to be conceptual fluidity between international law and its subsystems. On the one hand, the contained systems contribute to the development of the container system. Both international cultural heritage law and international economic law play an active role in the development of the substantive and procedural content of international law. They contribute to the maintenance of peace and security by fostering friendly and prosperous relations among nations, by promoting mutual understanding,

\(^1\) Simone de Beauvoir, *The Ethics of Ambiguity*, Bernard Frechtman (trsl.) (Citadel Press 1948).

\(^2\) The term ‘self-contained regime’ was first used by the PCIJ in the *Wimbledon* case to determine the relationship between conflicting treaty provisions. *Case of the SS Wimbledon (United Kingdom, France, Italy, and Japan v. Germany)* PCIJ Reports Series A No. 1 at 23–24. The ICJ used the expression in a different context. *Diplomatic and Consular Staff in Teheran Case (United States v. Iran)* 1980 ICJ Reports 40, at para. 86. See also WTO AB Report, *United States—Standards for Reformulated and Conventional Gasoline (US–Gasoline)*, WT/DS2/AB/R, adopted 20 May 1996, at 17 (affirming that WTO treaties are ‘not to be read in clinical isolation from public international law’); *Asian Agricultural Products Ltd v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Award, 27 June 1993, para. 21 (highlighting that international investment law ‘is not a self-contained closed legal system ..., but it has to be envisaged within a wider juridical context in which rules from other sources are integrated through implied incorporation methods, or by direct reference to certain supplementary rules, whether of international law character or of domestic law nature’).
free trade, and foreign direct investments among states, and providing generally effective dispute settlement mechanisms to name a few.

More interestingly, international economic law and international cultural heritage law also continuously contribute to the development of international law through their constant interactions. Arbitral tribunals build an ongoing dialogue between international investment law and international cultural heritage law, contributing to the current debate on the unity or fragmentation of international law, and supporting the argument that international law, albeit decentralized, is not an anarchic amalgam of different norms but rather has a structure similar to a system.\(^3\) In parallel, the WTO panels and AB have consistently reaffirmed that international trade law is not a self-contained regime, but an important part of international law. In turn, the container system contributes to the development of the contained systems, and international economic courts refer to international law cases and principles in their decisions.

To say that there is continuity between international law on the one hand, and international economic law and international cultural heritage law on the other, does not imply a sort of pre-established harmony (harmonie préétablie or harmonia praestabilita) between the system and its subsystems.\(^4\) For the German philosopher Gottfried Wilhelm Leibniz (1646–1716), just as two clocks can tick in time with each other without interaction purely because each is properly constructed, so an invisible hand can from the beginning ensure the harmony of each legal system’s development with that of the others. Rather, the argument of this book is that it is up to the interpreters to act as cartographers of international law and to find the appropriate equilibrium within the system.

What strategies are available to avoid collisions between the promotion of foreign investments and free trade on the one hand, and the safeguarding of cultural heritage on the other? After having critically assessed the interplay between international cultural heritage law and international economic law in theory and practice, this chapter now explores a set of different, yet complementary, legal avenues for integrating cultural threads into the fabric of international economic law.

From a procedural perspective, commentators have proposed a range of alternatives moving toward some judicialization of investor–state arbitration and the

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\(^3\) On the concept of legal system or legal order, see Santi Romano, *L’Ordinamento Giuridico*, 2nd edn (Firenze: Sansoni 1946).

parallel simplification of the WTO dispute settlement mechanism.\textsuperscript{5} While a discussion of the various reform proposals is outside the scope of this chapter, it will suffice to mention the fact that some reforms could actually foster the consideration of important policy objectives, including the protection of cultural heritage within international economic law. The establishment of a Multilateral Investment Court, a proposal backed by Canada and the European Union, can contribute to the development of a relatively consistent jurisprudence (even in the absence of binding precedent in international law). Tenured judges may be perceived to be more independent and impartial than \textit{ad hoc} arbitrators. Their background might be in international law and public law rather than commercial law, and this could favor a more balanced assessment of potential clashes between the safeguarding of cultural heritage and the promotion of foreign investments. The establishment of appeals mechanisms, an initiative adopted by countries such as the United States in some of its \textit{BIT}s, can also provide an additional layer of scrutiny.

In parallel, while a number of WTO members have launched an alternative appeals mechanism, the Multi-Party Interim Appeal Arbitration Arrangement, others have emphasized that ‘as the WTO needs to be reformed to be responsive, so too does its dispute settlement function need to evolve as part of the institution.’\textsuperscript{6} While the Appellate Body can contribute to the ‘stability and predictability of the multilateral trading system’, it must also ‘reflect the real interests’ of the WTO members.\textsuperscript{7} The question of substantive overreach, namely, the fact that the Appellate Body has ‘legislated too much’ in favor of liberalizing trade has inevitably affected the policy space of Member States. Accordingly, scholars call for rethinking the role of the Appellate Body to adjudicate disputes ‘one case at a time,’ and not consider its precedents as binding, thus enabling the development of its jurisprudence.\textsuperscript{8}

Although the establishment of a permanent world investment court and the eventual reform of the Appellate Body could improve the delicate balance between cultural and economic interests in international economic law, they do not necessarily offer a magic formula for balancing the various interests at stake; further reflection is needed.

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\textsuperscript{6} Lester, ‘Ending the WTO Dispute Settlement Crisis’, (quoting US Trade Representative, Katherine Tai).

\textsuperscript{7} WTO, ‘Members Commit to Engagement on Dispute Settlement Reform’, \textit{News Item}, 27 April 2022.

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Substantively, this chapter explores several policy options that may help policymakers and adjudicators to reconcile the different interests at stake. The chapter is divided into two parts. The first part discusses the mechanisms that are currently in force (de lege lata) that can help relevant stakeholders to settle disputes with cultural elements. Part I thus focuses on negotiation, applicable law, conflict of law, cultural public order, and treaty interpretation. The second part of the chapter examines the mechanisms that promote a change to the current law (de lege ferenda). Part II focuses on cultural exceptions, counter-claims, amici curiae, amendments, and waivers, as well as institutional cooperation. Since international treaties are renegotiated periodically, there is scope for inserting ad hoc clauses within these treaties and/or amending their provisions or waiving specific obligations for certain periods of time to safeguard cultural heritage. The conclusions then sum up the key findings of the chapter. Not only can these approaches promote the effectiveness of international cultural heritage law but they can also humanize international economic law and foster unity, coherence, and mutual supportiveness between different competing subsets of international law.

2 De Lege Lata

2.1 Negotiating Cultural Disputes

Disputes involving cultural heritage often raise complex political, economic, and cultural issues. While 'adjudication is not designed to address extralegal issues', which are deemed non-justiciable, alternative dispute resolution (ADR) methods (that is, alternative to arbitration and litigation) can be suited to resolve complex disputes involving political, economic, and cultural interests. ADR methods are part and parcel of international economic law. BITs typically include a three to six-month 'cooling-off period' for consultation and negotiation before a claim may be brought. The period runs from the date when the dispute arose or when the host state was formally notified by the investor. The practical purpose of the 'cooling off period' is twofold. On the one hand, the host state is granted the right to be informed

about the dispute and ‘an opportunity to redress the problem’. On the other hand, the cooling-off period can facilitate settlement before positions become entrenched. While the obligation to negotiate is an obligation of means, not of results, failure to observe a treaty’s cooling-off period results in a tribunal declining jurisdiction. Negotiations can take place even after the cooling-off period. Although complete statistics are not available due to confidentiality, almost one-third of ICSID cases and two-thirds of International Chamber of Commerce (ICC) cases are settled by negotiation.

At the WTO, several provisions of the Dispute Settlement Understanding are ‘clearly designed to facilitate settlement’. First, before requesting the establishment of a panel to hear a dispute, a complainant requests consultations. In the course of such consultations, which should be conducted in good faith, ‘members should attempt to obtain satisfactory adjustment of the matter.’ About 40% of the disputes brought before the WTO since its establishment in 1995 have been settled at this stage. For instance, in 1996 the United States initiated consultations regarding Turkey’s taxation of revenues generated from showing foreign movies. While Turkey imposed a 25% tax on box office revenues generated from showing foreign movies, it did not impose any tax on receipts from the showing of local films. Following consultations on this matter, Turkey acknowledged that the practice was incompatible with Article III GATT and agreed to equalize any tax imposed on box office revenues.

Second, Article 3.7 of the DSU provides that ‘[b]efore bringing a case, a Member shall exercise its judgment as to whether action under these procedures would be fruitful.’ It stresses that ‘[t]he aim of the dispute settlement mechanism is to secure a positive solution to a dispute’ and concludes that [a]

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12 *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Jurisdiction, 2 June 2010, para. 31.
14 Id. para. 135.
16 Lester, ‘Ending the WTO Dispute Settlement Crisis’.
17 DSU Article 4.
18 DSU Articles 4.3 and 4.5.
19 *Turkey—Taxation of Foreign Film Revenues*, Notification of Mutually Agreed Solution, WT/DS43/3.
solution mutually acceptable to the parties to a dispute and consistent with
the covered agreements is clearly to be preferred.'

Third, if the parties agree to do so, they can resort to good offices, concilia-
tion, and mediation to settle a dispute.21 A party can request good offices,
conciliation, and mediation at any time. Under this mechanism, the Direc-
tor-General, acting in an ex officio capacity, may help members settle a dispute. As Lester explains, ‘[t]aking all of these provisions into account, it is clear that the DSU as it is currently written is designed to facilitate the settlement of dis-
putes between members, and provides many opportunities to do so.’22

Negotiation is based on cooperative and interest-based approaches. In
abstract terms, it creates a situation where the parties cooperate to reach a sat-
isfactory result. The parties can often reach an agreement if they consider their
underlying interests. Negotiation may also produce more successful outcomes
than the adversarial ‘winner takes all’ approach.23 Negotiation has proven to
be a strategic tool to enhance cultural heritage protection while allowing eco-
nomic activities. For instance, when the Yellowstone National Park, which is a
World Heritage Site, was added to the Danger List in 1995 due to the proposed
development of a gold and copper mine three miles outside the Park bound-
ary, negotiation allowed the US government to eliminate the threat to the Park,
by creatively proposing a land swap to the investor.24

Similarly, in Germany, after strenuous litigation before national courts, a
local community was able to negotiate the relocation of a fortified ancient
church as part of an investment deal.25 By the end of 2008, the town of Heu-
ersdorf in Saxony had to make way for a lignite mine, to fuel a nearby power
plant.26 Although the local inhabitants could not save their village, they saved
the 750-year-old Emmaus Church (Emmauskirche) by relocating it to the
nearby town of Borna. The US mining company had the chance to exploit
its investment, albeit ultimately agreeing to pay the transplantation costs.27

21 DSU Article 5.
22 Lester, ‘Ending the WTO Dispute Settlement Crisis’.
23 Roger Fisher and William Ury, Getting to Yes: Negotiating Agreement Without Giving In
Basis for Limiting Federal Land Designation Pursuant to International Agreements’
2007.
26 Constitutional Court of Saxony, Judgment of 25 November 2005, Vf. 119-VIII-09, available
27 ‘A Holy Journey’. 
The images of the church’s journey crossed boundaries, capturing the imagination of thousands of people and making headlines worldwide.

Conciliation and mediation may also play a useful role in cultural heritage-related disputes. Where the degree of animosity between the parties is so great that direct negotiations are unlikely to lead to a dispute settlement, the intervention of a third party to reconcile the parties may be very practical.\textsuperscript{28} In this sense, several institutions provide the setting for conciliation, including \textit{UNCITRAL}, the \textit{ICC}, and the \textit{ICSID}, although conciliation has been used sparingly. At the \textit{WTO}, conciliation may be requested by any party at any time.\textsuperscript{29}

Mediation of cultural heritage-related disputes is also possible.\textsuperscript{30} Mediation involves the good offices of a neutral third party which facilitates communication between the discussants.\textsuperscript{31} Like negotiation, mediation is guided by the goal of finding a win-win situation for all parties through a process that focuses on the interests of the parties rather than on their positions and searches for creative alternatives to solve the dispute. The Multilateral Investment Guarantee Agency (\textit{MIGA}), a member of the World Bank Group, has mediated disputes between investors on the one hand and host states on the other hand, to help resolve investment claims resulting from state measures. The satisfaction of both parties is maximized, as the settlement constitutes a more-than-zero sum game. As mediators do not have the authority to make a binding decision and do not follow a fixed procedure, they may promote flexible and dynamic dialogue. Furthermore, mediation might involve the participation of other stakeholders.\textsuperscript{32}

\textit{ADR} methods present a number of intrinsic advantages. First, they usually achieve results in a short time frame. Second, they are not required to deal with the past: they ask the parties to look at their future and reshape their rights and responsibilities toward each other. Third, the parties participate in the decision-making process that will ultimately affect them. In these proceedings, all the different interests concerned are disclosed and discussed. Experience shows that agreements entered into through a voluntary process stand out

\textsuperscript{28} John Collier and Vaughan Lowe, \textit{The Settlement of Disputes in International Law} (Oxford: \textit{OUP} 2000) 27.
\textsuperscript{29} \textit{DSU} Article 5.3.
for their durability. The underlying reason is that the parties strongly identify with the achieved result which is perceived as fair. Finally, the confidentiality characterizing ADR mechanisms allows the parties to focus on the underlying interests of a given dispute.

However, ADR methods also present some limits. First, the confidential nature of these methods makes documenting their use and lessons learned difficult. Second, the parties to a given dispute may be ‘disinclined to subject disputes between them’ to ADR mechanisms ‘primarily because bureaucracies, governmental and corporate, may be reluctant to assume responsibility for accepting the provisions of a mediated settlement which afford them less than their publicly voiced demands’. Third, while ADR methods can be useful in those situations where both contracting parties have equal or similar bargaining power, such methods do not seem to be advisable when there are power asymmetries. This is particularly the case when the cultural heritage in question is associated with Indigenous peoples and minorities, for such groups have often been disregarded by the relevant state authorities in the race to attract foreign investment. Without adequate safeguards, ADR may fail to address power imbalances. Furthermore, in prioritizing the interests of the parties present, there is a concern that ADR methods cannot adequately ensure that the disputes are settled ‘in conformity with the principles of justice and international law’ including ‘universal respect for, and observance of, human rights and fundamental freedoms for all’.

Next, from a political science perspective, the specter of a potential dispute with a powerful investor can exert a chilling effect on a government’s decisions to regulate in the public interest. For instance, in 2002, a group of mainly foreign-owned mining companies threatened to commence international arbitration against the government of Indonesia in response to its ban on open-pit mining in protected forests. Six months later, the Ministry of Forestry agreed to change the forest designation from protected to production forests.

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33 Spain, ‘Integration Matters’, 23.
34 Schwebel, ‘Is Mediation of Foreign Disputes Plausible?’
38 Id.
In conclusion, ADR can be cheaper and less time-consuming than arbitration and adjudication, preserving the relations between the investors and traders on the one hand and states on the other.\textsuperscript{39} For instance, Professor Salacuse reports that in the Pyramids case, the state authorities ended up paying higher damages after they refused a tentative settlement.\textsuperscript{40} ADR methods can provide more flexibility than arbitration and litigation, enabling the consideration of political, economic, and cultural questions raised by cultural heritage-related disputes. Creative solutions can include land swaps or the rerouting of investment projects.

However, ADR mechanisms should not be seen as a tool for diluting states’ obligations under international law or as a delaying tactic. In some cases, it may be better to have recourse to arbitration or litigation because the resulting outcome can contribute to the development of international (economic) law and can inhibit further spurious claims on the part of the claimant, or illegal misconduct on the part of the respondent.\textsuperscript{41} Finally, ADR mechanisms are not suitable when there is uneven bargaining power between the parties.

2.2 Conflict and Reconciliation of Norms

International law offers a fertile ground for overlapping norms and conflicting obligations. The multitude of lawmakers and the constellation of courts and tribunals contribute to making international law a vibrant legal system accommodating new fields and actors. The increased proliferation of treaties and the specialization of different branches of international law make some overlapping between the latter unavoidable. At the same time, the chaotic and incremental nature of international law facilitates the potential for conflicts of norms. Although conflicts have been traditionally perceived negatively – as a source of separation or a struggle for definite dominance – the potential for conflicts of norms is inherent in every legal system.\textsuperscript{42} Provided that conflicts are successfully managed, they can foster positive change and strengthen the legal order.\textsuperscript{43} Reconciling seemingly opposing interests, as expressed in norms, can increase the legitimacy and strength of the legal system.

The act of reconciling conflicts, or of perceiving them as compatible, entails a complex interpretative process. Some scholars question whether norms belonging to different international law subsystems are truly comparable.

\textsuperscript{39} Salacuse, ‘Is There a Better Way?’, 176.
\textsuperscript{40} Id.
\textsuperscript{41} Id. 179.
\textsuperscript{42} Joost Pauwelyn, Conflict of Norms in Public International Law (Cambridge: CUP 2003), 12.
According to some scholars, the difference in nature between different branches of law means that they operate on different levels and are thus not amenable to balancing. Accordingly, only human rights courts should be empowered to adjudicate on highly sensitive issues involving cultural rights because they have jurisdiction over the matter and are composed of competent judges.\textsuperscript{44}

However, one may wonder whether a holistic approach might be preferred. Not only would such an approach bring coherence to international law, but it would also favor the ‘humanization’ of the same.\textsuperscript{45} Considering international public law as a ‘universe of interconnected islands’ may have a positive impact on economic globalization, promoting economic, social, and cultural development.\textsuperscript{46} While it is not possible to contest the importance of protecting aliens and traders in international law, it is important to keep in mind that economic interests do not receive absolute protection but may be limited for legitimate reasons in most legal systems.

Even if we accept the assumption that property rights are human rights, the very idea of granting these rights makes it necessary to limit their exercise in situations where such exercise would collide with the rights and protected interests of others. For instance, according to the European Convention on Human Rights, property rights can be limited to the extent necessary ‘to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties’.\textsuperscript{47} Owners have not only rights but also obligations. This is particularly true with regard to the protection of cultural heritage. In case of conflict between state obligations concerning cultural heritage and investors and traders’ rights, adjudicators will be called on to balance these interests through a procedure similar to that established and consolidated by human rights bodies and national constitutional courts.

There may be both apparent conflicts and conflicts in the applicable law. Apparent conflicts indicate those conflicts that are avoidable according to the time-tested criterion of presumption of conformity in the cumulative

\textsuperscript{45} Teodor Meron, \textit{The Humanization of International Law} (Leiden: Martinus Nijhoff 2006).
\textsuperscript{47} See e.g. Article 1(2) Protocol No. 1 to the European Convention on Human Rights.
application of different legal regimes. In many cases, ‘what may seem like a conflict’ may prove to be a mere ‘divergence which can be streamlined by means of ... treaty interpretation.’ Pursuant to the process of treaty interpretation and other legal techniques, many apparent conflicts can be resolved or even prevented. The attempt to prove the compatibility of two norms – when there is at least one way of complying with all their requirements – has been defined as the ‘reconciliation’ of norms.

However, other conflicts may have a genuine nature. Genuine or material conflicts of norms include two species of conflicts: inherent normative conflict and conflict in the application of the relevant norm. When a norm constitutes, in and of itself, a breach of another norm, there is an inherent normative conflict. A conflict in the application of norms arises when a party to two treaties cannot simultaneously comply with its obligations under both treaties; compliance with one norm entails noncompliance with the other. With regard to the relationship between the protection of cultural heritage and the promotion of trade and FDI, inherent normative conflicts, albeit theoretically conceivable, will rarely if ever appear in practice. Instead, both apparent conflicts and conflicts in the applicable law have often arisen in the context of cultural heritage-related trade and investment disputes. Often, conflicts in the application of norms arise because conflict prevention and management of apparent conflicts have not been attempted or have failed. Thus, both kinds of conflict deserve scrutiny, and theoretical effort is needed to reconcile the relevant interests.

The Vienna Convention on the Law of Treaties establishes a framework that governs the interplay between different international law rules. In particular, it addresses three different relationships: (1) the relationship between two or more treaties relating to the same subject matter; (2) that between a treaty and jus cogens; and (3) that between a treaty and other relevant rules of international law.

Whenever two or more norms deal with the same subject matter, generally accepted techniques of interpretation and conflict resolution in international

48 Pauwelyn, Conflict of Norms in Public International Law, 6.
law require that ‘priority should be given to the norm that is more specific’ (*lex specialis derogat legi generali*)\(^{51}\) or more recent (*lex posterior derogat priori*).\(^{52}\)

However, such general rules may not be wholly adequate to govern the interplay between treaty regimes, because international economic law and international cultural heritage law do not exactly overlap nor does the one contain the other. Rather, they have different scopes, aims, and objectives.\(^{53}\) In particular, international economic law aims to govern economic relations between states as well as between these and alien economic actors. It aims at fostering peaceful and prosperous relations among nations. International cultural heritage law is a more recent branch of international law that has been codified since the end of WWII. It aims at governing the international dimension of cultural phenomena, safeguarding heritage, and promoting the restitution of stolen cultural goods. International cultural heritage law can promote cultural cooperation and mutual understanding among nations, thus contributing to international peace and security.

There is no hierarchical relationship between international economic law and international cultural heritage law. The relevant UNESCO instruments do not set out a hierarchical relationship between international cultural heritage law and other components of public international law.\(^{54}\) Unless a cultural norm constitutes *jus cogens*, it is difficult to foresee and govern the interaction between different legal regimes.\(^{55}\)

The Vienna Convention on the Law of Treaties defines *jus cogens* as ‘a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character’.\(^{56}\) While this provision sets a legal framework on how peremptory norms work, it does not specify which norms belong to *jus cogens*.\(^{57}\) In fact,

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\(^{54}\) See e.g. CCD Article 20.


\(^{56}\) VCLT Article 53.

some authors contend that *jus cogens* is not a scientific reality.\(^{58}\) In this vein, Koskenniemi contends that *jus cogens* ‘ha[s] no clear reference in this world … Instead of meaning, [it] invokes a nostalgia for having such a meaning.’\(^{59}\) However, the concept of *jus cogens* is positive law.\(^{60}\) Generally accepted examples include the prohibition of apartheid, the use of force, slavery, torture, piracy, and genocide.\(^{61}\) Given the legal uncertainty surrounding this concept, it is up to international courts to decipher the complex tapestry of international law in determining its meaning.

Concerning the relationship between a treaty and *jus cogens* norms, Article 53 of the *VCLT* states that a treaty shall be void ‘if, at the time of its conclusion, it conflicts with a peremptory norm of general international law’. In parallel, Article 64 of the *VCLT* provides that ‘if a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.’ Accordingly, if an international economic law treaty conflicted with a peremptory norm, it would be null.\(^{62}\) Alternatively, some argue that any violation of peremptory norms would automatically annul any contrary treaty provisions.\(^{63}\) However, this conclusion is not supported by the *VCLT* which provides that ‘[i]n cases falling under Articl[e] … 53, no separation of the provisions of the treaty is permitted.’\(^{64}\)

However, the hypothesis that investment treaties, WTO-covered agreements, or some of their norms are incompatible as such with *jus cogens* seems an overstatement. International investment treaties and the WTO-covered agreements generally include vague and open-ended provisions, giving states parties flexibility in the implementation of their international economic law obligations. Because of the character of international economic law and the subject matter it covers, it is difficult to envisage a direct conflict between

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62 VCLT Article 53.
64 VCLT Article 44(5).
international economic law and peremptory norms. Rather, some interpretations of international economic law may be incompatible with peremptory norms. Therefore, any such interpretation should be avoided. In most cases, the good faith interpretation of international economic law will resolve all or most apparent and direct conflicts with peremptory norms. In other words, international economic courts should read international economic law provisions so as to avoid conflicts with peremptory norms.

With regard to the relationship between a treaty obligation and other international agreements, international law comes into play under Article 31(3)(c) of the VCLT, which provides that the treaty interpreter shall take into account ‘any relevant rules of international law applicable in the relations between the parties’. Pursuant to Article 31(3)(c) of the VCLT, ‘[e]very treaty provision must be read not only in its own context, but in the broader context of general international law, whether conventional or customary.’ International law should guide the interpretation of international economic law. Accordingly, Article 31(3)(c) of the VCLT reflects a principle of integration, emphasizing the unity of international law and requiring that rules should not be considered in isolation from general international law.

2.3 The Applicable Law

Deciding cases according to equity has a long history in international adjudication and might be fruitful in cases dealing with cross-cutting themes. Nonetheless, the parties often prefer adjudicating their disputes on the basis of law rather than equity because equity is perceived as leading to uncertain and unpredictable outcomes, operating outside of the law (extra legem) or overcoming the law (contra legem). While arbitral tribunals may be asked to adjudicate cases on the basis of equity (ex aequo et bono), this is not possible at the WTO.

65 VCLT Article 31(3)(c).
67 Statute of the International Court of Justice, Article 38.2. League of Nations, Statute of the Permanent Court of International Justice, 16 December 1920, Article 38.4.
68 Anastasios Gourgourinis, Equity and Equitable Principles in the World Trade Organization Addressing Conflicts and Overlaps between the WTO and Other Regimes (London: Rutledge 2016).
As most investment arbitrations and the whole of WTO adjudication are based on law, it is worth examining the applicable law, the sources of such law, and whether the law can accommodate equity within itself (infra legem). While states are generally bound in their behavior by international law, what is the law applicable in their relations before international economic courts? What are the sources of law? Can law accommodate equity within itself? This section addresses these questions by discussing the applicable law, that is, the law governing the relations among the parties and that applies to their disputes, the sources of such law, and how principles of equity can be part of the applicable law.\(^{70}\)

Within the WTO dispute settlement system, the sources of law are given by the covered agreements, customary law, and general principles of law, as well as judicial decisions and the teachings of the most qualified jurists as ‘subsidiary means for the determination of rules of law’.\(^{71}\) The principal sources of WTO law are the Marrakesh Agreement Establishing the World Trade Organization, the WTO-covered agreements, and the international agreements they incorporate by reference.\(^{72}\) WTO courts rarely use the term ‘applicable law’ because they basically apply the detailed provisions of the DSU and the covered agreements.

The question as to whether, and if so to what extent, other international agreements not referred to in a WTO agreement can be a source of international trade law is a controversial issue. Can other such treaties provide rights and obligations for states that can be invoked before international economic courts? Some scholars including Picone, Ligustro, and Francioni argue that international economic courts have incidental jurisdiction, that is, the possibility to incidentally apply other treaties.\(^{73}\) According to this view, international economic courts have the inherent powers to briefly

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\(^{71}\) Statute of the International Court of Justice, Article 38.


settle a matter incidentally (*incidenter tantum*) if addressing this matter is relevant for adjudicating the principal claims and provided that the other treaty to be applied is binding to the parties to the disputes. The value of this incidental statement would be that of an *obiter dictum*. Yet, the incidental reference to, and application of, the other treaty would contribute to the harmonious development of international law. The *ICJ* has made use of this incidental jurisdiction in the *Genocide* case, where it considered that its jurisdiction ‘d[id] not prevent the Court from considering, in its reasoning, whether a violation of international humanitarian law or international human rights law has occurred to the extent that this is relevant for the Court’s determination of whether or not there has been a breach of an obligation under the Genocide Convention’.

This passage suggests a role for other treaties outside the Genocide Convention beyond mere interpretative support. Similarly, Pauwelyn has argued that claims based on other international treaties cannot be brought before international economic courts, but could be invoked as a defense against an alleged breach of international economic law. Undoubtedly, international economic law is part and parcel of international law, and its effectiveness and legitimacy depend on how it relates to other international law norms. Certainly, other international treaties can play a significant role in the interpretation of international economic law.

Yet, one of the main functions of the WTO dispute settlement system is maintaining ‘a proper balance between the rights and obligations of Members’ under the covered agreements and ‘clarify[ing] the existing provisions of those agreements in accordance with customary rules of treaty interpretation.’ The *DSU* explicitly cautions the panels and the AB against judicial activism: in fact, ‘in their findings and recommendations, the panel and the Appellate Body cannot add to or diminish the rights and obligations provided in the covered agreements.’ As ‘the covered agreements are full of gaps and constructive ambiguity, there is much need for clarification of the existing provisions.’

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75 Pauwelyn, *Conflict of Norms in Public International Law*, 241.
76 See Section 2.5 below.
77 *DSU* Article 3.3.
78 *DSU* Article 3.2.
79 *DSU* Article 19.2.
Therefore, non-consensual sources of international law such as customary law, general principles of law, and subsidiary sources thus come into play.

The DSU explicitly refers to customary international law on treaty interpretation and makes it applicable in the context of WTO adjudication.81 Questions remain as to the applicability of other rules of customary international law.82 As the panel held in Korea—Procurement, '[c]ustomary international law applies generally to the economic relations between the WTO Members. Such international law applies to the extent that the WTO treaty agreements do not “contract out” from it.'83 The WTO courts have frequently referred to customary international law in their jurisprudence.84 As mentioned in Chapter 1, several norms requiring the protection of cultural heritage in times of war have achieved customary law status and have also been codified in widely ratified treaties.85 In addition, customary norms of international law requiring the protection of cultural heritage in times of peace are also emerging and have been codified in widely ratified UNESCO conventions and human rights treaties.86 Moreover, various jurisdictions have repeatedly acknowledged the customary nature of the obligations contained in such instruments.

General principles of law are also ‘sources of law applicable in WTO adjudication.’87 Like customary international law, they fill the gaps left by treaties.88 WTO courts have often used general principles of law ‘as a basis for their rulings or in support of their reasoning.’89 For instance, several reports

81 DSU Article 3.2.
84 Pauwelyn, Conflict of Norms in Public International Law, 210–211 and 470.
85 Since 1996, the International Committee of the Red Cross (ICRC) has identified a number of customary norms of international humanitarian law. Among such rules, seven norms relate to cultural heritage protection: Rule 38 (Attacks Against Cultural Property); Rule 39 (Use of Cultural Property for Military Purposes); Rule 40 (Respect for Cultural Property); Rule 41 (Export and Return of Cultural Property in Occupied Territory); Rule 51 (Public and Private Property in Occupied Territory); Rule 52 (Pillage); Rule 61 (Improper Use of Other Internationally Recognized Emblems).
89 Id.
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refer to the obligation to implement the covered agreements in good faith (*pacta sunt servanda*). In *Korea—Procurement*, the panel referred to the good faith (*bona fides*) principle as a general principle of public international law that must be taken into account by WTO courts.90

If equity is not a source of international law of its own under Article 38 of the ICJ Statute, it can be considered a general principle of law requiring adjudicators to fill the gaps in the law or concretize the open-endedness of its norms.91 It enables adjudicators to decide the merits of an admissible case even in the absence of suitable law, the vagueness or ambiguity of rules, or inconsistencies in the law. Recourse to equity within the law enables adjudicators to reach decisions, thus avoiding *non liquet* and contributing to the development of international law.92 Most IIA treaties include the fair and equitable treatment standard, and equitable considerations are thus built within the structure of international investment law. In any case, the principle of equity should not be interpreted as merely protecting the interests of investors and traders. Rather, this concept requires balancing opposing interests and values.93

As Mavroidis highlights, ‘in WTO adjudication, general principles of law have been used extensively, though in most cases as interpretative elements for the sources of WTO law.’94 In theory—but as yet, not in practice—general principles could be used as factors for inserting cultural concerns into the fabric of international economic law, as general principles of law already require the protection of significant cultural heritage and elements of cultural diversity. In the context of cultural heritage-related disputes, the principle of intergenerational equity might well come into play. This principle posits that every generation holds natural and cultural heritage in common with members of the past, present, and future generations. Accordingly, this principle requires generations not to consume the stock of natural and cultural resources but to use and safeguard such heritage responsibly, thus ‘meet[ing] the needs of the present without compromising the ability of future generations to meet

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90 Panel Report, *Korea—Procurement*, para. 7.93.
94 Mavroidis, ‘No Outsourcing of Law?’, 443.
their own needs.\textsuperscript{95} Policymakers can thus govern the market to preserve cultural heritage at a level that allows for cultural sustainability and intertemporal justice.\textsuperscript{96}

Investment disputes are to be resolved on the basis of law unless the parties have expressly agreed otherwise.\textsuperscript{97} The sources of international investment law include treaties, customary law, general principles of law, and subsidiary sources of law. While international investment agreements tend to be the principal source to be applied in investment treaty disputes, arbitral tribunals also generally refer to general principles and customary law in their jurisprudence. For instance, with regard to customary international law, the \textit{Grand River} Tribunal could not ‘avoid noting the strong international policy and standards articulated in numerous written instruments and interpretative decisions that favor state action to promote ... [the] rights and interests of Indigenous peoples’.\textsuperscript{98}

Several \textit{BITs} contain a composite choice of law clause, typically including treaty rules, host state law, and customary international law. For instance, the 2012 \textit{US Model BIT}\textsuperscript{99} provides that in certain cases, ‘the Tribunal shall decide the issues in dispute in accordance with this treaty and applicable rules of international law.’\textsuperscript{100} The \textit{USMCA} similarly states that ‘the Tribunal shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law.’\textsuperscript{101} For cases brought before \textit{ICSID}, the \textit{ICSID} Convention provides that a tribunal will apply the law selected by the parties or, in the absence of such a choice, the law of the host country and such principles of international law as are applicable.\textsuperscript{102}

Such clauses do not generally extend the jurisdiction of the arbitral tribunals. Arbitral tribunals are of limited jurisdiction and cannot adjudicate

\textsuperscript{96} David Throsby, \textit{Economics and Culture} (Cambridge: CUP 2001).
\textsuperscript{100} Id. Article 30(1).
\textsuperscript{101} USMCA Article 14.D.9.
\textsuperscript{102} ICSID Convention Article 42.
claims based on different treaty regimes. If they did so, their award would be beyond their legal power (ultra vires) and could be challenged under Article V of the New York Convention, or, if the case were to be adjudicated at the ICSID, under Article 52(1)(c) of the ICSID Convention, since the tribunal had ‘manifestly exceeded its powers’. In *Grand River*, the Arbitral Tribunal affirmed: ‘This is a Tribunal of limited jurisdiction; it has no mandate to decide claims based on treaties other than NAFTA.’ To hold otherwise would indeed transform the NAFTA ‘into an unqualified and comprehensive jurisdictional regime, in which there would be no limit ratione materiae to the jurisdiction of a tribunal established under [NAFTA] Chapter 11.’

If the jurisdictional mandate of an arbitral tribunal is clearly limited, why have treaty-makers inserted clauses referring to ‘applicable rules of international law'? Persuasively, eminent authors have argued that international law should always apply, as either national law is consistent with it, or if it is not, then international law supersedes national law. When the constitution of the host state opts for monism granting primacy to public international law, the latter permeates the law applicable to the contract. Even in states that adopt the dualist theory and require international law to be ‘translated’ into domestic law, arbitrators apply norms of international law when they apply the national norms which convey them. As Professor Kreindler points out, ‘Thus, even where the parties have not agreed, directly or indirectly, to the application of international law “rules” or “principles”, international law may already be internally applicable as part of the domestic law chosen by the parties.’

For instance, in *Maffezini v. Spain*, the choice of law clause in the Argentina–Spain BIT expressly mentioned the applicability of the law of the host state. In this case, an Argentine investor complained, *inter alia*, that the Spanish authorities had pressured the company to invest before the Environmental

103 New York Convention Article V.
104 ICSID Convention Article 52(1)(c).
105 *Grand River v. United States*, Award, para. 71.
106 Id. (internal reference omitted).
Impact Assessment (EIA) process was finalized and before its implications were known. Therefore, according to the claimant, the Spanish authorities would have been responsible for the additional costs resulting from the EIA. The Arbitral Tribunal dismissed the claims concerning the EIA: ‘the environmental impact assessment procedure is basic for adequate protection of the environment and the application of appropriate environmental measures. This is true not only under Spanish ... Law but also increasingly so under international law.’

If the host state that is party to the investment treaty dispute has ratified a relevant UNESCO Convention, the pertinent provisions of the given UNESCO Convention would become relevant. In the Glamis Gold case, the fact that the US is a party to the WHC was of relevance; the arbitrators took the WHC into account when considering the protection that the US afforded to Indigenous cultural heritage, citing Article 12 of the WHC. The Tribunal pointed out: ‘The Convention makes special note that the fact of a site’s non-inclusion on the register does not signify its failure to possess “outstanding universal value.”’

The Tribunal thus upheld the legitimacy of California’s regulation protecting Indigenous cultural heritage. The Parkerings Tribunal also referred to the WHC, to which Lithuania was a party, to establish whether there was any likeness between two competing projects. The Tribunal considered that a world heritage site differed from other areas, because the former had outstanding and universal value while the latter did not. It thus concluded that the Municipality of Vilnius had legitimate reasons to prefer the Dutch project (that would build a parking area far from the Cathedral) to the Norwegian project (that would have built the parking area under the church) because the former prevented any damage to the world heritage site.

If the relevant treaty provision directs the arbitral tribunal to apply domestic law, some scholars have pointed out that a state could bring a counterclaim against an investor for breach of the domestic (cultural) law. Investors’ obligations can arise out of domestic law. Analogously, if a given investment treaty protects only investments made ‘in accordance with the laws’ of the

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111 Id. para. 67.
112 Glamis Gold v. United States, Award, footnote 194.
113 Parkerings-Compagniet AS v. Republic of Lithuania, Award, ICSID Case No. ARB/05/8, 11 September 2007, para. 392
host state, where the operation of an investment occurs in breach of the host state’s cultural heritage laws, the host state could use this circumstance as a substantive defense.\textsuperscript{116}

What seems clear is that arbitral tribunals require substantiation of cultural claims: the \textit{Grand River} Tribunal affirmed that it was ‘respectful of the cultural patterns that inform business relations among First Nation peoples’ and did not question that ‘the written or unwritten laws of Indigenous peoples could be the basis for establishing an enterprise for the purposes of \textit{NAFTA}.’\textsuperscript{117} However, it required evidence of this law: ‘mere assertions of the existence of Seneca law and custom, just as mere assertions of other forms of law, are not enough.’\textsuperscript{118} Similarly, when the Arbitral Tribunal examined whether a norm of customary law requires governmental authorities to consult Indigenous peoples on governmental policies significantly affecting them, it recalled the number of international law instruments mentioned by the claimants which feature such a norm.\textsuperscript{119}

Another substantive point that deserves further investigation is the interplay between international economic law and peremptory norms of international law (\textit{jus cogens}). One may legitimately wonder whether international economic courts can shy away and limit the focus of their analysis to economic matters only when peremptory norms of international law are relevant. In the infamous 1857 judgment, \textit{Dred Scott v. Sandford},\textsuperscript{120} the US Supreme Court held that the Bill of Rights protected the right of slaveholders to their property, including slaves. The Court did not focus on the rights of the individuals affected by slavery, a crime against humanity. Far from responding to emerging societal needs of equality and freedom, on that occasion, not only did the Court miss an opportunity, but it also contributed to the unrest that eventually led to the 1860–1865 American Civil War. Analogously, by closing the doors to peremptory norms of international law or transnational public policy and focusing on economic matters only, international economic courts risk undermining the unity of international law and the cogency of human dignity, thus contributing to international conflicts.

\textsuperscript{116} Jorge Viñuales, \textit{Foreign Investment and the Environment in International Law} (Cambridge: CUP 2012).
\textsuperscript{117} \textit{Grand River v. United States}, Award, para. 103.
\textsuperscript{118} Id.
\textsuperscript{119} Id. para. 210.
\textsuperscript{120} \textit{Dred Scott v. John Sandford}, 60 U.S. (19 How.) 393 (1857).
2.4 Transnational Public Policy

Whereas public policy reflects the fundamental principles of a given society, transnational public policy (or *ordre public international*) reflects the fundamental interests and values of the international community. Transnational public policy refers to those principles that receive an international consensus as to universal standards and includes laws with a higher status than the ordinary rules of international law (*jus cogens*). Rather than being an autonomous source of international law, transnational public policy expresses a type of norm of superior quality that can be endorsed in any of the typical sources of international law, be they customary, treaty, or general principles of law.

As to the content of transnational public policy, this is generally identified in the prohibition of apartheid, drug trafficking, corruption, slavery, piracy, and terrorism. Arbitral tribunals have stressed that some caution is needed to ‘check the objective existence of a particular transnational public policy rule’ and have generally identified such norms by looking at international conventions, state practice, comparative law, and the jurisprudence of international courts and tribunals.

While the relationship between *jus cogens* and transnational public policy remains to be fully explored, the two notions seem to overlap to a certain extent. According to some scholars, peremptory norms constitute the international public order: ‘International *jus cogens* and international public policy are synonyms.’ Certainly, several international public policy norms have acquired *jus cogens* status and go beyond the traditional physics of international law. Not only are such norms ‘of greater specific gravity than others’, but they seem to include a metaphysical component, the idea that they are so fundamental to the common good as to pre-exist and trump any contrary norm. Transnational public policy and peremptory norms insert a hierarchy

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in the sources of international law, prioritizing fundamental values and adopting a humanist conception of law according to which international law is at the service of human beings. Transnational public policy and *jus cogens* reflect the aspiration of the international community to ‘a greater unity’, overcoming ‘juxtaposed egoisms’ as well as political and economic differences in the pursuit of the common good.\(^{128}\) By limiting economic freedoms, they safeguard the interests of all.\(^{129}\) They protect human rights rather than state interests, thus limiting state autonomy.\(^{130}\)

Within the *WTO*, peremptory norms are often dealt with informally: should a dispute arise, *WTO* Members can make use of the public morals exceptions (under *GATT* Article XX(a), or *GATS* Article XIV(a), respectively) or the security exception (under *GATT* Article XXI).\(^{131}\) By contrast, older *IIAs* do not include such general exceptions. Only in the past decades have such *GATT*-style provisions become common in investment treaties.\(^{132}\) However, this does not mean that transnational public policy has not been relevant in international investment law and arbitration. Moreover, exceptions could shrink, rather than expand, states’ discretion.\(^{133}\)

This section investigates how transnational public policy can accommodate cultural concerns and thus constitute a tool for inserting cultural concerns in the operation of international investment law and arbitration. The discussion is also relevant for gradually expanding the concept of public morals, which *WTO* courts interpret as including elements of public order in the operation of international trade law.

Within international investment law and arbitration, transnational public policy always applies irrespective of whether a specific treaty provision mandates it or not. In fact, because transnational public policy aims at maintaining the integrity of the international legal order, it must always apply.\(^{134}\) As noted by Douglas, ‘[t]he concept of international public policy vests a

\(^{128}\) Id. 422.
\(^{131}\) See sections 5.6 and 5.7 above.
tribunal with a particular responsibility to condemn any violation regardless of the law applicable to the particular issues in dispute and regardless of whether it is specifically raised by one of the parties. \textsuperscript{135} If an arbitral tribunal finds a breach of international public policy, the claims will be inadmissible. \textsuperscript{136} In fact, \textquoteleft no legal effect can be given to a transaction involving the transgression of a peremptory norm of international law.\textquoteright \textsuperscript{137} For instance, if an investment violated a \textit{jus cogens} norm, such as a private military company committing genocide, or a business using slave labor, an arbitral tribunal would not have jurisdiction to hear a case dealing with such illegal investments. \textsuperscript{138}

This section proceeds as follows. First, it highlights that some norms belonging to international cultural heritage law may present a peremptory character and thus are applicable in the context of cultural heritage-related international economic disputes as a matter of transnational public policy. Second, this section briefly examines how transnational public policy has operated in theory. Finally, the section concludes discussing how transnational public policy operates in practice.

2.4.1 The Emergence of an \textit{Ordre Public Culturel}

Some elements of international cultural heritage law have the character of \textit{jus cogens} or may acquire it, because of the dynamic nature of \textit{jus cogens}. In fact, new peremptory norms may arise and may modify the existing rules. \textsuperscript{139} \textit{Jus cogens} already includes self-determination, the prohibition of apartheid and discrimination, and core elements of cultural rights. Because \textit{jus cogens} is dynamic, it can expand to include the prohibition of cultural genocide. In any event, peremptory norms relating to the protection of human rights and cultural heritage already constitute part of transnational public policy and form a distinct \textit{ordre public culturel}.

The systematic violation of Indigenous Peoples\textquoteright cultural identity and their right to determine their economic, social, and cultural development can violate their right to self-determination \textsuperscript{140} and ultimately lead to the cultural genocide.

\textsuperscript{136} Id. 181.
\textsuperscript{137} Id.
\textsuperscript{138} Id.
\textsuperscript{139} VCLT Articles 64 and 53.
\textsuperscript{140} International Covenant on Civil and Political Rights, 16 December 1966, 6 ILM 368, 999 UNTS 171, Article 1.1; International Covenant on Economic, Social, and Cultural Rights, 16 December 1966, 6 ILM 360, 993 UNTS 3, Article 1.1.
of an Indigenous group. Far from being marginal, cultural identity constitutes the essence of Indigenous Peoples. While cultural entitlements and the right to self-determination are conceptually different, they are mutually supportive, as Indigenous peoples may pursue alternative forms of development according to their worldview.141

Respect for the principle of self-determination ‘is one of the purposes of the United Nations’ and ‘one of the basic principles of international law’142 This principle is also commonly regarded as an erga omnes obligation,143 if not a ‘peremptory norm of general international law’.144 As is known, the right to self-determination certainly belongs to customary international law, but it is also part and parcel of positive law as Articles 1 of the ICCPR and the ICESCR reaffirm the right to self-determination. Both provisions clarify 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’.145 While some countries were reluctant to recognize the right of Indigenous peoples to self-determination because they feared that such recognition could affect state sovereignty, in the end, the UNDRIP has recognized that Indigenous peoples have the right to self-determination.146 This provision is generally interpreted as recognizing internal self-determination, that is, the right of Indigenous peoples to make meaningful choices in matters of concern to them, and to enjoy some autonomy within the existing state.147 If one considers self-determination to be a norm of jus cogens, the fact that Indigenous peoples exercise internal self-determination does not make it a lesser right. In this regard, UNDRIP requires states to consult and cooperate in good faith with Indigenous peoples

144 Orakhelashvili, Peremptory Norms in International Law, 51 (noting that ‘[t]he right of peoples to self-determination is undoubtedly part of jus cogens because of its fundamental importance’); Ian Brownlie, Principles of Public International Law, 7th ed. (Oxford: OUP 2008) 511, 582.
145 ICCPR Article 1.2; ICESCR Article 1.2.
146 UNDRIP Article 3.
147 James Summers, Peoples and International Law (Leiden: Brill/Nijhoff 2013) 497.
to obtain their free, prior, and informed consent before adopting measures that may affect them. The right of Indigenous peoples to be consulted can be conceptualized as an expression of the right to self-determination and as a norm of international public policy. The principle of self-determination requires Indigenous peoples to be ‘in control of their own destinies’.

If arbitral tribunals failed to consider customary law norms of *jus cogens* status protecting the inherent rights of Indigenous Peoples, this would not depose favorably on the quality and overall viability of such jurisprudence. From a post-colonial perspective, the absence of concern for Indigenous peoples’ right to self-determination would risk replicating colonial patterns of dispossession. More fundamentally, such jurisprudence would be at odds with emerging jurisprudence of regional human rights courts and the quasi-jurisprudence of UN human rights treaty bodies.

Over the past thirty years, there has been a robust development of jurisprudence regarding the cultural, land, and resource rights of Indigenous peoples under international law. Such jurisprudence generally emphasizes Indigenous peoples’ unique and enduring relationship to their land. For Indigenous peoples, ‘the ability to reside communally on their lands … is inextricably tied to the preservation of communal identity, culture, religion, and traditional modes of subsistence.’ As the Inter-American Court of Human Rights explained, not only does land constitute the principal means of subsistence for Indigenous peoples, but it also shapes their cultural identity: the close ties of Indigenous peoples to the land ‘must be recognized and understood as the fundamental basis for their cultures, their spiritual life, their integrity, and their economic survival.’

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151 Id. 823.

152 Id. 814.


154 IACtHR, *Case of the Mayagna (Sumo) Awas Tigni Community v. Nicaragua*, Judgment, 21 August 2001, para. 149, IACtHR (ser. C) No. 79.
The jurisprudence of arbitral tribunals is gradually conforming to these broader trends. For instance, in *Bear Creek Mining Corporation v. Peru*, in his Partial Dissenting Opinion, Arbitrator Philippe Sands highlighted ‘the distinctive contributions of Indigenous peoples to the cultural diversity and social and ecological harmony of humankind and to international cooperation and understanding.’\(^{155}\) Significantly, in *Álvarez y Marín Corporación v. Panama*, the Arbitral Tribunal declined jurisdiction because the investors had not complied with the domestic law of the host state to safeguard Indigenous peoples’ rights.\(^{156}\) Although the Tribunal did not refer to *jus cogens*, it noted that the Law establishing the Comarca and the Panamanian Constitution aimed at protecting Indigenous Peoples’ cultural, economic, and social well-being.\(^{157}\) It also considered the commonality of land as a fundamental condition for the survival and continuity of the ethnic identity of Indigenous peoples.\(^{158}\)

The prohibition of racial discrimination constitutes a norm of *jus cogens*. For instance, *GATT* Article III requires that municipal regulation affecting trade must not discriminate across domestic and imported like products. Can a WTO member prohibit the sale of racist papers under international trade law? The best view would require considering racist and non-racist papers as different products; accordingly, any regulation distinguishing the two products would necessarily be in full conformity with *GATT* Article III. But even if consumers considered racist and non-racist papers to be like products, and thus regulation distinguishing such products resulted in a violation of *GATT* Article III, the WTO member ‘might, if challenged, invoke *jus cogens* under *GATT* Article XX’\(^{159}\). In parallel, an Arbitral Tribunal held that the domestic law of an Arab country that discriminated against and boycotted companies with business in Israel was contrary to international public policy. According to the Tribunal, such law implicated religious and racial discrimination and thus was inapplicable to the dispute on transnational public policy grounds.\(^{160}\)

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155 *Bear Creek Mining Corp. v Peru*, Partial Dissenting Opinion, 12 September 2017, para. 7 (internal references omitted).


157 Id. paras 318–319.

158 Id., para. 327 (‘Las tierras comunales son consideradas elemento fundamental para la supervivencia y perpetuación de la identidad étnica de los pueblos indígenas.’)

159 Mavroidis, ‘No Outsourcing of Law?’, 426.

Some core elements of cultural rights may have achieved peremptory character. According to Simma and Kill, ‘norms relating to economic, social, and cultural rights could also constitute rules applicable in the relations among States, even if there [was] no independent treaty obligation running between the States in question ... [T]he fact that the Vienna Convention's preamble proclaims the state parties’ universal respect for, and observance of, human rights and fundamental freedoms for all may tip the scale toward a broader conception of applicability.”\(^{161}\) In *Bear Creek Mining Corporation v. Peru*, in his Partial Dissenting Opinion, Arbitrator Philippe Sands pointed out that ‘human rights ... are complemented by an obligation on all parts, public and private parties, not to engage in activity aimed at destroying such rights.’\(^{162}\)

Some advocates of Indigenous Peoples’ rights are increasingly conceptualizing the violations of such rights as ‘cultural genocide.’\(^{163}\) However, although cultural genocide has been a persistent international legal issue, international law remains impervious to the same.\(^{164}\) International law does not formally recognize the concept of cultural genocide, even though international lawyers have coined the term and investigated it for decades. Defined as ‘the purposeful weakening and ultimate destruction of cultural values and practices of feared out groups’,\(^{165}\) the idea of ‘cultural genocide’ was famously elaborated by the Polish lawyer Raphael Lemkin (1900–1959) in the aftermath of WWII. Because ‘what makes up a group's identity is its culture’, Lemkin believed that ‘the essence of genocide was cultural.’\(^{166}\) His unpublished works examined the linkage between colonialism and genocide.\(^{167}\) Some authors have looked


\(^{162}\) Id. (quoting *Urbaser S.A. v. Argentine Republic*, Award, ICSID ARB/07/26, 8 December 2016, para. 1199).


at ‘cultural genocide as a potential precursor to physical genocide’, others have considered it as ‘wanton acts of cultural annihilation in the wake of, even independently from, genocide’. Nonetheless, the concept of cultural genocide was not included in the Genocide Convention, which limits its definition of genocide to violence committed ‘with intent to destroy, in whole or in part, a national, ethnical, racial or religious group’. In the Genocide case, Bosnia and Herzegovina alleged, inter alia, that the Serbian forces’ attempt ‘to eradicate all traces of the culture of the protected group through the destruction of historical, religious, and cultural property’ amounted to a form of genocide under the Genocide Convention. The Court considered that there was ‘conclusive evidence of the deliberate destruction of the cultural and religious heritage of the protected group’. However, in the Court’s view, the destruction of cultural heritage ‘did not fall within the categories of acts of genocide set out in Article 11 of the [Genocide] Convention’.

Reportedly, the inclusion of cultural genocide as part of the Genocide Convention was contested by States fearing prosecution for their treatment of minorities and Indigenous peoples. Although Indigenous peoples can be comprehended under the definition of ‘national, ethnical, racial or religious groups’ that must be protected against genocide, the Genocide Convention is inapplicable whenever the intention to physically destroy the group is lacking. Analogously, a draft provision on cultural genocide was debated during the travaux préparatoires of the UNDRIP, but ultimately not included in its text. Nonetheless, the UNDRIP substantially prohibits such genocide, recognizing that

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172 Id. para. 320.
173 Id. para. 344.
174 Id.
176 Id.
‘Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture.’

Finally, the prevention of illicit trafficking of cultural property is linked to the prevention of terrorism and the maintenance of international peace and security. The prohibition of terrorism and piracy are classic examples of *jus cogens* and grounds of transnational public policy. Even before the UN Security Council adopted specific resolutions linking the safeguarding of cultural heritage to the maintenance of peace and security, domestic courts have highlighted the existence of *ordre public culturel* relating to the prevention of illicit trafficking of antiquities and the restitution of cultural property to the state of origin. In fact, the existence of such *ordre public culturel* has been established by referring to the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property, even before its ratification by the relevant parties. The municipal courts thus considered that this international Convention contained ‘general principles capable of nourishing the international public order of States which had not ratified [it]’.

For instance, the Swiss Supreme Court recognized the existence of international public order in the field of cultural property in cases concerning the restitution of cultural goods. The regulatory framework protecting such goods against looting is deemed to express the international public order: ‘When, as in this case, the request relates to the return of cultural property, the ... judge must be careful to take into account the interest of the international community ... tied to the protection of cultural property. These standards, which derive from a common inspiration, constitute ... the expression of an international public order in force or in formation ... these norms ... concretize the imperative of an effective international fight against trafficking in cultural property.’

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178 UNDRIP Article 8(1).
182 Bundesgericht (Federal Supreme Court) 1 April 1997, 123 Arrets du Tribunal Federal Suisse (ATF) 11 134 (Switz.) (holding that ‘Lorsque, comme l’espèce, la demande porte sur la restitution d’un bien culturel, le juge de l’entraide doit veiller à prendre en compte l’intérêt public international ... lié à la protection de ces biens. Ces normes, qui relèvent d’une commune inspiration, constituent autant d’expressions d’un ordre public international en vigueur ou
Courts have considered contracts violating foreign regulations prohibiting the export of national treasures to be null and void. For instance, the German Supreme Court (Bundesgerichtshof) recognized that an insurance contract subject to German law was null and void because it related to the illegal export of cultural goods from Nigeria. The court considered that this contract ran against public morals (bonos mores) or international public policy. In Soleimany v. Soleimany, a Court of Appeal in the UK ultimately refused the enforcement of an award relating to smuggled goods on public policy grounds.

2.4.2 Transnational Public Policy in Theory

Arbitrators are bound to apply relevant peremptory norms of international law whether or not they are pleaded by the parties. The question is not whether to add new claims to those articulated by the parties but to apply the law. The applicable law and the principle of not deciding issues beyond the parties’ claims (nec ultra petita) are two different issues. The applicable law concerns the body of law that applies to the dispute. The principle of nec ultra petita concerns the claims raised by the parties but does not lessen the importance of mandatory rules applicable to the dispute. As Jan Paulsson puts it, ‘a tribunal in an investment dispute cannot content itself with inept pleadings, and simply uphold the least implausible of the two’. As the Permanent Court of International Justice once held, an international tribunal is ‘deemed itself to know what [international law] is’. Such an approach does not amount to arbitral law-making, but recognizes that arbitrations do not occur in a vacuum. Rather, they contribute to the development of international law and must conform to its basic rules.

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184 Id. 368.
In the *Methanex* case,\(^{189}\) the Arbitral Tribunal asserted that ‘as a matter of international constitutional law, a tribunal has an independent duty to apply imperative principles of law or *jus cogens* and not to give effect to the parties’ choice of law that is inconsistent with such principles.’\(^{190}\)

In fact, transnational public policy imposes *positive* duties on arbitrators: ‘[a]ny tribunal owes an obligation to the international community to apply international public policy’ and ‘the faithful application of public order would acquit a tribunal of its obligations to the parties to apply the law chosen by them through compromise or otherwise, but nothing can acquit a tribunal of its mandate to apply public policy.’\(^{191}\) In other words, arbitrators ‘have the right – and even the obligation – to themselves raise the issue of whether disputed contracts or legal provisions before them satisfy the requirements of international public policy.’\(^{192}\) Kreindler also highlights the fact that ‘[t]he arbitrator[s] need not apply the agreed or determined governing law if doing so would cause [them] to violate international public policy.’\(^{193}\)

Human rights norms could be conceptualized as ‘part of transnational public policy’: ‘[t]o the extent that human rights protection constitutes a core part of international or national public policy, human rights aspects must be considered by the tribunal.’\(^{194}\) Arbitrators can raise ‘an issue of blatant violation of fundamental human rights deemed to be incompatible with transnational public policy.’\(^{195}\) International public policy is a flexible and dynamic concept that could be used as a corrective mechanism or as a tool to balance complex and often conflicting goals.

Traditionally, public policy has played a *negative* role by preventing the recognition of arbitral awards that breached it.\(^{196}\) Arbitral tribunals must render

\(^{189}\) *Methanex v. United States of America*, UNCITRAL (NAFTA), Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005, Part IV, ch. C, para. 24.

\(^{190}\) Id., Part IV, ch. C, para. 24.

\(^{191}\) Orakhelashvili, *Peremptory Norms in International Law*, 493.


an enforceable award.\textsuperscript{197} Such obligation encourages arbitral tribunals to consider transnational public policy.\textsuperscript{198} In particular, if an arbitral award contravened public policy, national courts could deny the enforcement of such an award. In this context, the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards\textsuperscript{199} expressly provides for a limited judicial review on the merits of an award for public policy reasons.\textsuperscript{200}

With regard to investment arbitration, ICSID awards are truly delocalized. Indeed, the ICSID Convention excludes any attack on the award in the national courts, and ICSID awards are final and self-executing.\textsuperscript{201} However, this does not mean that arbitrators should not respect international public policy. The arbitral tribunal must observe international law under Article 42 of the ICSID Convention.\textsuperscript{202} Giardina rightly points out that the fact that ICSID awards are recognized and enforced as binding on all states that are parties to the relevant agreements requires their necessary compliance with international law. Thus, respect for public international law and international public policy would be an implicit prerequisite of ICSID awards.\textsuperscript{203} If an ICSID award were contrary to peremptory norms of public international law, the national court would be obliged not to execute it because of its non-compliance with the transnational public order. If a contracting state failed to abide by and comply with the award rendered, the state of the foreign investor could decide to bring an international claim on behalf of the investor before the ICJ. However, diplomatic protection would be an unlikely discretionary move on the side of the home state. Therefore, this possibility does not constitute a strong disincentive to refuse execution due to international public order concerns. In general, to avoid subsequent challenges in terms of annulment proceedings and non-enforcement of arbitral awards,

\begin{itemize}
  \item \textsuperscript{197} See, for instance Article 42 of the 2021 International Chamber of Commerce (ICC) Arbitration Rules: ‘the Arbitral Tribunal shall act in the spirit of the rules and shall make every effort to make sure that the Award is enforceable at law.’
  \item \textsuperscript{199} New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, adopted 10 June 1958, in force 7 June 1959, 330 UNTS 38.
  \item \textsuperscript{200} Id.
  \item \textsuperscript{201} Id.
\end{itemize}
arbitrators should take international public policy into account in the course of the arbitral proceedings.

2.4.3 Transnational Public Policy in Practice
International courts and tribunals have adopted a restrictive approach to the interpretation and application of transnational public policy and *jus cogens* to avoid their political misuse. The revolutionary nature of *jus cogens* has been 'domesticated' by voluntarist views according to which international law is based on the consent of states. While the conceptual vocabulary of *jus cogens* has found its way into international law, the judicial practice remains dominated by voluntarism, especially when state prerogatives are at stake.\textsuperscript{204}

Arbitral tribunals have held that investors cannot invoke *jus cogens* as an independent cause of action, as arbitral tribunals have limited jurisdiction.\textsuperscript{205} Analogously, when such *jus cogens* arguments have been raised by third parties, mainly non-governmental organizations (NGOs) intervening in the arbitral proceedings as *amici curiae*, arbitral tribunals have tended to dismiss such arguments as irrelevant.\textsuperscript{206} The mere reference by the host states to *jus cogens* has not been enough to lead arbitral tribunals to accept such arguments. In fact, some arbitral tribunals have dismissed such arguments considering that they had not been fully pleaded. Other tribunals have merely alluded to the *jus cogens* arguments as advanced by the host state incidentally without deeming it necessary to take a stance on the matter.

In several arbitrations brought against Argentina in the aftermath of its financial crisis, the host state raised human rights and *jus cogens*-related arguments to justify the measures adopted to cope with the crisis. In a nutshell, the state argued that it had some duties of status higher than economic duties. For instance, in *EDF v. Argentina*,\textsuperscript{207} the respondent argued that the measures adopted to cope with its financial crisis were justified by human rights concerns.\textsuperscript{208} In particular, Argentina argued that fundamental human rights

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\item \textsuperscript{204} Valentina Vadi, *Jus Cogens in International Investment Law and Arbitration* (2015) 46 Netherlands Yearbook of International Law 357–388, 381.
\item \textsuperscript{205} Biloune and Marine Drive Complex Ltd v. Ghana Investments Centre and the Government of Ghana (UNCITRAL), Award on Jurisdiction and Liability, 27 October 1989, 95 I.L.R. 184.
\item \textsuperscript{207} *EDF International, SAUR international, and Léon Participationes Argentinas v. Argentina*, ICSID Case No. ARB/03/23, Award, 11 June 2012.
\item \textsuperscript{208} Id. para. 192 (quoting the Respondent’s Rejoinder: ‘it was necessary to enact the Emergency Tariff measures in order to guarantee the free enjoyment of certain basic human rights such as, *inter alia*, the right to life, health, personal integrity, education, the rights
\end{enumerate}
\end{footnotesize}
should prevail over other treaty obligations because of their peremptory character. While the Tribunal did not contest the existence of human rights and peremptory norms, it questioned the relevance of the contested state measures for their enjoyment. The Tribunal held that Argentina had not demonstrated that it ‘was not able to comply with the relevant treaty provision’. In *Suez v. Argentina*, the Tribunal rejected the argument that ‘Argentina’s human rights obligations to assure its population the right to water somehow trump[ed] its obligations under the BITs … Argentina [was] subject to both international obligations, *i.e.* human rights and [investment] treaty obligations, and [should] respect both of them equally.’

In some cases, the arbitral tribunals did not substantively address *jus cogens* arguments, finding that they had not been fully argued. For instance, in *Azurix v. Argentina*, an ICSID case concerning water and sewage systems, Argentina raised the issue of the compatibility of the BIT with human rights treaties. It argued that ‘a conflict between a BIT and human rights treaties must be resolved in favor of human rights because the consumers’ public interest must prevail over the private interest of service providers.’ The Tribunal dismissed this argument, finding that it had not been fully argued. In *Siemens v. Argentina*, Argentina claimed that given its financial crisis, the full protection of the property rights of investors would jeopardize its compliance with human rights obligations. The Tribunal, however, held that the argument had not been developed and that ‘without the benefit of further elaboration and substantiation by the parties, it [wa]s not an argument that, *prima facie*, b[ore] any relationship to the merits of this case.’ Analogously, in *CMS Gas v. Argentina*, despite Argentina’s arguments that given the country’s economic and social crisis, the performance of specific investment treaty obligations violate constitutionally recognized rights, the Arbitral
Tribunal held that ‘there [wa]s no question of affecting fundamental human rights.’\textsuperscript{218}

As Reiner and Schreuer point out, ‘[t]hese awards seem to indicate the tribunals’ reluctance to take up matters concerning human rights, preferring to dismiss the issues raised on a procedural basis rather than dealing with the substantitive arguments themselves.’\textsuperscript{219} Admittedly, some of these arbitrations involved human rights, the peremptory character of which is uncertain. In some arbitrations, the host states have preferred to refer only to domestic constitutional provisions rather than relying on the alleged \textit{jus cogens} nature of the rights involved. This is not surprising, as such pleadings may be considered to contribute to state practice, and states are very careful in invoking \textit{jus cogens} as the same arguments could be used against them in other contexts.

Nonetheless, one may wonder whether such an approach is overly restrictive. In fact, human rights treaties recognize ‘a set of core rights from which no derogation is permitted not even during times of public emergency.’\textsuperscript{220} For example, according to the Committee on Economic, Social, and Cultural Rights, if a state did not provide its population with essential food, primary healthcare, and the most basic forms of education, it would breach its obligations under the \textit{ICESCR}. As Verdross argued almost a century ago, ‘a state cannot be bound to close its schools, universities or courts, to abolish its police or to reduce its public services in such a way as to expose the population to the dangers of disorder and anarchy, in order to obtain the necessary funds for the satisfaction of foreign creditors.’\textsuperscript{221}

Other tribunals have adopted a more sensitive approach to human rights issues. For instance, in \textit{Sempra v. Argentina}, the Tribunal acknowledged that the dispute ‘raise[d] the complex relationship between investment treaties, emergency, and the human rights of both citizens and property owners.’\textsuperscript{222} Regardless, it found that ‘the real issue in the instant case [wa]s whether the

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\item\textsuperscript{218} CMS Gas Transmission Co. v. Argentina, ICSID Case No. ARB/01/08, Award, 12 May 2005, para. 121.
\item\textsuperscript{221} Alfred Verdross, ‘Forbidden Treaties in International Law’ (1937) 31 AJIL 571–577, at 575.
\item\textsuperscript{222} Sempra Energy International v. The Argentine Republic, ICSID Case No. ARB/02/16, Award, 28 September 2007, para. 332.
\end{itemize}
\end{footnotesize}
constitutional order and the survival of the State were imperilled by the crisis, or instead whether the Government still had many tools at its disposal to cope with the situation." It concluded that "the constitutional order was not on the verge of collapse" and that "legitimately acquired rights could still have been accommodated by means of temporary measures and renegotiation."

Analogously, in Continental Casualty v. Argentine Republic, concerning an insurance business, the Arbitral Tribunal considered that the Government's efforts struck an appropriate balance between the protection of investor's rights and the responsibility of the government toward the country's population: "it is self-evident that not every sacrifice can properly be imposed on a country's people in order to safeguard a certain policy that would ensure full respect toward international obligations in the financial sphere, before a breach of those obligations can be considered justified as being necessary under this BIT. The standard of reasonableness and proportionality do not require as much."

On the other hand, in several cases, arbitral tribunals have declined their jurisdiction on the basis of transnational public policy. In this regard, the operation of *jus cogens*, in its peculiar interaction with, and articulation as, international public order, can legitimize investor-state arbitration. It can ensure that the most fundamental values of the international community are not violated by either foreign investors or the host states, and indicate how to shape or reform future practice to foster responsible and lawful investments. Adjudicators are in the best position to fulfill the promise of *jus cogens*, interpreting and applying the various formal sources of international law embodying peremptory norms.

Public policy has been forcefully asserted in a series of international arbitrations. For example, in the 1875 *Maria Luz* arbitration, the Czar of Russia, sitting as the sole arbitrator, drew upon public policy in declaring that Japan "had not breached the general rules of the Law of the Nations" in freeing the slaves carried on the Peruvian vessel *Maria Luz* and denying the subsequent demands for indemnity of the Peruvian citizens." In an ICC arbitration,
Mr. Lagergreen, acting as a sole arbitrator, stated that 'it cannot be contested that there exists a general principle of law recognized by civilised nations that contracts which seriously violate bonos mores or international public policy are invalid or at least unenforceable and that they cannot be sanctioned by courts or arbitrators.'

Similarly, in *World Duty Free Company Limited v. The Republic of Kenya*, the ICSID Tribunal referred to international public policy and did not allow claims based on bribes or on contracts obtained by corruption. The Tribunal stated that 'in light of domestic laws and international conventions relating to corruption, and in light of decisions taken in the matter by courts and international tribunals, this Tribunal is convinced that bribery is contrary to the international public policy of most, if not all states. Thus, claims based on contracts of corruption or contracts obtained by corruption cannot be upheld by this Arbitral Tribunal.' According to the Tribunal, transnational public policy protects the public.

In *Inceysa Vallisoletana SL v. Republic of El Salvador*, the Tribunal concluded that it did not have jurisdiction over the claim brought before it by the investor, as the respondent had not consented to the protection of investments procured by fraud, forgery, or corruption. In *Plama Consortium Ltd v. Republic of Bulgaria*, after finding the claimant in violation of Bulgarian and international law, the Tribunal did not grant the investor the substantive protection under the Energy Charter Treaty.

In *Phoenix Action Ltd v. the Czech Republic*, an ICSID Tribunal held that 'nobody would suggest that ICSID protection should be granted to investments made in violation of the most fundamental rules of protection of human rights.'

### 2.5 Treaty Interpretation

International economic law is a creature of international law to be construed in accordance with international law, the system to which it belongs. Because international economic law constitutes an important field of international law, as such, it should not frustrate the aims and objectives of the latter, which
include the protection of cultural heritage. As a matter of treaty interpretation, Article 3.2 of the DSU⁴³⁷ enables panels and the AB to interpret WTO treaties in accordance with customary rules of treaty interpretation. WTO courts have interpreted this provision to be an implicit reference to Articles 31, 32, and 33 of the VCLT.⁴³⁸ Analogous provisions appear in the text of several investment treaties, and contemporary arbitral jurisprudence is replete with references to Articles 31–33 of the VCLT.⁴³⁹ These rules of interpretation guide parties and adjudicators to interpret the text of treaties, can contribute to the defragmentation of international law, and promote a holistic approach to the interpretation of conflicting provisions.⁴⁴⁰

Under the general rule of interpretation, as codified by Article 31 of the VCLT, ‘a Treaty shall be interpreted in good faith.’ The same Article provides that the intentions of the parties are revealed through the ordinary meaning of the terms of the treaty, in their context, and in light of the object and purpose of the treaty.⁴⁴¹ Article 32 of the VCLT provides that ‘recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.’ Article 33 of the VCLT deals with the interpretation of treaties authenticated in two or more languages and may be useful when interpreting

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⁴³⁸ United States—Standards for Reformulated and Conventional Gasoline, Appellate Body Report, adopted 20 May 1996, WT/DS2/9, p. 17 (holding that the fundamental rule of treaty interpretation set out in Article 31(1) of the VCLT ‘has attained the status of a rule of customary or general international law’); Japan—Taxes on Alcoholic Beverages, Appellate Body Report, WT/DS8/AB/R; WT/DS10/AB/R; WT/DS11/AB/R, 4 October 1996 (holding that Article 32 of the VCLT, dealing with supplementary means of interpretation, ‘has also attained the same status.’)
⁴⁴¹ Article 31(1) VCLT.
investment treaties, which are generally written in the languages of the contracting parties.

Although Article 31 of the VCLT uses mandatory terms, it does not clarify how much weight should be given to each of its elements.\textsuperscript{242} All of the relevant approaches – textual, contextual, purposive, or teleological – are not set in a hierarchical order; rather, they need to be balanced in a single combined interpretative process.\textsuperscript{243} As a WTO panel put it, ‘for pragmatic reasons, the normal usage ... is to start the interpretation from the ordinary meaning of the raw text of the relevant treaty provisions and then seek to construe it in its context and in the light of the treaty’s object and purpose. However, ... text, context, and object-and-purpose ... are to be viewed as one holistic rule of interpretation rather than a sequence of separate tests to be applied in a hierarchical order.’\textsuperscript{244} Therefore, the use of the customary norms of treaty interpretation as restated by the VCLT does not lead to any univocal results or ‘irrebuttable interpretation’;\textsuperscript{245} rather, it leaves the interpreter with ‘considerable flexibility’,\textsuperscript{246} providing ‘principles of logic and order which both constrain and empower the interpreter.’\textsuperscript{247}

Reference to other international law is possible even for interpreting the text of a specific provision. For example, the WTO AB used a multilateral environmental agreement (MEA) to maintain that sea turtles are an exhaustible natural resource. It did not apply the MEA provision; rather, it interpreted the text of Article XX(g) of the GATT, using the MEA as an interpretative tool. This approach enables international economic courts to construe international economic law ‘in harmony with other rules of international law of which [it] form[s] ... part, including those relating to human rights.’\textsuperscript{248}

The purposive or teleological interpretation of treaties is based on the analysis of their object and purpose, which are usually included in their preambles.\textsuperscript{249} Although preambles are not binding, they must be considered

\begin{thebibliography}{99}
\bibitem{242}Michael Waibel, ‘Demystifying the Art of Interpretation’ (2011) 22 EJIL 571–588, 574.
\bibitem{244}Id. Compare with \textit{ICJ, Maritime Delimitation in the Indian Ocean (Somalia v. Kenya)}, Preliminary Objections, Judgment, \textit{ICJ} Reports 2017, p. 29, para. 64.
\bibitem{246}Waibel, ‘Demystifying the Art of Interpretation’, 575.
\bibitem{247}Isabelle Van Damme, \textit{Treaty Interpretation by the WTO Appellate Body} (Oxford: OUP 2009) 38.
\bibitem{248}\textit{Urbaser v. Argentina}, Award, ICSID Case No. ARB/07/26, 8 December 2016, para. 1200.
\end{thebibliography}
by adjudicators as they form part of the context of the agreement.\textsuperscript{250} They can contribute to clarifying the aim and objectives of a treaty, playing an important role in the teleological interpretation of the same.

Certainly, if the preamble of a given treaty refers to sustainable development, which encapsulates a cultural dimension as seen in Chapter 1, it will be possible for international economic courts to take cultural concerns into account. The preamble of the Agreement establishing the WTO refers to the goal of raising standards of living and promoting sustainable development.\textsuperscript{251} In parallel, the preamble of the TRIPS Agreement recognizes ‘the underlying public policy objectives of national systems for the protection of IP, including developmental and technological objectives.’\textsuperscript{252} While most BIT preambles are unidimensional, emphasizing the need to foster FDI and promote economic development, several more recent preambles state that investment promotion must be consistent with certain policy goals, including public health, safety, and sustainable development.\textsuperscript{253}

Even where the preamble makes no reference to sustainable development, scholars caution against interpreting the purpose of bilateral investment treaties as merely promoting foreign direct investments.\textsuperscript{254} One-sided approaches risk politicizing investment disputes ‘and, in the long-run, losing support among states parties.’\textsuperscript{255} As Berman pinpoints, ‘it would surely be wrong to take too narrow a view of “object and purpose”, for example, by claiming that the object and purpose of investment treaties is to protect the investor … Deducing the object and purpose is specific to the particular treaty under discussion, and does not admit general postulates.’\textsuperscript{256} As the Amco Tribunal held, ‘the [ICSID] Convention is aimed to protect, to the same extent and with the same vigour,
the investor and the host state, not forgetting that to protect the investment is to protect the general interest of development and of developing countries.”

As the Lemire Tribunal pointed out, ‘the object and purpose of the Treaty is not to protect foreign investments per se, but as an aid to the development of the domestic economy. And local development requires that the preferential treatment of foreigners be balanced against the legitimate right of [the host state] to pass legislation and adopt measures for the protection of what as a sovereign it perceives to be its public interest.’

Analogously, in the UPS case, Canada referred to the preambular language of NAFTA to preserve the flexibility of the parties to safeguard the public welfare. Accordingly, the Tribunal enlightened the interpretation of the relevant investment provisions with cultural concerns.

Under Article 31(3)(c) of the VCLT, the treaty interpreter shall consider ‘any relevant rules of international law applicable in the relations between the parties.’ Accordingly, ‘Every treaty provision must be read not only in its own context, but in the wider context of general international law.’ Therefore, this provision properly expresses the principle of ‘systemic integration’ within the international legal system, indicating that treaty regimes are themselves creatures of international law.

The expression ‘any relevant rules of international law applicable in the relations between the parties’ indicates ‘all sources of international law, including custom, general principles and, where applicable, other treaties.’ As aptly noted by Sands, for a rule of international law to be taken into account in interpreting a treaty, it must be (1) relevant, that is, related to the treaty norm being interpreted; and (2) applicable in the relations between the parties. The WTO panels and the AB have pinpointed that they must consider only those

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257 Amco Asia Corp. v. Republic of Indonesia, ICSID Case No. ARB/81/01, Award on Jurisdiction, 24 September 1985, para. 23.
259 VCLT, Article 31(3)(c).
rules of international law that apply to all WTO Members. While they are not required to consider treaties signed by only some WTO members, they can use such treaties as informative tools.\(^{264}\) The International Law Commission has criticized this approach: because a precise identity in the membership of most international treaties is unlikely, any use of other treaty law would thus become unlikely in the interpretation of WTO law.\(^{265}\)

As Sands points out, ‘the treaty being interpreted retains a primary role,’ while the rule of international law which is relevant and applicable between the parties ‘must be taken into account.’\(^{266}\) International law does not define what taking into account means; Sands explains that ‘the formulation is stronger than “take into consideration” but weaker than “apply.”’\(^{267}\) One may wonder whether ‘taking into account’ is analogous to ‘drawing inspiration’, a formulation that appears in Article 60 of the African Charter,\(^{268}\) enabling the Commission to draw inspiration from international law on human rights as well as from the provisions of various instruments adopted within the Specialized Agencies of the United Nations of which the parties to the … Charter are Members.\(^{269}\)

In any case, the principle of systemic integration creates a presumption that international economic law is to be interpreted consistently with general international law.\(^{270}\) This presumption has both positive and negative dimensions: on the one hand, the parties are to refer to public international law for all questions which are not resolved by the treaty; on the other hand, the parties should not act inconsistently with general international law.\(^{271}\) Systemic thinking contributes to the unity of international law. As the Arbitral Tribunal put it in \textit{AAPL v. Sri Lanka},\(^{272}\) BITs are ‘not a self-contained closed legal system’ but


\(^{266}\) Id. 103.

\(^{267}\) Id. 103.


\(^{269}\) See e.g. \textit{Perenco v. Ecuador}, ICSID Case No. ARB/08/6, Interim Decision on the Environmental Counterclaims, 11 August 2015, para. 322.


have to be ‘envisaged within a wider juridical context in which rules from other sources are integrated through implied incorporation methods, or by direct reference to certain supplementary rules whether of international law character or domestic law nature.’ Analogously, the Appellate Body has clarified that ‘the General Agreement is not to be read in clinical isolation from public international law.’ Furthermore, as international economic law typically enshrines ‘general, open-textured language,’ ‘practical considerations may impel the interpreter to seek guidance from general international law.’

Therefore, both WTO adjudicative bodies and arbitral tribunals have some interpretative space to consider other international treaties when they collide with international economic law. In fact, customary rules of treaty interpretation require that international cultural heritage law serve as an interpretive context if it is relevant to the interpretation and application of international economic law. This argument is even stronger with regard to the cultural entitlements of a peremptory character. Because international economic courts often seem reticent when referring to, let alone considering, such rights, all actors involved—treaty negotiators, arbitrators, academics, civil society, and the parties to a given dispute—should strive to foster such consideration. Only by interpreting international economic law in conformity with international law and fine-tuning its language can international economic law develop its potential to enable peaceful, just, and prosperous relations among nations and contribute to the development of international law.

Nevertheless, treaty interpretation cannot be invoked to displace the applicable law. In *South American Silver Limited (SAS) v. Bolivia*, the Bermudan subsidiary of a Canadian company alleged that the host state expropriated the company’s ten mining concessions near the village of Malku Khotan in the Bolivian province of Potosí. Bolivia expressly required that the Tribunal ‘interpret the Treaty in light of the sources of international and internal law’

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273 Id. para. 21.
277 *Case Concerning Oil Platforms (Iran v. United States)*, Judgment, 6 November 2003, ICJ Reports 2003, 161, Separate Opinion by Judge Higgins, para. 49.
that guarantee the protection of the rights of the Indigenous peoples.\textsuperscript{279} In this regard, it referred to customary norms of treaty interpretation as restated in the VCLT, requiring adjudicators to take into account the context of a treaty, which includes, according to Article 31(3)(c) of the same Convention, ‘any relevant rules of international law applicable in the relations between the parties.’\textsuperscript{280}

The Arbitral Tribunal found that the applicable \textit{BIT} was ‘the principal instrument by which it [should] resolve the dispute between the Parties.’\textsuperscript{281} After noting that both parties agreed that ‘Article 31 of the Vienna Convention sets forth the rules of interpretation for the Treaty,’\textsuperscript{282} it held that as a tool for treaty interpretation, systemic interpretation as restated by Article 31(3)(c) of the Vienna Convention should be applied ‘with caution.’\textsuperscript{283} The Tribunal recalled Judge Bruno Simma’s warning that ‘systemic interpretation allows for harmonization through interpretation but cannot be used to modify a treaty.’\textsuperscript{284} It then concluded that its jurisdiction could not ‘be extended to cover other treaties via Article 31(3)(c) of the Vienna Convention if the States have not consented to such jurisdiction.’ In other words, the Tribunal held that it could not ‘alter the applicable law through rules of treaty interpretation.’\textsuperscript{285}

While some argue that little difference exists between the interpretation of a given treaty and its application, these are different, albeit interrelated, processes. While treaty interpretation aims at ‘discovering the proper meaning of treaty terms through various interpreting methods’, treaty application aims at identifying and applying the source of law.\textsuperscript{286} In other words, Article 31(3)(c) of the VCLT broadens the normative horizons of international economic judges – not their competence. Furthermore, states have agreed on specific dispute settlement mechanisms in the various fields of international law: ‘such intentions would be frustrated if a procedure created for one branch were to be

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\bibitem{279} South American Silver Limited \textit{v. the Plurinational State of Bolivia}, Objections to Jurisdiction, Admissibility and Counter-Memorial on the Merits, para. 192.
\bibitem{280} Id. para. 193.
\bibitem{282} Id. para. 210.
\bibitem{283} Id. para. 212.
\bibitem{284} Id. para. 214.
\bibitem{285} Id. paras 215–6.
\end{thebibliography}
extended to another branch where it has for quite particular reasons not been chosen before.'

To sum up, international economic courts have limited jurisdiction. Because of their limited mandate, they cannot adjudicate on the eventual breach of international cultural heritage law. International economic courts are not allowed to decide whether a certain governmental measure is in conformity with other international treaties. They are only permitted to decide whether the measure violates international economic law.

However, this does not mean that international cultural heritage law is and/or should be irrelevant in the context of economic disputes. While being aware of their limited jurisdiction and their specific mandate to interpret the instruments under which they are set up, international economic courts have recognized that the rules which they have the jurisdiction to apply and interpret are not detached from international law. Public international law, including international cultural heritage law, is relevant in the interpretation of international economic law. Adjudicators may analyze the specific claims in light of the relevant rules of international law applicable to the relationship between the parties. For instance, in the case *Micula and Others v. Romania*, the Arbitral Tribunal considered Article 15 of the Universal Declaration of Human Rights (*UDHR*) in the process of interpreting a BIT's nationality requirements by referring to Article 31(3)(c). In the case *Saluka Investments v. Czech Republic*, the Arbitral Tribunal took into account the customary international law principle 'that a deprivation can be justified if it results from the exercise of regulatory actions aimed at the maintenance of public order' by referring to Article 31(3)(c). In *Saipem v. Bangladesh*, the Arbitral Tribunal took into account the right to a fair trial as a general principle of international law.

The relevant rules of international law applicable in the relationship between the parties may include international cultural heritage law. Given that UNESCO has an almost universal membership and that some of its...
conventions are very successful in terms of adhesion, this leads to the conclusion that adjudicators should take cultural concerns into account. If one deems that some elements of cultural heritage protection already belong to customary international law, or are general principles of law, the case for such consideration is even stronger.

For instance, reference to the relevant UNESCO conventions may be made to clarify the meaning of investment treaty provisions, including the fair and equitable treatment standard and the principle of non-discrimination. In particular, when ascertaining the legitimate expectations of foreign investors, arbitral tribunals should take into account the host state’s obligations under international law. The expectations of foreign investors cannot be legitimate if they disregard the host state’s obligations under international cultural heritage law. Conversely, foreign investors may have legitimate expectations that the host state would comply with the relevant international law.

In parallel, the host state’s obligations under international cultural heritage law may help in establishing the lawfulness of particular expropriatory measures, such obligations constituting evidence of the legitimate objectives of such measures. In *SPP v. Egypt*, the Arbitral Tribunal took Egypt’s international obligations into account to ascertain the legitimacy of its actions: ‘Clearly, as a matter of international law, the Respondent was entitled to cancel a tourist development project situated in its own territory for the purpose of protecting antiquities. This prerogative is an unquestionable attribute of sovereignty. The decision to cancel the project constituted a lawful exercise of the right of eminent domain.’ In other cases, the host state’s obligations under international cultural heritage law may help arbitrators distinguish a legitimate regulation from an indirect expropriation. For instance, in *Glamis Gold v. United States*, the backfilling requirement was deemed to constitute a feature of a legitimate regulation rather than an indirect expropriation due to the state’s right to govern cultural heritage sites.

In addition, the obligations of the host state under international cultural heritage law may help arbitrators to determine whether a given investment is comparable to another one or not, for the purpose of establishing a violation of the non-discrimination principle under the relevant investment treaty.

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293 *Southern Pacific Properties (Middle East) Ltd v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Award on the Merits, 20 May 1992, para. 158.
For instance, in *Parkerings v. Lithuania*, the Arbitral Tribunal deemed that ‘the City of Vilnius did have legitimate grounds to distinguish between the two projects ... especially in terms of historical and archaeological preservation.’

Article 31(3)(c) also allows space for dynamic or evolutive treaty interpretation. As the content of international law changes and develops continuously, and international investment treaties and the WTO-covered agreements can be considered as living instruments, any approach to interpretation should deal with this dynamism: terms and concepts used in international economic law should reflect the evolution of law. An adjudicator’s interpretation cannot remain unaffected by subsequent developments of law; ‘an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of interpretation.’ For instance, in the *Shrimp–Turtle* case, the WTO Appellate Body interpreted the term ‘exhaustible natural resources’ in Article XX(g) of the GATT to include living natural resources ‘in the light of contemporary concerns of the community of nations about the protection and conservation of the environment.’

International economic courts, however, have often adopted a reductionist or minimalist vision of their mandate. Such tribunals have rarely addressed law external to international economic law, as these norms are rarely invoked before international economic courts. Even when other international rules are invoked, arbitral tribunals have either dismissed such norms on jurisdictional grounds or mentioned them in passing. Even when host states have relied on other international law to justify measures with adverse effects on trade, arguing that their measures were in furtherance

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of other international law commitments, they have met only little success before WTO courts. Arbitral tribunals have nonetheless shown a growing willingness to consider other international law as a matter of treaty interpretation. They have even considered other international law by way of analogy. For instance, in Mondev v. United States, the NAFTA Tribunal referred to the European Convention on Human Rights (ECHR) to clarify the meaning and extent of the principle of non-retroactivity in international law. The ECHR was inapplicable as the dispute related to the North American Free Trade Agreement, and none of the NAFTA parties had ratified the European Convention. Nonetheless, the Arbitral Tribunal considered such an instrument to interpret the applicable law. This growing appreciation of the linkage between international economic law and other international law can increase the perceived legitimacy of international economic law. As seen above, international customary norms of treaty interpretations require systemic interpretation.

3 De Lege Ferenda

Having analyzed how international economic courts have dealt with cultural heritage disputes, the chapter examines treaty-driven approaches to cultural heritage protection, considering the inclusion of cultural exceptions, amendments, and waivers in international economic law.

3.1 Cultural Exceptions

The importance of the protection of cultural heritage to individuals, communities, nations, and the international community as a whole suggests that policy makers should consider introducing ad hoc provisions, even in international instruments that are not related to the protection of cultural heritage. This treaty-driven approach to promote the consideration of cultural concerns in international economic law would not only strengthen the regulatory autonomy of states in the cultural sector, but it would also help defragment international law. A text-driven approach suggests reform to bring international

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301 Mondev v. United States of America, ICSID Case No. ARB/(AF)/99/2, Award, 11 October 2002, paras 139–143.
economic law better in line with cultural concerns.\textsuperscript{302} It promotes the consideration of cultural heritage in international economic law, relying on the periodic (re)negotiation of IIAs as well as the periodic fine-tuning of WTO law.

Treaty drafters can expressly accommodate the protection of cultural heritage in the text of IIAs or renegotiate existing ones.\textsuperscript{303} For instance, they can refer to cultural heritage in the preambles, carveouts, exceptions, and annexes of IIAs.\textsuperscript{304} Preambles can strengthen the state right to regulate and power to adopt cultural policies. Cultural exceptions enable states to derogate from treaty obligations in certain circumstances without incurring liability under international law.\textsuperscript{305} Interpretative statements can lead adjudicators to be less likely to find treaty inconsistencies in countries’ cultural policies.

Carve-outs can target cultural policies, cultural industries or services, or cultural goods that would normally be covered by the scope of international economic law, excluding them from the scope of one or more provisions for their cultural character. Depending on their formulation, their operation is not to exclude cultural policies, cultural industries or services, or cultural goods from the entire scope of international economic law, but only from that of one or several specific provisions of the same.\textsuperscript{306}

During the negotiations of the Multilateral Agreement on Investment (MAI) under the aegis of the Organization for Economic Co-operation and Development (OECD),\textsuperscript{307} France and Canada applied for an exception in the area of culture for the protection of national cultural goods. Such a clause would have enabled all parties to follow cultural policies to protect cultural diversity and enterprises dealing with cultural activities. However, since the MAI was perceived as a one-sided instrument unilaterally prepared by OECD countries to ensure higher standards of protection and legal security for foreign investors, the negotiations of this instrument failed in 1998 because of the opposition of

\textsuperscript{303} Vadi, Cultural Heritage in International Investment Law and Arbitration, 277–286.
\textsuperscript{304} Schill and Djanic, ‘International Investment Law and Community Interests’, 15.
\textsuperscript{307} OECD Multilateral Agreement on Investment, Consolidated Text and Commentary, Draft DAFFE/MAI/NM(97)2.
civil society, and since then, countries have adopted different approaches to the issue. For instance, the Trans-Pacific Strategic Economic Partnership Agreement (Trans-Pacific SEP), which establishes a free trade area between Brunei, Chile, Singapore, and New Zealand (Aotearoa in the Maori language), contains an exception to protect items or specific sites of historical or archaeological value.\textsuperscript{308} The Trans-Pacific SEP recognizes the need to promote cultural policies aimed at protecting the cultural heritage of the countries involved, both in its tangible dimension (archaeological and historical sites) as well as in its intangible one (creative arts).\textsuperscript{309} Analogously, the China–New Zealand Free Trade Agreement expressly provides that ‘For the purposes of this Agreement, subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between the Parties where like conditions prevail, or a disguised restriction on trade in goods or services or investment, nothing in this Agreement shall be construed to prevent the adoption or enforcement by a Party of measures necessary to protect national works or specific sites of historical or archaeological value, or to support creative arts of national value.’\textsuperscript{310} Similarly, in the Annex of the US–Lithuania BIT, Lithuania reserved ‘the right to make or maintain limited exceptions to national treatment’ with regard to ‘monuments of nature, history, archaeology, and culture as well as the surrounding protective areas’ and the land of the Curonian Spit – a landscape of dunes that is a World Heritage Site.\textsuperscript{311} With regard to Indigenous peoples, the duty to protect Indigenous peoples’ rights has led states to include specific Indigenous exceptions in multilateral environmental agreements. Such MEAs include derogations to their main principles to accommodate the needs of Indigenous peoples.\textsuperscript{312}

\begin{itemize}
\item \textsuperscript{309} Id., Article 19(i)(3).
\item \textsuperscript{310} China–New Zealand Free Trade Agreement, in force 1 October 2008, Article 200(3). The text is available at www.chinafta.govt.nz.
\item \textsuperscript{311} 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, signed on 14 January 1998, Annex, para. 3.
\item \textsuperscript{312} See e.g. Convention on Conservation of Migratory Species, 23 June 1979, 1 ILM 11, Article 3.5; Interim Convention on Conservation of North Pacific Fur Seals, 9 February 1957, 314 UNTS 105, Article 7; International Convention for the Regulation of Whaling, 2 December 1946, 161 UNTS 72, Article III(13)(b).
\end{itemize}
Challenges and Prospects

sures and forms of differential treatment to protect the rights of Indigenous peoples are justified under international human rights law. Therefore, there is no theoretical obstacle to inserting similar Aboriginal exemptions in the context of IIAS.

Several IIAS expressly acknowledge the rights of Indigenous peoples. For instance, Canada has inserted specific clauses protecting Indigenous rights in its trade and investment agreements,313 including its model Foreign Investment Protection Agreement (FIPA).314 The Trans-Pacific SEP expressly states that New Zealand can provide more favorable treatment to the Maori in fulfillment of its obligations under the Treaty of Waitangi,315 ‘provided that such measures are not used as a means of arbitrary or unjustified discrimination against persons of the other Parties or as a disguised restriction on trade in goods and services’.316 In light of the constitutional concerns raised by the implementation of the Treaty of Waitangi, which is considered to be New Zealand’s founding document, the parties’ inclusion of an apposite cultural exception excluding New Zealand’s efforts to comply with the Treaty’s requirements from the dispute settlement provisions of the Trans-Pacific SEP represents a sensible approach.317

Analogously, the Energy Charter Treaty318 allows the contracting parties to adopt or enforce ‘any measure ... designed to benefit Investors who are Aboriginal people or socially or economically disadvantaged individuals or groups or their investments, provided that such measure (a) has no significant impact on that Contracting Party’s economy; and (b) does not discriminate between Investors of any other Contracting Party and Investors of that Contracting Party not included among those for whom the measure is intended, provided that no such measure shall constitute a disguised restriction on Economic Activity in the Energy Sector, or arbitrary or unjustifiable discrimination between Contracting Parties or between Investors or other interested persons of Contracting Parties.’319 Malaysia has

316 Trans-Pacific SEP Article 19(5)(1).
317 Id. Article 19(5)(2).
319 ECT Article 24.
similarly excluded measures designed to promote the economic empowerment of the Bumiputra ethnic group from the scope of BITs.\footnote{320 M. Sornarajah, \textit{The International Law on Foreign Investment} (Cambridge: CUP 2010) 120–1, 366–7.}

The participation of Indigenous representatives in the drafting and renegotiation of IIAs has been recommended by the Special Rapporteur on the rights of Indigenous peoples.\footnote{321 Victoria Tauli-Corpuz, Special Rapporteur of the Human Rights Council on the Rights of Indigenous Peoples, Report on the Impact of International Investment and Free Trade on the Human Rights of Indigenous Peoples, UN Doc A/70/301 (2015).} After finding that provisions in IIAs have ‘significant potential to undermine the protection of Indigenous peoples’ land rights and the strongly associated cultural rights,’\footnote{322 Id. para. 23.} she recommended that states develop participatory mechanisms so that Indigenous peoples have the ability to comment and provide inputs in the negotiation of IIAs. This explicit recognition of Indigenous entitlements by IIAs can empower the state to protect Indigenous groups without fearing expensive investment claims. In parallel, investors can consider the existence of protected groups when assessing the viability of the given investment.

Within the WTO framework, Article XX of the GATT 1994 includes a list of (limited) exceptions to fundamental trade standards. In some circumstances, the AB has sought guidance from other sources of law and international organizations to interpret and apply this provision. For instance, in the \textit{Shrimp–Turtle} case, the AB referred to MEAs to define the scope of ‘exhaustible natural resources’\footnote{323 Appellate Body Report, \textit{United States—Import Prohibition of Certain Shrimp and Shrimp Products}, WT/DS58/AB/R, 6 November 1998, para. 130.} Analogously, the general exceptions listed in Article XX can be interpreted in light of international cultural heritage law and human rights instruments protecting cultural entitlements. Regrettably, the restrictive requirements of the introductory part (\textit{chapeau}) of Article XX have limited the successful application of Article XX of GATT 1994 to trade disputes.

Concerning FTAs, two different approaches have emerged in negotiations. Adopted by Canada and the European Union in their FTAs, the first approach typically contains cultural exceptions.\footnote{324 Lilian Richieri Anania, ‘Cultural Diversity and Regional Trade Agreements: The European Union Experience with Culture Cooperation Frameworks’, \textit{SIEL} Working Paper (July 2012).} Adopted in the FTAs negotiated by the United States, the second approach consists in drawing a negative list: the agreement covers all services except those carved out by the parties.
Since the adoption of the 2007 European Agenda for Culture in a Globalizing World, a new strategic framework for culture in the EU’s external relations has emerged. Culture is increasingly perceived as a strategic factor of political, social, and economic development. As a party to the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions (CCD), the EU is committed to taking full account of the specific nature of cultural activities, goods, and services in its external relations. The objective is twofold: on the one hand, the EU aims to promote an understanding of European cultures throughout the world. Thus, the protection of cultural heritage, both tangible and intangible, is reaffirmed. On the other hand, the EU aims to contribute to the vitality of the European economy of culture and to promote ‘external cultural policies that encourage dynamism and balance in the exchange of cultural goods and services with third countries. European Union’s economic partnership agreements (EPAs) have incorporated cultural concerns. Such economic agreements adopt ‘a broad and ... holistic position aiming to promote cultural exchanges through cooperation, while still safeguarding policy space in cultural matters through [the] traditional cultural exception.’ For instance, the 2008 Cariforum–EU EPA includes a Protocol on Cultural Cooperation that aims to promote cultural diversity and cooperation for the development of cultural industries and the protection of cultural heritage sites and historic monuments. A specific provision of the EPA addresses the relationship between IP, biodiversity, traditional knowledge, and folklore.

Before the accession of some Eastern European countries to the European Union, the European Commission had expressed concerns about the compatibility of their earlier BITs with European standards on European content

326 Id.
328 Id.
331 Cariforum EU EPA Article 150.
in broadcasting. Notwithstanding the EU Commission’s initial pressures for the abrogation of these BITs, an understanding was reached with the United States and prospective Member States. The memorandum ‘expressed the US intent to amend the US BITs in order to eliminate incompatibilities between certain BIT obligations and EU law’.\footnote{Letter of Transmittal by George W. Bush to the Senate of the United States, 12 March 2004, available at http://tcc.export.gov/%5C%5C/static/TGA.Poland_protocol.pdf.} For instance, the Amending Protocol to the US–Poland BIT provides a specific exemption concerning performance requirements ‘in the audio-visual sector that relate to the production, distribution, and exploitation of audio-visual works, that implement quotas, or that require the purchase or use of goods produced or services provided in countries of the Council of Europe or, with respect to goods produced or services provided, a particular level or percentage of content from a source in countries of the Council of Europe’\footnote{Additional Protocol between the United States of America and the Republic of Poland to the Treaty between the United States of America and the Republic of Poland concerning Business and Economic Relations of 21 March 1990, signed in Brussels on 12 January 2004, Article 1(b). The text of the Additional Protocol is available at http://tcc.export.gov/%5C%5C/static/TGA.Poland_protocol.pdf.} The same provision appears in the amending protocols to the US BITs with other EU Member States, notably the Czech Republic, Estonia, Latvia, Lithuania, the Slovak Republic, Bulgaria, and Romania.\footnote{See Luke Eric Peterson, ‘Bush Administration Sets Process in Motion to Amend BITs with Eastern and Central Europe’, Investment Law & Policy Weekly News Bulletin, 16 February 2004.}

In parallel, Canada has always adopted a firm stance with regard to the protection of its cultural sector, considering it vital to Canadian identity and elaborating a specific exemption related to cultural goods in its trade agreements. According to Article 2005 of the Canada–United States Free Trade Agreement (CUSFTA),\footnote{Canada–United States Free Trade Agreement (CUSFTA) entered into force on 1 January 1989, 27 ILM (1988) 281 ff.} the predecessor of NAFTA, cultural industries are exempt from the provisions of the Agreement, except as specifically provided for.\footnote{CUSFTA Article 2005.} This provision has been recalled in the subsequent NAFTA, which replaced CUSFTA, and the United States-Mexico-Canada Agreement (USMCA), which has now replaced NAFTA.\footnote{NAFTA Article 2106.} Such cultural exception demonstrates that economic
liberalization can be achieved while maintaining a strong sense of cultural identity and cultural sovereignty.\textsuperscript{338}

In contrast, the United States ‘has used FTA negotiations essentially to achieve cultural liberalization’,\textsuperscript{339} using a ‘negative list’ approach whereby all services and investments not specifically excluded from the agreements are covered by liberalization commitments. Such an approach can constrain the ability of states to adopt cultural policies. For instance, during the negotiations of the Australia–United States Free Trade Agreement (AUSFTA),\textsuperscript{340} although the United States requested to increase foreign market access, Australia insisted that local content requirements in audiovisual and broadcasting media were necessary to preserve Australian culture. The ‘non-conforming measures’ are now listed in Annex 1 of the AUSFTA.\textsuperscript{341} However, any modification of such measures must not diminish their conformity to liberalization principles. Analogously, in the US–Chile FTA, while Chile retains the right to employ a screen quota,\textsuperscript{342} cultural policies are subject to significant restraint. The US–Singapore FTA similarly contains a carve-out provision concerning national content broadcasting and distribution and publication of printed media.\textsuperscript{343} Notwithstanding such carve-out provisions, a negative list approach tends to promote the liberalization of the market of cultural goods and services.\textsuperscript{344}

The merit of introducing a cultural clause in BITs is further demonstrated by United Parcel Service of America, Inc. v. Government of Canada,\textsuperscript{345} which involved debate over the applicability of the cultural industries clause in a NAFTA claim. United Parcel Service of America (UPS), a US company providing courier and package delivery services both throughout Canada and worldwide, claimed that Canada’s Publications Assistance Program (PAP) – a policy

\textsuperscript{338} The United States–Mexico–Canada Agreement (USMCA) entered into force on 1 July 2020.


\textsuperscript{341} AUSFTA Annex 1, p. 14.

\textsuperscript{342} United States–Chile Free Trade Agreement, in force 1 January 2004.

\textsuperscript{343} US–Singapore FTA, in force 1 January 2014, Annex 8A.


designed to promote the wide distribution of Canadian periodicals – was discriminatory to foreign investors as it ‘provide[d] financial assistance to the Canadian magazine industry but only on the condition that any magazines benefitting from the financial assistance [we]re distributed through Canada Post [an institution of the Government of Canada], and not through companies such as UPS Canada’. The Tribunal upheld Canada’s argument that PAP was exempted from review under NAFTA by virtue of the cultural industries exception. Cases like *UPS v Canada* demonstrate 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. Finding the proper balance between private economic interests and common cultural concerns is the key challenge that international economic law faces ‘in the interest of its own legitimacy’. However, the lack of careful drafting in investment treaties should not undermine the regulatory power of the host state to adopt and implement cultural policies and even affirmative actions aimed at promoting economic, cultural, and social opportunities for disadvantaged groups. Such programs should not be seen as running foul of the bans on discrimination and performance requirements included in investment treaties.

The idea that affirmative action can be needed for achieving substantive equality among communities was first formulated by the Permanent Court of International Justice (PCIJ) in its Advisory Opinions on German Settlers in Poland and Greek Minority Schools in Albania respectively and has

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346 Id. paras 156–60.
347 Id. para. 80.
348 NAFTA Annex 2106.
349 *UPS v Canada*, Award.
been further developed by human rights bodies. In the words of the PCIJ, ‘Equality in law precludes discrimination of any kind; whereas equality in fact may involve the necessity of different treatment in order to attain a result which establishes an equilibrium between different situations.’

Already three decades ago, affirmative action has been considered to be required by the principle of equality ‘to diminish or eliminate conditions which cause or help to perpetuate discrimination’, and to be ‘a case of legitimate differentiation’.

Affirmative action may be needed to protect the cultural expressions of minorities or Indigenous peoples or those cultural expressions which are at risk of extinction or which need urgent protection. For instance, the Convention on Cultural Diversity (CCD) expressly entitles states parties to adopt measures to protect cultural expressions ‘at risk of extinction, under serious threat, or otherwise in need of urgent safeguarding’. Such conditions would enable states to adopt special measures, and this would not amount to discrimination against other cultural communities.

Nonetheless, the compatibility between affirmative measures adopted by the host state and its international investment law obligations remains untested. When South Africa adopted an ambitious social and economic program to advance the standing of historically disadvantaged persons in the aftermath of the apartheid regime, this program generated much controversy among foreign investors and was challenged before an international arbitral tribunal. The Mineral and Petroleum Resources Development Act (MPRDA) vested all mineral and petroleum rights with the South African government. It then required that companies apply for converting their former property rights into new-order rights, that is, licenses for mineral exploitation from the South African government. Finally, it required corporations to sell 26 percent of their

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355 PCIJ, Minority Schools in Albania, p. 19.
357 CCD Article 8.
359 Piero Foresti, Laura De Carlì, and Others v. Republic of South Africa, ICSID Case No. ARB (AF)/37/1, Award, 4 August 2010.
360 Id. para. 59.
shareholding to disadvantaged individuals. Holding large investments in the natural stone business in South Africa, the investors claimed that the MPRDA extinguished their property rights, thus amounting to indirect expropriation in breach of the relevant provisions in the Italy–South Africa BIT and the Luxembourg–South Africa BIT. They also alleged that they were denied fair and equitable treatment because of affirmative action requirements for the hiring of historically disadvantaged managers. South Africa contended that the MPRDA aimed at countering ‘negative social effects caused by apartheid’, and that it did not amount to indirect expropriation or a breach of fair and equitable treatment. Although the case was settled, and what is publicly available does not give a clear picture of how it would have been adjudicated by the Arbitral Tribunal, this case demonstrates the merit of introducing a specific clause or exception in the context of investment treaties to create a shield for policies of particular cultural or social relevance in accordance with international human rights law.

As a matter of dispute avoidance, a cultural clause would prevent such disputes. In this sense, South African BITs now expressly allow the application of government measures designed to promote equality. Such clauses clarify the willingness of the parties to fulfill the obligations of the BIT and to maintain a margin of maneuver for protecting the rights of disadvantaged groups. Exceptions protecting morals and/or public order can also be interpreted to include selected cultural concerns.

Yet, most of the existing IIAs do not contain any explicit reference to cultural heritage. Moreover, IIAs generally include ‘survival clauses that guarantee protection under the treaty ... for a substantial period after the treaty has elapsed.’ Therefore, ‘it is unrealistic to expect that treaty drafting can solve the conflict between [international investment law] and other community

361 Id. para. 56.
362 Id. paras 58–9.
363 Id. para. 78.
364 Id. para. 69
365 Id. paras 74–5 and 78.
366 See e.g. Agreement Between the Czech Republic and the Republic of South Africa for the Promotion and Reciprocal Protection of Investments, 14 December 1998, Article 3(3)(c) (providing that: ‘[the guarantees of non-discrimination for foreign investors] shall not be construed so as to oblige one Party to extend to the investors of the other the benefit of any treatment, preference or privilege which may be extended by the Former Party by virtue of ... any law or other measure the purpose of which is to promote the achievement of equality in its territory, or designed to protect or advance persons, or categories of persons, previously disadvantaged by unfair discrimination.’)
interests on its own.\textsuperscript{368} While countries gradually rebalance their IIAs,\textsuperscript{369} it seems crucial to consider other mechanisms to promote the consideration of cultural heritage in international economic law.

3.2 \textit{Counterclaims}

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 communities adversely affected by the investment in the host state.’\textsuperscript{370}

A way to defragment the fragmentation of international law and to include cultural concerns in the operation of investor–state arbitration is by inserting legality requirements in treaties and raising counterclaims for eventual violations of domestic law protecting cultural entitlements. States can build some safeguards within international economic law by requiring compliance with domestic law. For instance, Article XX(d) of the GATT lists ‘Measures necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of GATT’ among the policies that may exempt a measure from being considered a GATT violation. Analogously, states can clarify that the relevant investment treaty protects only those investments that comply with domestic law. Such a clause can enable an adaptation of the treaty to the cultural needs of the state.

Recent IIAs tend to include legality requirements, that is, obligations for foreign investors to conform to, and respect, the domestic laws of the host state.\textsuperscript{371} For instance, Article 15.3 of the 2012 Southern African Development Community Model BIT prohibits investors from operating their investment ‘in a manner inconsistent with international, environmental, labour, and human rights obligations binding on the host state or the home state, whichever obligations are the higher’. Similarly, under Article 11 of the 2016 Indian Model BIT, ‘the parties reaffirm and recognize that: (i) Investors and their investments shall comply with all laws, regulations, administrative guidelines, and policies of a

\textsuperscript{368} Id.


Party concerning the establishment, acquisition, management, operation, and disposition of investments.’

Such provisions empower states to adopt special measures to protect cultural heritage. Such clauses require foreign investors to comply with existing cultural heritage law as a condition for claiming rights under the treaty. In this manner, the mechanism that gives international economic law so much power—dispute resolution—is infused with the need to protect cultural heritage.

States have also increasingly tried to assert counterclaims against investors, even though their efforts have tended not to be successful.372 While most treaties do not have broad enough dispute resolution clauses to encompass counterclaims, ‘drafting treaties to permit closely related counterclaims would help to rebalance investment law.’373

Some investor–state dispute settlement provisions confer on tribunals the power to hear ‘any dispute between an investor of one contracting party and the other contracting party in connection with an investment.’374 Other investment treaties provide that the law applicable in investor–state arbitration is the domestic law. If domestic law is the applicable law, ‘international law plays a supplemental and corrective function in relation to domestic law.’375 Not only does international law ‘fill the gaps in the host state’s laws,’ but in case of conflict with the latter, it prevails.376 In any case, even if the applicable law was not domestic law, investors remain under an obligation to abide by the domestic laws of the state in which they operate, because of the international law principle of territorial sovereignty. These and similar textual hooks seem to enable counterclaims. The ICSID Convention also expressly contemplates the possibility of counterclaims ‘provided that they are within the scope of the consent of the parties and are otherwise within the jurisdiction of the centre.’377

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373 Id. 461.
374 India–Netherlands Agreement for the Promotion and Protection of Investments, 6 November 1995, Article 9.1.
376 Id.
377 ICSID Convention, Article 46 (stating that ‘[e]xcept as the parties otherwise agree, the Tribunal shall, if requested by a party, determine any incidental or additional claims or counter-claims arising directly out of the subject matter of the dispute, provided that they are within the scope of the consent of the parties and are otherwise within the jurisdiction of the centre.’)
In practice, arbitral tribunals have adopted diverging approaches regarding the possibility of counterclaims. Most tribunals have declined jurisdiction to hear counterclaims, focusing on whether counterclaims were within the scope of the consent of the parties. While most tribunals remain hesitant to hear counterclaims, recent arbitral tribunals have been more willing to hear such claims. If consent to jurisdiction was explicit, or if the applicable law was domestic, investment tribunals could allow states to raise breaches of cultural policies in their counterclaims against investors. Thus, investor-state arbitration could prompt investors to comply with domestic (and international) cultural heritage law. If investors knew they could be held liable for harm to cultural heritage in the event of a dispute, they would be more likely to develop investment projects that safeguard or at least respect cultural heritage and cultural entitlements.

### 3.3 Amici Curiae

International economic courts may not be the most appropriate tribunals for adjudicating cultural heritage-related disputes. In most cases, states have defended key economic and cultural interests before international economic courts. For instance, in the seal products dispute before the WTO panel and Appellate Body, Canada forcefully defended its coastal communities' economic and cultural interests in practicing seal hunting and commercializing seal products that had been affected by the EU ban on seal products. In the Glamis Gold arbitration, concerning a gold mine in California, the United

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380 *Burlington v. Ecuador*, ICSID Case No. ARB/08/5, Decision on Counterclaims, 7 February 2017, para. 275 (holding Burlington liable for violating Ecuador’s domestic law implementing international standards); *Urbaser v. Argentina*, ICSID Case No. ARB/07/26, Award, 8 December 2016, para. 1192 (holding that a bilateral investment treaty ‘[is] not a set of rules defined in isolation without consideration given to rules of international law.’)
381 *Burlington v. Ecuador*, Decision on Counterclaims, at para. 60 (affirming jurisdiction on counterclaims, as the claimant did not object to the Tribunal's jurisdiction).
382 *Al-Warraq v. Indonesia*, UNCITRAL, Final Award, 15 December 2004, para. 155 (allowing Indonesia to bring a counterclaim to seek compensation of the investor’s failure to comply with domestic banking law.)
States vigorously and successfully defended its cultural interest in protecting Indigenous sacred sites. However, in other cases, states and given local communities may have diverging interests. While states may pursue intensive developmental policies, local communities affected by such plans might prefer a more sustainable approach to developmental objectives.

In this regard, international economic courts constitute an uneven playing field: while foreign investors and trading nations have the right to act or be heard (locus standi) before these tribunals, local communities and Indigenous peoples do not have direct access to these dispute settlement mechanisms. Rather, their arguments need to be espoused by their home government. Nonetheless, states are not always willing to adequately represent the cultural interests of local communities and Indigenous peoples. In fact, the cultural entitlements of local communities and Indigenous peoples often compete with the economic development plans of both investors and states. Therefore, despite the formal premise of equality between the parties, there are structural power asymmetries between different stakeholders in cultural heritage-related international economic disputes.

To overcome this imbalance, local communities, groups of Indigenous peoples, NGOs, academics, and even UNESCO, and other UN bodies who are not a party to a given dispute but have an interest in the outcome of the same can seek permission to intervene in the proceedings and present friend-of-the-court (amicus curiae) briefs reflecting their interests. Amicus curiae submissions can assist international economic courts in the determination of factual or legal issues related to the dispute by bringing a perspective that is different from that of the disputing parties. They can be particularly useful in cultural heritage-related disputes by adding new content or defending positions not adequately represented in the proceedings.

International economic courts can seek, accept, and consider amicus curiae briefs because such briefs can assist them in establishing facts and the

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applicable rule of law and its correct legal interpretation (*jura novit curia*).\(^{388}\) The principle *jura novit curia* certainly belongs to general international law.\(^{389}\) Although international economic law does not specifically provide for this principle, the WTO courts have consistently endorsed it.\(^{390}\) In parallel, several arbitral tribunals and ICSID Annulment Committees have held that this principle applies to investment treaty arbitration.\(^{391}\)

Therefore, in light of their inherent powers to seek information and technical guidance from any individual or body they may consider appropriate, international economic courts can seek information or grant requests to submit *amicus curiae* briefs if the friends of the court can demonstrate that they could assist tribunals without unduly delaying the proceedings.\(^{392}\) International economic courts usually ensure that the participation of *amici curiae* does not disrupt the proceedings or affect the due process of law or unduly burden either party.

UNESCO has never yet submitted any *amicus curiae* to arbitral tribunals or WTO courts. However, this does not mean that international economic courts could not seek information from this organization should they deem it appropriate or accept a request to submit an *amicus curiae* brief from the same organization in the future. UNESCO has submitted an *amicus curiae* brief to the International Criminal Court, and there is no reason why it would not submit similar briefs to the attention of international economic courts in the future.\(^{393}\) Such briefs could provide adjudicators with an excellent and

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389 ICJ, Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America) 1986 ICJ Reports 14, para. 29 (holding that ‘it [is] the duty of the Court itself to ascertain and apply the relevant law in the given circumstances of the case, the burden of establishing or proving rule of international law cannot be imposed upon any of the parties for the law lies within the judicial knowledge of the Court.’).


391 See e.g. British Petroleum Exploration Co (Libya) Ltd. v. The Government of the Libyan Arab Republic, Award, 10 October 1973, 53 ILR 297 (1979) (finding that an arbitral tribunal is ‘both entitled and compelled to undertake an independent examination of the legal issues deemed relevant by it, and to engage in considerable legal research going beyond the confines of the materials relied upon by the Claimant.’); Iurii Bogdanov, Agurdino-Invest Ltd. and Agurdino-Chimia JSC v. Republic of Moldova, Award, 22 September 2005, SCC Case No. 093/2004 pp. 9–10.


updated illustration of international cultural heritage law and related obligations. As destroying cultural heritage can ‘disrupt the social fabric of societies’, requesting or allowing UNESCO intervention as *amicus curiae* in the context of proceedings could facilitate the prevention of irreparable cultural harm, consolidate institutional cooperation, and contribute to the harmonious development of international law.

Analogously, requests to submit *amicus curiae* briefs could be made to or received from other UN bodies such as the Special Rapporteur on the Rights of Indigenous Peoples, an independent expert appointed by the UN Human Rights Council to monitor and promote the full realization of Indigenous peoples’ rights worldwide. The Special Rapporteur on the Rights of Indigenous Peoples has already submitted *amicus curiae* briefs before international courts and tribunals, and there is scope to envisage similar participation in Indigenous heritage-related international economic disputes.

Indigenous peoples have increasingly participated in investment arbitrations through *amici curiae*. They submitted their first *amicus curiae* brief to an international economic court in the *Softwood Lumber* case, a long-lasting trade dispute between the US and Canada. In this case, the US complained that the price at which Canada sold lumber to the US was artificially low and amounted to illegal dumping. In their *amicus curiae* brief, Indigenous tribes rejected Canada’s argument that its comparative advantage came from the fact that ‘Canada ha[d] more trees’. Rather, the *amici* argued that ‘in reality [such advantage] c[ame] from the fact that it g[ave] the forests over to the companies who pa[id] only a small extraction fee and no-one pa[id] a dime to the Aboriginal co-owners of the forests or even to the people of Canada’. The use of *amicus curiae* briefs may be ‘a new and effective way of framing arguments in seeking the recognition and protection of Indigenous rights’. Nonetheless, the panel did not comment on the arguments presented in the *amicus curiae* brief.

Other *amicus curiae* submissions followed in subsequent arbitrations. In the *Glamis Gold* case, the Tribunal granted the Quechan Indian Nation leave to

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394 Id. para. 1.
397 Id.
file a non-party submission. However, in reaching its decision, the Tribunal did not refer to any of the arguments advanced by their brief. In the Grand River case, the Tribunal received a letter from the National Chief of the Assembly of First Nations, endorsing the UNDRIP and customary international law, and calling for Indigenous rights to be ‘taken into account whenever a NAFTA arbitration involves First Nations investors or investments.’ The Tribunal did not explicitly qualify the Chief’s letter as an amicus curiae submission but the arbitrators ‘read and considered’ it.

More recently, in Bear Creek Mining v. Peru, concerning the development of a silver mining project, the Tribunal granted the permission to submit an amicus curiae brief to an NGO which promoted the human rights of the Aymara and Quechua Indigenous peoples. The Tribunal considered that its expertise and ‘local knowledge of the facts might add a new perspective that differ[ed] from that of the Parties.’ The amicus curiae brief contributed to the factual and legal architecture of the case.

On the factual level, it ‘present[ed] the concerns of the population with regard to the social, cultural, and environmental impact that would occur if the … mining project were developed.’ As the brief explained, the project was taking place in a poor and rural area whose peasant communities ‘ethnically and culturally belonged to the Aymara people.’ The brief highlighted the ‘deep cultural and social ties’ of the Aymara people with their land. In fact, their principal economic activities depended on the land, namely agriculture, fishing, and livestock farming. Moreover, for the Aymara, land was ‘not only a geographical space but represents a spiritual bond.’ Therefore, the Aymara had ‘concerns regarding changes to the natural landscape, the integrity
of their territories, and the negative effects on their sanctuaries and culture.\footnote{Bear Creek Mining Corporation v. Republic of Perù, Award, para. 226.} The \textit{amici} contended that the company ‘did not do what was necessary to understand ... the Aymara culture ... [T]he company acted as if it were sufficient to promise benefits to some of the ... communities in the areas surrounding the project ... without needing to work closely with [all of the relevant] communities.’\footnote{Id. para. 218.} Therefore, some communities opposed the project, and the company ‘did not obtain the social license to operate.’\footnote{Id.}

At the legal level, the \textit{amicus curiae} brief referred to international human rights law and corporate social responsibility.\footnote{Bear Creek Mining Corporation v. Republic of Peru, \textit{Amicus Curiae} Brief Submitted by the Association of Human Rights and the Environment et al., at 14.} In particular, it referred to ‘the right of Indigenous peoples to free and informed prior consultation, the responsibility of the company to respect human rights and conduct itself with due diligence with the aim of obtaining local consent and social license to operate.’\footnote{Id. at 2.}

The Tribunal considered the \textit{amicus curiae} submission in the final award.

Nonetheless, international economic courts are not legally obligated to accept let alone to consider such briefs; rather, they have the power to do so should they deem it appropriate: ‘it is particularly within the province and authority of a panel to determine the need for information and advice in a specific case, to ascertain the acceptability and relevancy of the information or advice received, and to decide what weight to ascribe to that information, or to conclude that no weight at all should be given to what has been received.’\footnote{Appellate Body report, \textit{United States—Import Prohibition of Certain Shrimp and Shrimp Products}, WT/DS58/AB/R, adopted 6 November 1998, para. 104.} The Appellate Body has advocated the power not to accept \textit{amicus curiae} submissions or not to address, in its reports, the legal arguments made in such briefs:\footnote{Appellate Body report, \textit{European Communities—Measures Affecting Asbestos and Asbestos-containing Products}, WT/DS135/AB/R, adopted 5 April 2001, paras 51–2.} ‘Acceptance of any \textit{amicus curiae} brief is a matter of discretion.’\footnote{Appellate Body Report, \textit{European Communities—Trade Description of Sardines}, WT/DS231/AB/R, para. 167.}

Arbitral tribunals have adopted a similar stance.

In some cases, arbitral tribunals have denied the participation of Indigenous non-disputing parties.\footnote{Bernhard von Pezold and Others v. Zimbabwe, ICSID Case No. ARB/10/15, Procedural Order No. 2, 26 June 2012, para. 49.} For instance, in \textit{Bernhard von Pezold and Others v. the Republic of Zimbabwe},\footnote{Bernhard von Pezold and Others v. Republic of Zimbabwe, ICSID Case No ARB/10/15.} the claimants alleged unlawful expropriation
of their farms in Zimbabwe, which were compulsorily acquired by the government as part of its land reform program. An NGO and four Indigenous communities requested permission to file a written submission as amici curiae to the Arbitral Tribunal.\footnote{Bernhard von Pezold and others v. Republic of Zimbabwe, ICSID Case No ARB/10/15, Procedural Order No 2, 26 June 2012.} As the farms were allegedly located on their ancestral territories, the Indigenous communities submitted that ‘the outcome of the ... arbitral proceedings w[ould] determine not only the future rights and obligations of the disputing parties with regard to these lands, but m[ight] also potentially impact on the Indigenous communities’ ... rights.’\footnote{Id. paras 18–21.}

The petitioners argued that ‘international human rights law on Indigenous peoples applies to these arbitrations in parallel to the relevant BITs and the ICSID Convention.’\footnote{Id. para. 25.} According to the petitioners, the ‘Arbitral Tribunals’ mandate derives from powers delegated to it by Contracting Parties with concrete human rights obligations under international law.'\footnote{Id. para. 58.}

The claimants objected to the submissions, alleging the petitioners’ lack of independence. They noted that while their titles had ‘never been subject to, or conditional on, the claims of the Indigenous communities,’ they had ‘always acknowledged that some parts of the Border Estate [we]re of particular cultural significance to those communities,’ and ‘therefore granted access to those parts of the Estate to the communities.’\footnote{Id. para. 32.} The claimants also argued that ‘reference to “international law” in the applicable BITs does not mean that the whole body of substantive international law is applicable.’\footnote{Id. para. 39.} For its part, the Respondent had no objection to the NGO being allowed to make submissions ‘provided they ... d[id] not impinge on or amount[ed] to a challenge to the sovereignty and territorial integrity of the Republic of Zimbabwe.’\footnote{Id. para. 5}

The Tribunal rejected the petition.\footnote{Bernhard von Pezold v. Zimbabwe, Award, para. 64.} The Tribunal acknowledged that the Indigenous tribes had ‘some interest in the land over which the Claimants assert[ed] full legal title,’ and that ‘the determinations of the Arbitral Tribunal in these proceedings w[ould] have an impact on the interests of the Indigenous communities.’\footnote{Id. para. 62.} Yet, it held that the ‘apparent lack of independence or neutrality
of the petitioners [was] a sufficient ground for denying the application.\footnote{Id. para. 56.} In fact, the Tribunal considered that by requiring that the \textit{amicus curiae} briefs bring a perspective ‘different from that of the parties,’ Article 37(2)(a) of the ICSID Rules implied a requirement of independence from the same parties.\footnote{Bernhard von Pezold v. Zimbabwe, Award, para. 49.}

Finally, the Tribunal agreed with the Claimants that the applicable law ‘did not incorporate the universe of international law into the BITs or into disputes arising under the BITs.’\footnote{Id. para. 57.} Since neither Party put the identity and/or treatment of the Indigenous communities under international law in issue in the proceedings, the Tribunal considered that the matter fell outside the scope of the dispute as it was constituted.\footnote{Id. paras 57 and 60.} While the proposed submission purported to focus on the rights of Indigenous peoples under international law, the ICSID dispute concerned measures adopted by Zimbabwe that, according to the claimants, infringed provisions of the applicable BITs.\footnote{Id. para. 60.} For the Tribunal, the former was not within the scope of the latter.

Proponents of \textit{amicus curiae} briefs consider them a means of enhancing the legitimacy and effectiveness of decision-making. Such briefs can harbinger the introduction of public values into international economic governance.\footnote{Id. para. 56.} They can illuminate the stance of historically marginalized communities and enable their voices to be heard in the implementation of international economic law. They can thus build bridges across different treaty regimes. \textit{Amicus curiae} briefs can contribute to the factual and legal architecture of a case. Finally, they can enhance the perceived openness of international economic governance to non-state actors.

Yet, opponents of non-state actors’ involvement contend that it undermines efficient decision-making by repoliticizing disputes and enabling the undue influence of special interests over trade and investment.\footnote{Id. 28 (reporting these criticisms).} For instance, an excessive emphasis on the conservation of natural and cultural heritage can constitute an act of ‘green colonialism,’ whereby outside groups show interest in land preservation and suggest the adoption of environmental and cultural policies that affect the land rights of Indigenous peoples.
Amicus curiae briefs are not particularly controversial in investor-state arbitration as several arbitration rules provide for the admissibility of their submissions if certain basic conditions are met. More controversial has been the admissibility of such briefs before the WTO DSM, as some WTO members, especially developing countries, contended that the need to consider and react to amicus curiae briefs would ‘bend the WTO dispute settlement procedures in favor of members with more legal resources.’

In any case, amicus curiae briefs do not constitute an ideal participatory mechanism as international economic courts are not required to accept such submissions; rather, they can accept them, provided that certain conditions are met, including timeliness, brevity, and independence. Moreover, even when such courts decide to accept amicus curiae briefs, they may impose restrictive word limits and short timeframes to present arguments. More importantly, by serving as amici curiae, local communities and Indigenous peoples do not become parties to the proceedings; rather, they have limited rights in the course of the same and cannot file an appeal or an annulment claim. They cannot ask for final or interlocutory remedies to preserve cultural entitlements before international economic courts. Finally, international economic courts are not obligated to discuss arguments presented in amicus curiae briefs in their decisions.

In conclusion, international economic courts should be sympathetic to amicus curiae briefs, in particular to those presented by affected Indigenous and local communities, accepting them as a matter of course in disputes that can affect their interests. This would enable Indigenous and local communities to have a say in proceedings that can affect them, illuminate their perspectives, and bring their arguments to the forefront of legal debates. Even though participation as amici curiae does not amount to a right, and international economic law includes other defragmenting techniques, this tool can contribute to the harmonious development of international law. By giving voice to the voiceless, even if some amicus curiae briefs did not ultimately influence the proceedings in the short term, they could influence further debate and potentially have a long-term impact on the development of international law.

436 See e.g. *United States—Measures Affecting the Production and Sale of Clove Cigarettes*, Appellate Body report, WT/DS406/AB/R, 4 April 2012, para. 10.


3.4 Authoritative Interpretations, Waivers and Amendments

International economic law is not written in stone and continually evolves through the periodic renegotiation of IIAs and the multilateral negotiation rounds at the WTO. Authoritative interpretations, waivers, and amendments can further contribute to the evolution of international economic law and its fine-tuning with other international law instruments. Such legal tools enable international economic law to openly endorse the fluidity of time and successfully manage change. In an ever-changing world, some change is also needed within the international legal order to ensure stability and justice. While treaties govern international relations and enable stability, certainty, predictability, and the functioning of the international legal system, a certain degree of flexibility is needed in some circumstances to maintain a balance between the rights and obligations within any given treaty. These legal tools can enable international economic law to respond to the challenges ahead – including cultural heritage-related disputes. Moreover, these three different, albeit related, legal tools can open international economic governance to ‘the coordination and reconciliation of competing norms and interests’.438

While the Ministerial Conference and the General Council acting on its behalf have ‘no general law-making competence’, they can adopt authoritative interpretations,439 waivers,440 and amendments.441 Concerning authoritative interpretations, the Ministerial Conference and the General Council can interpret the WTO agreements without being bound by prior decisions of WTO courts. To date, the WTO has not yet explicitly used authoritative interpretations.442 Instead, parties to investment treaties have used this legal tool to clarify vague treaty provisions and fill in interpretive gaps.443 Through authoritative interpretations, states ‘formally possess the ability to specify what the law is or should be when they ... disagree with interpretations developed by [international economic courts], as well as in situations where ... rules are unclear or

439 WTO Agreement Article IX:2.
440 Id. Article IX:3–4.
441 Id. Article X:1.
442 Some authors, however, have interpreted the Doha Declaration on the TRIPS Agreement and Public Health as an authoritative interpretation. See Holger Hestermeyer, Human Rights and the WTO: The Case of Patents and Access to Medicines (Oxford: OUP 2007) 281.
permit multiple interpretations. Such interpretations are binding on state parties and can reconcile conflicting treaty provisions, prevent disputes, and ultimately contribute to the harmonious development of international law. Such interpretations could be added to IIAs and be adopted at the WTO to foster the consideration of cultural concerns in key areas of international economic governance, for instance, concerning traditional knowledge and cultural expressions.

The WTO frequently grants waivers to respond to changing circumstances. In exceptional cases, waivers permit a Member to depart from an existing WTO obligation for a limited time. Waivers are ‘exceptional in nature’ and subject to strict terms and conditions. Waivers are reviewed annually and, based on such review, they may be extended, modified, or terminated. Therefore, waivers cannot be taken as ‘a subsequent agreement in the sense of Article 31(3)(a) of the Vienna Convention on the Law of Treaties’. Nonetheless, the WTO members have sometimes used waivers in situations where a multilateral interpretation would have been more appropriate.

For example, the General Council issued a waiver enabling several WTO members to ban trade in conflict diamonds under the Kimberley Process Certification Scheme (KPCS). Endorsed in General Assembly and Security Council resolutions, this scheme aims at barring trade in conflict diamonds, that is, diamonds used by rebel movements to fund armed conflict aimed at overthrowing legitimate governments. Under the scheme, only certified
non-conflict diamonds may be traded between Kimberley participants. In addition, all trade between participants and non-participants is banned. The scheme contributes to maintaining peace and security and preventing human rights violations by preventing rebels from financing their weapons through the diamond trade. The waiver shields the measures adopted under the KPCS from claims of illegality under WTO law.  

In fact, it exempts such measures from the MFN treatment obligation and the prohibition of quantitative restrictions.

While the waiver was welcomed as a successful way to compose diverging interests, namely international peace and security on the one hand and free trade on the other, Pauwelyn has convincingly highlighted the fact that international trade law itself already had all of the relevant flexibilities to reconcile the conflicting interests. Therefore, for Pauwelyn, waivers ‘risk ... sending out the wrong signals, confirming a WTO superiority complex.’ Nonetheless, they have the merit of reaffirming the importance of non-economic values within international economic law. Moreover, waivers could be envisaged to shield urgent measures adopted by states to safeguard their intangible cultural heritage and cultural practices.

More recently, India and South Africa proposed a waiver to ensure that, during the COVID-19 pandemic, IP protection could not prevent timely, universal, and affordable access to, and development of, related health products including vaccines. Many countries backed the proposal arguing that it would help save lives by allowing developing countries to produce their COVID-19 vaccines at a low cost. At the 12th WTO Ministerial Conference in Geneva, Member States agreed on a deal that temporarily removed IP barriers around patents for COVID-19 vaccines. While this agreement did not waive IP on all essential COVID-19 medical tools and did not apply to all countries, it contributed to the global fight against the pandemic.

States also have the power to amend treaties adding to, altering, or diminishing existing rights and obligations. The procedures for amending the various WTO agreements are complex and differ according to the agreement and

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452 Id. 1177.
454 WTO, 12th Ministerial Conference, Ministerial Decision on the TRIPS Agreement, 17 June 2022, WT/MIN/22/W/15/Rev.2.
provision at issue.\textsuperscript{455} In practice, ‘the amendment procedure does not make for an efficient mechanism’ of reform, as the process is lengthy.\textsuperscript{456} For instance, the first treaty amendment agreed upon by WTO Members—the Protocol Amending the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) adopted in 2005—entered into force in 2017 after two-thirds of the WTO Members deposited an instrument of acceptance with the Director General. Pursuant to the amendment decision, Article 31bis and an Annex were added to the TRIPS Agreement. The amendment aims to facilitate access to medicines, enabling members to export medicines produced under compulsory licenses to certain eligible countries.

Treaty texts could be amended to insert cultural concerns explicitly within the tapestry of international economic law, acknowledging the states’ rights and duties to adopt affirmative measures to protect the cultural heritage of minorities and Indigenous peoples, admitting the possibility of considering cultural products as different from other goods, or modifying the text of the general exceptions to include a specific provisions for cultural products.

3.5 Institutional Cooperation
Neither the World Trade Organization nor the World Bank are the primary international institutions responsible for addressing cultural matters. This task is the province of UNESCO. The United Nations established this specialized agency in 1946 to foster intercultural dialogue and build peace through international cooperation in education, sciences, and culture. Although the WTO and the World Bank are not UN agencies, they have maintained strong relations with the UN and its agencies since their establishment. These organizations have almost the same membership: only a handful of UN member countries are not members of the WTO and the World Bank.

The WTO–UN relations are governed by specific 1995 Arrangements.\textsuperscript{457} The WTO Director General participates in the Chief Executive Board which is the organ of coordination within the UN system. In parallel, the United Nations and the World Bank Group signed a Strategic Partnership Framework

\begin{thebibliography}{99}
\bibitem{wto} WTO Agreement Article X:1–2.
\bibitem{creamergodz} Creamer and Godzimirsk, ‘Engagement within the World Trade Organization’, 421.
\bibitem{arr} Arrangements for Effective Cooperation with other Intergovernmental Organizations—Relations Between the WTO and the United Nations, signed on 15 November 1995.
\end{thebibliography}
to consolidate their cooperation in helping countries implement the 2030 Agenda for Sustainable Development.\textsuperscript{458}

During the GATT era, institutional cooperation led to win-win outcomes from both trade and cultural perspectives. For instance, UNESCO and the GATT Contracting Parties collaborated on matters of cultural trade, conceptualizing trade as a useful tool to promote access to knowledge and education. The Florence Agreement on the Importation of Educational, Scientific, and Cultural Materials aimed to dismantle customs barriers to cultural goods.\textsuperscript{459} Covering books and audiovisual material of an educational, scientific, and cultural nature, the Florence Agreement offers a unique example of inter-institutional collaboration on matters of cultural trade.

Institutional cooperation and coordination between the WTO, the World Bank, and UNESCO can moderate the effects of possible conflicts of norms. Indeed, Article V of the WTO Agreement directs the General Council to ‘make appropriate arrangements for effective cooperation with other intergovernmental organizations that have responsibilities related to those of the WTO.’\textsuperscript{460} These organizations could mutually provide observer status, with each institution allowing the other to witness its deliberations and, in some cases, to have a voice in them. While the World Bank has observer status at the WTO General Council, the WTO has observer status at the World Bank and UNESCO.

Memoranda of understanding could set out the terms by which the World Bank, the WTO, and UNESCO might cooperate in areas of common interest. These organizations could also conduct joint research and analysis, for instance by organizing regular workshops on matters of common interest and publishing the outcomes of the proceedings.\textsuperscript{461} In this regard, the WTO Secretariat has developed several publications in collaboration with other counterparts on issues of mutual interest, and already cooperates with UNESCO in matters related to IP and services. Cultural heritage is also increasingly discussed at the WTO annual Public Forum.\textsuperscript{462}


\textsuperscript{460} WTO Agreement, Article V.

\textsuperscript{461} For instance, \textit{WIPO–WTO Colloquium Papers} are a peer-reviewed academic journal, published jointly by the World Intellectual Property Organization and the WTO each year since 2010 to examine intellectual property-related topics that are of common concern to the two organizations.

\textsuperscript{462} WTO, Public Forum 2016, Session 46, Held on 28 September 2016, \textit{Trade and Inclusive Access to Knowledge}. 
International economic courts could consult cultural experts when adjudicating cultural heritage-related cases. This type of consultation has already been used: for instance, panels have consulted with officials of the World Health Organization (WHO) when adjudicating cases relating to public health. For instance, in *European Communities—Measures Affecting the Approval and Marketing of Biotech Products* (*EC*—*GMO*s), the Panel sought and received information from several international organizations. Institutional cooperation can certainly be improved by building more explicit legal bridges between UNESCO and the WTO.

In conclusion, the WTO, the World Bank, and UNESCO have already established some institutional relations with each other. This culture of cooperation needs to be enhanced to make international economic law more permeable to cultural concerns to respond to current challenges and evolve in conformity with other international law instruments.

## 4 Conclusions

The development of international economic law poses a challenge for international lawyers, as it raises the question of whether or not international economic law is clinically isolated from public international law. The question is clearly linked to the debated topic of whether public international law is a fragmented system or not. Adopting a unitary approach, this chapter advocates the importance of achieving coherence among the different sources of international law when adjudicating cultural heritage-related disputes. This chapter has investigated several legal tools that both *de lege lata* and *de lege ferenda* may help adjudicators and policy-makers to reconcile the different interests at stake.

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De lege lata, investment treaties and the WTO-covered agreements should not be considered self-contained regimes but important components of public international law. Thus, international economic law has to be consistent with international law. In parallel, international economic courts can consider cultural entitlements within the current framework of international economic law. Arbitral tribunals, WTO panels, and the AB are of limited jurisdiction and cannot hold states liable for breach of their cultural obligations unless they receive the mandate to do so. Rather, they can only determine whether the protections in the relevant investment treaty or WTO-covered agreements have been breached.

However, this does not mean that cultural heritage should be irrelevant in the context of trade and investment disputes. In many circumstances, international law is the law applicable to the given disputes according to the arbitral clause or the relevant treaty provision. Even in those cases where the applicable law is the law of the host state, it is worth recalling that national legal systems are permeated by international law, be they monist or dualist systems. Therefore, when arbitrators apply national provisions that reflect international law norms, the boundaries between the international and the national planes become blurred. Where peremptory norms of international law matter in the context of adjudication, adjudicators must consider these fundamental norms. In particular, arbitral tribunals, WTO panels, and the AB can and should interpret international economic law in conformity with jus cogens and state obligations under the United Nations Charter. International economic law must also be interpreted in light of customary rules of treaty interpretation, thus considering any relevant rules of international law applicable in the relations between the parties.466 Traditional tools of treaty interpretation may contribute to reconciling trade, foreign investment, and cultural heritage, as well as to gradually humanizing of international economic law.

De lege ferenda, treaty-driven approaches to cultural heritage protection can be envisaged. Such text-driven approaches rely on the periodical renegotiation of international agreements. Since international investment treaties are renegotiated from time to time, there is scope for inserting ad hoc clauses such as cultural exceptions within these treaties. Analogously, the WTO-covered agreements are not written in stone; rather, rounds of negotiations regularly take place, and WTO members have adopted interpretative statements, waivers, and even amendments to better accommodate non-trade concerns into the fabric of the WTO.

466 VCLT Article 31.3.c.