

Cultural Heritage in International Economic Law

by Valentina Vadi, Brill/NIJHOFF, 2023.

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*'Since antiquity, trade, and investment on the one hand and cultural production on the other have characterised human endeavour. These areas of human activity have thus inevitably intersected: not only have trade and foreign investment facilitated interaction among different civilizations but cultural goods have also been traded for millennia. Therefore, there can be mutual supportiveness between the safeguarding of cultural heritage and the promotion of trade and foreign investment.'*²¹

Introduction

These words by the author sum up the core of the analysis in this 400 + pages book which highlights the linkages between economic interests and cultural interests and how the dynamics of these relationships could result in tension(s) requiring amicable settlement: in this case adjudication. Typically, the subject of cultural heritage finds its relevance generally within the confines of international humanitarian law or specifically within its own distinct branch of international law that is international cultural heritage law. Together, they focus on the protection of cultural objects/property during armed conflicts² and in peace time³. Although several publications examine cultural heritage in international law,⁴ and its intersection with international humanitarian law, international environmental law, and international human rights law, they rarely explore the intersection between cultural heritage law and international economic law (IEL).

Valentina Vadi's book is an important addition to the existing literature and brings a unique dimension to the discussions on cultural heritage by exploring the intersection between international economic law and international cultural heritage law (p.5). This intersection is explored by examining the

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1 VALENTINA VADI, CULTURAL HERITAGE IN INTERNATIONAL ECONOMIC LAW 143 (Brill Nijhoff, 2023).

2 Convention for the Protection of Cultural property in the Event of Armed Conflict with Regulations for the Execution of the Convention, The Hague (May 14, 1954), <https://www.unesco.org/en/legal-affairs/convention-protection-cultural-property-event-armed-conflict-regulations-execution-convention>.

3 UNESCO Declaration Concerning the Intentional Destruction of Cultural Heritage, Preamble, (Paris, Oct. 17, 2003), https://international-review.icrc.org/sites/default/files/irrc_854_unesco_eng.pdf.

4 See generally Max Planck Encyclopaedias of International Law, Cultural Heritage Law and Policy Series, or the Oxford Scholarly Authorities on International Law, all of which are available at <https://opil.ouplaw.com/page/881#1> (last visited Aug. 14, 2023).

‘interplay between the protection of cultural heritage and the promotion of trade and investment in international economic law’ (p. 12). The discussions are analysed through the lens of the IEL dispute settlement mechanisms (DSM); the World Trade Organisation (WTO) adjudicative bodies on one hand and the investment treaty arbitral tribunals on the other (referred to by the author as the international economic courts). In particular, this book considers whether common approaches have emerged in the way international economic courts balance economic interests with cultural heritage concerns/cultural interests in adjudicating cultural heritage related disputes.

As acknowledged by Francesco Francioni,⁵ ‘one of the most serious threats to cultural property today is the rampant illicit and clandestine traffic of cultural objects and antiquities across national boundaries.’⁶ This inference by Francioni agrees with a specific argument put forward by the author that, ‘the commodification of culture, that is, the transformation of cultural practices or items into commodities or objects of trade can dilute their cultural value unless it is conducted in a culturally appropriate way.’ (p.2) It is within this context that disputes may arise necessitating the adjudication of such cultural related disputes within the field of IEL. It is thus fascinating to see how the author uses this as a lens to explore the contribution of IEL to developments in International Cultural Heritage Law by highlighting the relevant disputes concerning cultural elements adjudicated before international economic courts (p.12). Even where research has shown the link between cultural heritage and international trade law, they have not examined it from the dispute settlement perspectives of the international economic courts which makes this book a valuable contribution to scholarship.

The Structure of the Book

The book is divided into three parts: part 1 and 2 are divided into three chapters each and part 3 provides the conclusion.

Part 1-Cultural Heritage, Trade and Foreign Direct Investment: Defining and Connecting the Fields

Part 1 consists of chapters one to three. It maps out the legal framework governing cultural heritage, free trade and foreign direct investment. Chapter 1 begins by tracing the importance and recognition of cultural heritage in international law. In analysing the concept of cultural heritage and the main features of international law that governs it, the chapter examines five different but related categories of cultural heritage: world heritage, underwater cultural heritage, intangible cultural heritage, cultural diversity, and indigenous heritage. The chapter effortlessly illustrates the impact of globalization on all these varieties of cultural heritage. A major finding of the chapter is that despite the recognition given to cultural heritage in international law, it lacks a compulsory dispute settlement mechanism, but rather, different international cultural heritage law instruments contain ‘weak’ dispute settlement provisions mostly stipulating diplomatic means of dispute settlement. (p.55).

5 FRANCESCO FRANCONI, CULTURAL HERITAGE, in MAX PLANCK ENCYCLOPAEDIA OF PUBLIC INTERNATIONAL LAW (Oxford Public International Law, Nov. 2020), <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1392?prd=EPIL>.

6 *Id.* at ¶ C.

In Chapter 2, the author links the conversations to the analysis in Chapter 1 by exploring the ‘converging divergences between international trade law and international investment law in relation to their interplay with cultural heritage protection.’ (p. 92). Here, the author emphasizes the link between cultural heritage protection and international economic law in theory and in practice. The chapter finds that given the non-binding nature of the dispute settlement mechanisms available within international cultural heritage law, cultural disputes involving investors or traders’ rights have been frequently brought before international economic courts (p. 104). The preference for these courts is attributed to the binding dispute settlement mechanism available under international economic law.

Chapter 3 concludes the discussion in part one by highlighting ‘the distinct interplay between international cultural heritage law and international economic law and select areas where this interaction takes place.’ (p.126). The chapter confirms that international economic courts have attracted a significant number of cultural heritage-related international economic disputes. A major argument in the chapter is that international disputes relating to the intersection between cultural heritage interests and economic interests are ‘characterised by the need to balance the state’s duty to adopt cultural policies on one hand, and the economic interests of investors and traders on the other.’ (p.124). The author also brings to the fore the advantages and disadvantages of instituting cultural heritage related disputes before international economic courts and simultaneously emphasizes the dangers of prioritizing economic interests over cultural heritage interests/concerns.

Part 2- When Cultures Collide: Cultural Heritage, Trade and Foreign Direct Investment

Part 2 consists of chapters four to six. Together, these chapters form the crux of the analysis in this book. A crucial question for determination in this part of the book is whether ‘international economic courts have paid attention to cultural heritage concerns and if so, how have they balanced economic interests and cultural policies of host states?’ (p.149). Chapter 4 examines cultural heritage in international investment law and arbitration. Questions about the ability of arbitral tribunals to consider cultural interests in the adjudication of investment disputes are assessed. The author considers the adjudication of several international investment disputes in arbitral tribunals across different jurisdictions. The cases examined here, and the jurisprudence of the tribunals across the jurisdictions reveal a tension between state obligations under investment treaty provisions and state cultural policies (p. 221). Specifically, the chapter confirms that cultural heritage concerns are not at the heart of the petitions brought before arbitral tribunals but rather the protection of investment/economic interests are prioritized. A key finding in this chapter is that ‘arbitral tribunals cannot rule on violations of international cultural heritage law unless the relevant investment treaty or contract requires them to do so.’ (p. 201) This is because the jurisdiction of arbitral tribunals is limited and usually concerned with investment treaty obligations. However, the chapter confirms that the jurisprudence of arbitral tribunals is contributing to the development of international law requiring the protection of cultural heritage.

In Chapter 5, the author takes an interesting approach by analysing the complex intersection between trade and cultural heritage law and exploring how the WTO dispute settlement bodies deal with cultural heritage. Specifically, the chapter investigates whether the WTO dispute settlement

bodies consider cultural concerns when adjudicating cultural heritage-related disputes. (p. 234). Several cultural heritage disputes relating to diverse areas of international trade law are examined. The evidence clearly points to the fact that WTO members have in fact brought cultural heritage-related disputes before the DSM where they claim that [cultural] regulatory measures adopted by member states affect their economic interests and are in breach of relevant WTO laws. (p. 233). In such instances, the underlying objective is to ensure that a balance is reached in the preservation of cultural heritage and the promotion of free trade. Despite the wide range of scenarios put forward by the author, there is no doubt left in the mind of the reader that the WTO system is not very interested in cultural heritage issues because they are not economic concerns which is the focus of the free-market system of the WTO. The author thus acknowledges that the WTO courts may not be the most appropriate court for settling cultural heritage related disputes.

Chapter 6 considers the institutional and jurisprudential convergencies and divergencies in the cultural heritage-related adjudication in the international economic courts. (p.330) While the author draws various similarities between the WTO DSM and arbitral tribunals in terms of substantive and procedural similarities, a major inference from this chapter is the noticeable divergences in the jurisprudence and practice in respect of cultural heritage-related disputes instituted in these courts. Accordingly, this chapter confirms that while arbitrators take cultural elements into consideration when adjudicating these disputes, the WTO DSM has instead adopted a more limited approach in its consideration of other international laws (pp.330-331). It is worthwhile to note that this chapter shows that a major point of departure in the jurisprudence of international economic courts in determining cultural heritage-related disputes is that 'while cultural concerns have influenced if not shaped some significant awards in the investment tribunals, cultural concerns remain marginal topics at the WTO.' (p. 337). The author continually reiterates that international economic courts ultimately settle international disputes in accordance with international economic law and are likely to favour economic interests over other interests including cultural heritage interests.

Although this book makes a compelling argument for a unique jurisprudence emerging from international economic courts in the way they settle cultural heritage related disputes by prioritizing economic interests over cultural heritage interest, it is difficult to see how this differs substantially from the way other courts decide cases brought before them. In fact, courts both at the domestic and international level tend to stick to the subject matter of the legislation or treaty establishing them.⁷ Instead, the book corroborates this practice: that is, most courts including international economic courts in exercising jurisdiction are limited to the subject matter of the treaty establishing them. This is similar to the proposals for the jurisdiction of the International Criminal Court (ICC) to be expanded to include corporate criminal responsibility so that Multinational Companies (MNCs)

7 ANNABELLE BENNETT & SAM GRANATA, WHEN PRIVATE INTERNATIONAL LAW MEETS INTELLECTUAL PROPERTY LAW – A GUIDE FOR JUDGES 32 (Hague Conference on Private International Law & World Intellectual Property Organization, 2019) https://www.wipo.int/edocs/pubdocs/en/wipo_pub_1053.pdf; see also GUÉNAËL METTRAUX, INTERNATIONAL CRIMES AND AD HOC TRIBUNALS 5–12 (OUP, 2006) (accessible online with ISBN no. 9780191709203).

can be sued in the ICC.⁸ Until such a time when the Rome Statute is amended to allow the ICC to prosecute companies, it is unlikely that these MNCs can be sued in the ICC as collective entities; the ICC will have limited jurisdiction. Whether personal or subject matter jurisdiction, courts must be seized with either to consider a case.

What is clear from the analysis in Part Two of this book is that the arguments provide another layer of justification for the protection of cultural heritage not only during armed conflict/war but also in peace time. That is, examining the jurisprudence of the international economic courts in relation to cultural heritage-related disputes, confirms the need to strengthen international cultural heritage law. Also, the analysis in Part Two contributes to existing scholarship that demonstrate that litigation can be used as an instrument for political, legal, and social change.⁹ By highlighting that international economic courts should expand their jurisprudence or become activist courts and include cultural heritage interests in their decisions, the author contributes to this body of scholarship.

Part 3- Challenges and Prospects

Part 3 provides the conclusion in Chapter 7. Here, the author asks a very crucial question: ‘what strategies are available to avoid collisions between the promotion of foreign investments and free trade on one hand and the safeguarding of cultural heritage on the other?’ (p. 364) In answering the question, the author proposes several tools that may help adjudicators in international economic courts and policy makers to reconcile the different interests at stake when considering cases involving cultural heritage related disputes. (p. 439). For example, the adoption of Alternative Dispute Resolution (ADR) methods as a possible tool is proposed. In the words of the author, ‘while adjudication is not designed to address extra-legal issues which are deemed non-justiciable, alternative dispute resolution (ADR) methods... can be suited to resolve complex disputes involving political, economic, and cultural interests.’ (p. 366). The author explains how these ADR methods are already intricate parts of the DSM of the international economic courts. The argument made here is that these could be utilized in resolving cultural heritage disputes before international economic courts. The author is careful not to present an alternative without its own shortcoming(s). Consequently, the difficulties that may arise in adopting these suggestions are also highlighted. For example, the author notes that ‘without adequate safeguards, ADR may fail to address power imbalances’ that may exist between disputing parties. (p.370).

8 Photeine Lambridis, *Corporate Accountability: Prosecuting Corporations for the Commission of International Crimes of Atrocity*, 53 INT'L L. & POL. 144–51 (2021); see also Antony Crockett et al., *International Criminal Court to Prosecute business and human rights*, HERBERT SMITH FREEHILLS (Nov. 2, 2016), <https://www.herbertsmithfreehills.com/insights/2016-11/international-criminal-court-to-prosecute-business-and-human-rights>.

9 See JAMES THUO GATHII, *THE PERFORMANCE OF AFRICA'S INTERNATIONAL COURTS- USING LITIGATION FOR POLITICAL AND SOCIAL CHANGE* (James Thuo Gathii ed., 2020); Tom Ginsburg, BOOK REVIEW – *THE PERFORMANCE OF AFRICA'S INTERNATIONAL COURTS: USING LITIGATION FOR POLITICAL, LEGAL, AND SOCIAL CHANGE* 384 (James Thuo Gathii ed., Oxford University Press, 2020); see Tim Ginsburg, *The Performance of Africa's International Courts: Litigation for Political, Legal, and Social Change*, 115(4) AM. J. INT'L L. 777 (2021).

The conclusion in the book could be summarised as follows: with the lack of a compulsory dispute settlement mechanism within international cultural heritage law, cultural heritage-related disputes have gravitated towards international economic courts. (p.442). The author reiterates that these courts may not ‘constitute the most suitable courts for settling cultural heritage related disputes.’ (p.442). This is because international economic courts could dilute or neglect significant cultural interest and instead emphasize economic interests. The author admits that despite the number of cultural heritage-related disputes adjudicated before the international economic courts, IEL has not ‘developed any institutional machinery for the protection of cultural heritage through dispute settlement.’ (p.445).

Conclusion

This book makes for an interesting read. It captivates the reader by weaving the conversations from the introduction to its conclusion using simple and comprehensible language and maintaining a central theme. In unpacking the analysis, an explorative and analytical methodology is adopted, and it engages in literature that transcends the field of culture, economics, and law. It is enriched by the depth of case laws examined. This book will be useful for legal academics and scholars, researchers, students, (international) adjudicators, cultural heritage experts, political and social scientists, economists, and policy makers. Moreso, at a time where world events have brought to the fore conversations which centre on the fragmentation and intersectionality of international law, this book is timely as it draws attention to the need for researchers to consider a re-focus of research on intersectionality of international law viz-a-viz the lens of international economic law and international cultural heritage law.