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Socio-Legal Perspectives on the Adjudication of Cultural Diversity Disputes in International Economic Law

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O wad some Pow'r the giftie gie us
To see ourselves as others see us!
It wad frae mony a blunder free us,
And foolish notion (Burns 1786)

Abstract

This article explores and critically assesses the recent case law adjudicated by WTO panels and investment arbitral tribunals on cultural diversity related disputes. Adopting a socio-legal approach, this study focuses on the role that adjudicators have played in mapping the interactions between international economic law and the international cultural law i.e. international law protecting cultural diversity. While arbitrators have started to accommodate cultural values in argumentation patterns, WTO panels and even the WTO Appellate Body have adopted a more cautious approach. This paper identifies the socio-legal reasons that may contribute to these different approaches.

This study will proceed as follows. *First*, I will briefly define the multifaceted concept of cultural diversity and sketch out the relevant UNESCO instrument. *Second*, I shall analyze the available dispute settlement mechanisms. *Third*, the conflict areas between international economic law and cultural diversity law will be scrutinized through the analysis of some relevant case studies. *Fourth*, this contribution critically assesses the role that adjudicators play in adjudicating interdisciplinary disputes. Finally, some conclusions will be drawn.

Key words

Cultural diversity, international economic law.

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Introduction

This paper explores and critically assesses some recent cases adjudicated by WTO dispute settlement bodies and arbitral tribunals on the interplay between international economic law and international cultural law. While other studies have analyzed the interplay between international economic law and cultural diversity from an institutional perspective, by focusing on treaty law and/or the historical articulation of the dichotomy between trade and culture (Germann 2006, Donders 2008, Burri Nenova 2010a), this paper adopts a socio-legal approach, by focusing on the role that adjudicators have played in mapping the interactions between two different sets of norms. The underlying assumption is that adjudication is a mode of governance, and has a fundamental importance with regard to the concrete implementation of a given legal regime. While some authors have already scrutinized whether and how the WTO panels and Appellate Body have dealt with cultural diversity, a study focusing on the relevant arbitral case law is missing. This study aims to address this lacuna in contemporary legal studies and may contribute to the current debate on the unity or fragmentation of international law. The survey of the relevant case law presents mixed results. While investment treaty arbitration has started to accommodate cultural values in the reasoning of arbitral awards (Vadi 2009), WTO panels and even the WTO Appellate Body have adopted a much more cautious approach to the introduction of cultural values in their decision framework. This paper explores the socio-legal reasons that can explain these different approaches.

This study will proceed as follows. *First*, I will define the multifaceted concept of cultural diversity and sketch out the main tenets of the relevant UNESCO instruments. *Second*, the available dispute settlement mechanisms will be sketched out. *Third*, the conflict areas between international economic law and international cultural law will be scrutinized through the analysis of some relevant case studies. *Fourth*, this contribution critically assesses the role that adjudicators play in adjudicating interdisciplinary disputes. Finally, some conclusions will be drawn.

1. Cultural Diversity

Cultural diversity can be defined as 'the manifold ways in which the culture of groups and societies finds expression', and 'is made manifest not only through the varied ways in which the cultural heritage of humanity is expressed, […] but also through diverse modes of artistic creation, production, dissemination, distribution and enjoyment, whatever the means and technologies used' (UNESCO 2005 Article 4.1). Cultural diversity is thus an inclusive concept which holds two interrelated components: culture and diversity. In order to understand what cultural diversity means, one needs to explore both its parts.

Three different meanings of culture can be identified (Eide 1995): 1) culture in its material sense, as the product of a given cultural process; 2) culture in its immaterial sense as a process of artistic or scientific creation; 3) culture in its anthropological sense, that is, culture as a way of life. Cultural diversity in the narrow sense draws upon the last meaning of culture, whereby culture is holistically meant as 'the set[s] of distinctive spiritual, material, intellectual and emotional features of society' which encompass in addition to art and literature lifestyles, ways of living together, values systems, traditions and beliefs (UNESCO 2001). Cultural diversity in the broader sense embodies the three above-mentioned meanings of culture: cultural diversity is not limited to cultural goods (Burri Nenova 2010b) but also includes the protection of tangible and intangible cultural heritage. As culture is not a static concept but a fluid and dynamic force which changes over time, it is by nature diverse. Thus, diversity is inextricable from culture (UNESCO 2002).

In the past decade, cultural diversity has come to the forefront of legal and policy debate. At the normative level, the United Nations Educational, Scientific and Cultural Organization (UNESCO 1945) has promoted the understanding of cultural diversity as a desirable goal. Respect for the diversity of cultures, dialogue and cooperation are deemed to be among the best guarantees of international peace and security (UNESCO 1945, preamble); the recognition of cultural diversity together with the awareness of the unity of mankind can lead to greater solidarity; finally, cultural exchanges create the conditions for renewed dialogue among civilizations (UNESCO 2001, preamble). If the wide diffusion of culture is deemed to be indispensable to the dignity of man and to constitute a 'sacred duty' which all the nations must fulfil in a spirit of mutual assistance (UNESCO 1945, preamble), cultural diversity is deemed to represent 'an ethical imperative inseparable from respect for human dignity'(ECOSOC 2009, § 40) and 'the common heritage of humanity' (UNESCO 2001, Article 1).

UNESCO's commitment to protect cultural diversity has reinforced traditional state authority in the cultural sector. Cultural sovereignty, i.e. the freedom of any State to choose its cultural model, beyond its own political, economic and social system, has traditionally fallen within the domestic jurisdiction of the state (Pineschi 2010). International cultural law has reinforced the cultural sovereignty of states and their top-down capacity to regulate individuals in the cultural domain (Morijn 2008). At the same time, the UNESCO has diffused the idea that cultural diversity is a common heritage of mankind and has attributed an international relevance to cultural goods and values that used to fall within the domestic jurisdiction (Francioni 2008). This paper focuses on the states' cultural policies as claims before international economic courts are based on states' regulatory behaviour.

2. When Cultures Collide: The Tension between Cultural Diversity and Economic Globalization

Globalization has brought cultures and people into closer contact than ever before (Sassen 1999). The enhanced interaction between cultures brings a series of opportunities. By leading to more choice for consumers, trade and foreign direct investment may enhance cultural diversity and media pluralism thus facilitating free speech, free flow of ideas and constant exchanges and interaction between cultures (UNESCO 2005, preamble). However, the enhanced interaction between cultures can endanger cultural diversity (UNDP 2004, p. 10). While the growing international trade and investment in cultural products constitutes an important part of the global economy (Peng 2008), the products of large producers tend to crowd out the products of smaller producers. Due to economies of scale, the current asymmetry in flows and exchanges of cultural goods at the global level jeopardizes cultural diversity possibly leading to cultural homogenization and ultimately to 'cultural hegemony'. Cultural hegemony is a sociological concept, originated by the philosopher Antonio Gramsci. In its original meaning, cultural hegemony indicates that a society can be ruled or dominated by one of its social classes that is able to impose on other groups, through everyday practices and shared beliefs, their views until they are internalized, creating the conditions for a complex system of control (Gramsci 1948). In this paper I use this term more broadly to indicate the predominance of a certain national culture over other competing cultures.

Do states have a right to preserve 'shelf-space' for national cultural products and services? Are cultural goods like other goods? Posner famously argued that cultural property is just another form of property and is not entitled to differential treatment: cultural considerations should not affect the market-based exchange of goods (Posner 2006). Posner's analysis was driven by efficiency concerns and the rationale of the comparative advantage.

However, the idea that cultural goods have a double nature i.e. economic and cultural and thus deserve special consideration by policy makers has increasingly gained prominence at the theoretical and normative levels. At the theoretical level, arguments are made that cost-benefit analysis is flawed for public sector decisions. As cultural goods have a societal relevance, they should not be assigned mere monetary value (Ackermann and Heinzerling, 2004). Most notably, the 2005 UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions, often referred to as Convention on Cultural Diversity (CCD) (UNESCO 2005), reaffirms 'the sovereign rights of States to maintain, adopt and implement policies and measures that they deem appropriate for the protection and promotion of the diversity of cultural expressions on their territory'(UNESCO 2005, Article1). At the root of this Convention was the need to safeguard the state power to encourage its national audio-visual sector - the sector with the highest economic value- against the general applicability of free trade (Wouters and Vidal 2010). Having failed to overcome the resistance by the United States against the inclusion of a cultural exception into the law of the World Trade Organization and the proposed Multilateral Agreement on Investment, the EU and other actors, most notably Canada, 'abandoned their defensive approach and opted for a proactive stance' (Herold 2006).

During the negotiations the positions were polarized (Donders 2008). As Kelsey points out, 'The US delegation made constant and vigorous interventions throughout the drafting process […] even though the US was unlikely ever to ratify the instrument – a tactic it applied with considerable success in negotiations on numerous environmental and human rights treaties […]'(Kelsey 2008, p. 248) When the Convention was finalized, the US protested that decisions by voting had undermined the spirit of *consensus* that normally characterized UNESCO decision making; more substantially it objected that the Convention was not about *culture* but about *trade*, and thus exceeded the mandate of UNESCO (Kelsey 2008).

Political and sociological considerations lead to the conclusion that if the negotiators agreed on the CCD this was deemed to be a desirable political and legal outcome notwithstanding some visible flaws. While some countries, most notably the EU and Canada, looked for creating a counter-weight to free trade discourse, the CCD goes beyond this limited goal and contributes to giving culture a place on the international political agenda. While the Convention deals with only one aspect of cultural diversity, that is cultural expressions, other aspects of cultural diversity are already covered by other UNESCO Conventions: the Convention concerning the Protection of the World Cultural and Natural Heritage (1972) and the Convention for the Safeguarding of the Intangible Cultural Heritage (2003). Not only do these Conventions introduce a compelling case or argumentative framework for the consideration of cultural diversity in policy making and adjudication but also create a normative framework for *good cultural governance* (Du Plessis and Rautenbach 2010).

Cultural governance expresses the need to regulate human activities and their effects on cultural diversity (including, for example, cultural heritage, cultural practices and cultural goods and services) by means of processes mandated by law so as to protect the cultural interests of present and future generations (Du Plessis and Rautenbach 2010). Cultural governance entails a number of 'legislative, executive and administrative functions, instruments and ancillary processes that could be used by governments […] to organize and regulate culturally relevant activities' (Du Plessis and Rautenbach 2010 p. 46). *Good cultural governance* refers to the exercise of state authority (Du Plessis and Rautenbach 2010 p. 48) according to due process and the rule of law which includes the respect for human rights and fundamental freedoms (Du Plessis and Rautenbach 2010 p. 62). In this sense, the CCD is not to be implemented at the entire discretion of the parties. To the contrary, the Convention requires respect for human rights and fundamental freedoms, such as freedom of expression, information and communication. Article

2.1 CCD expressly affirms that 'cultural diversity can be protected and promoted *only if human rights and fundamental freedoms, such as freedom of expression, information and communication […] are guaranteed.*'[emphasis added]

The Convention does not modify rights and obligations under other treaties, but requires parties to perform in good faith their obligations under the CCD and all other treaties to which they are parties. Without subordinating the CCD to any other treaty, Article 20 CCD states that the parties shall foster mutual supportiveness between the CCD and the other treaties to which they are parties. The Convention also requires parties to take into account the obligations and relevant provisions of the Convention when interpreting and applying the other treaties to which they are parties. In sum, Article 20 CCD puts forward the principle of mutual supportiveness, complementarity and non-subordination with other conventions. Although it is unclear how this principle can be applied to concrete situations and this clause has been criticized as a chimera or a Pyrrhic victory (Kelsey 2010), it should not be dismissed by adjudicators as a mere agreement to disagree. The provision is included in a binding treaty which requires 'taking into account' the provisions of the CCD when interpreting other treaties.

The fact that the CCD does not set out a hierarchical relation between international cultural law and international economic law merely reflects the paradigm shift of contemporary international relations from a pyramidal model of international organization to a network system (Van Den Kerchov and Ost 2002) or spaghetti bowl (Bhagwati 1995). As it is difficult to articulate the interaction of different legal paradigms at the normative level, this articulation was left to the adjudicative branch. The inclusion of the interpretative provision in the CCD does not void this attempt to create a counter balance to the embedded liberalism which underpins international economic law but only creates further arenas of contestation.

3. The Dispute Settlement Mechanisms

The disparity between international cultural law and international economic law is particularly evident in how their disputes are settled. Because international cultural law is still in its infancy, it presents embryonic features and lacks a dispute settlement mechanism. The proposals to establish a World Heritage Court for the settlement of disputes with cultural elements have not been successful (Chechi 2009). Many political considerations oppose the establishment of such a dispute settlement mechanism. *First*, how do we define a 'cultural' dispute? *Second*, would states ever relinquish their cultural sovereignty? *Third*, litigation may not be the proper context for settling this kind of disputes. As an author points out, 'cultural heritage disputes are often multidimensional, involving not only complex legal issues, but also sensitive, not necessarily legal elements, of an emotional, ethical, historical, moral, political, religious, or spiritual nature' (Theurich 2009). Because of the distinct features of these disputes, stakeholders tend to prefer alternative dispute resolution.

In this sense, the CCD does not provide for a compulsory dispute settlement mechanism but requires mandatory negotiations. If the parties cannot reach agreement by negotiation, they 'may jointly seek the good offices of, or request mediation by a third party' (CCD, Article 25.2). If these procedures fail, the parties 'may have recourse to conciliation in accordance with the procedure laid down in the Annex of this Convention' (CCD, Article 25.3). The parties are then under an obligation to consider in good faith the proposal for the resolution of the dispute made by the Conciliation Commission established on an *ad hoc* basis (CCD, Article 25.3). Such a system is characterized by the almost complete lack of enforceable substantive provisions. While this 'dispute settlement mechanism is worth mentioning only as being reminiscent of the very early days of modern international

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law' (Hahn 2006), its characteristics also reflect the delicate nature of the subject matter of the possible disputes.

By contrast, international economic law is characterized by well-developed and sophisticated dispute settlement mechanisms. While the dispute settlement mechanism of the World Trade Organization (DSU 1994) has been defined as the 'jewel in the crown' of this organization (Narlikar 2005), investment treaty arbitration has become the most successful mechanism for settling investment-related disputes (Franck 2009).

The creation of the WTO Dispute Settlement Body determined a major shift from the political consensus-based dispute settlement system of the GATT 1947 (GATT 1947) to a rule-based, architecture designed to strengthen the multilateral trade system (Crowley and Jackson 1996). The WTO Dispute Settlement Mechanism is compulsory, exclusive and highly effective (Van den Bossche 2008). The decisions of panels and the Appellate Body are binding on the parties, and the Dispute Settlement Understanding provides remedies for breach of WTO law.

At the procedural level, when cultural diversity related trade disputes emerge, Article 23.1 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) obliges Members to subject the dispute exclusively to WTO bodies (DSU, Article 23.1). In *US – Section 301 Trade Act*, the Panel held that Members 'have to have recourse to the DSU DSM to the exclusion of any other system' (*US – Section 301* § 7.43). In *Mexico – Soft Drinks* the Appellate Body clarified that the provision even implies that 'that Member is entitled to a ruling by a WTO panel' (*Mexico – Soft Drinks* § 52). Pursuant to WTO settled case law and Arts. XXIII:1 of the GATT 1994 each WTO Member which considers any of its benefits under the covered Agreement prejudiced can bring a case before a panel.

In parallel, investment treaties provide investors direct access to an international arbitral tribunal. This is a major novelty in international law, as customary international law does not provide such a mechanism. The use of the arbitration model is aimed at depoliticizing disputes, avoiding potential national court bias and ensuring the advantages of confidentiality and effectiveness (Shihata 1986). Arbitral tribunals review state acts in the light of their investment treaties, and this review has been compared to a sort of administrative review. Authors postulate the existence of a global administrative space in which the strict dichotomy between domestic and international has largely broken down (Krisch and Kingsbury 2006). Under this theoretical framework, investor-state arbitration has been conceptualized as a global administrative law (GAL) creature (Van Harten and Loughlin 2006, p. 121), which impels states to conform with GAL principles and to adopt principles of good governance.

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

One may wonder whether the fact that cultural diversity disputes tend to be adjudicated before international economic law *fora* determines a sort of institutional bias. With regard to the WTO DSB, 'it is quite uncontroversial that an adjudicatory

system engaged in interpreting trade-liberalizing standards would tend to favor free trade (Trachtman 1999). Recent empirical studies have also shown that there is a consistently high rate of Complainant success in WTO dispute resolution (Maton and Maton 2008) and authors have theorized that 'the WTO panels and the WTO Appellate Body have interpreted the WTO agreements in a manner that consistently promotes the goal of expanding trade, often to the detriment of respondents' negotiated and reserved regulatory competencies' (Colares 2009, p. 388). In particular, given the fact that about 80% of the cases have been settled in favour of the claimant, Colares has highlighted that 'the DSB has evolved WTO norms in a manner that consistently favors litigants whose interests are generally aligned with the unfettered expansion of trade.' (Colares 2009, p. 387) This study questions whether the same 'institutional bias' is present in investor-state arbitration and whether and how adjudicators have an important role to play in adjudicating these disputes.

4. International Economic Disputes with Cultural Elements

As the number of disputes with cultural elements continues to increase, it is important to reflect on the method for identifying and characterizing such disputes. In a preliminary way, no two parties will agree that a dispute is essentially 'cultural' (Sands 2007). Indeed, the mere definition of a dispute as a 'cultural dispute' may have implications for a case. Therefore, it seems more appropriate to talk about 'disputes which have a cultural component' or 'cultural diversity related disputes' rather than to characterize a dispute as 'cultural'. This neutral approach is based on the consideration that cultural diversity related claims are rarely, if ever, raised in isolation from other international legal arguments. Still, the fact that cultural diversity related claims are raised together with other claims, does not erase their cultural quality, but simply emphasizes the need to ascertain such a quality in the merit phase of the proceeding.

In general terms, cultural diversity related international economic disputes are characterized by the need to balance the legitimate interests of a state to adopt cultural policies on the one hand, and the legitimate interests of foreign investors and traders to protect their property rights on the other. Several issues arise in this context. While environmental concerns have been somehow integrated in investment treaties and in GATT Article XX(g), cultural diversity receives much less attention if any. In the vast majority of international economic law treaties, cultural diversity is not mentioned at all. If cultural concerns are mentioned, the relevant clauses remain rather vague. The very fact that the balancing process occurs in the context of investor-state arbitration or the DSB could lead to the procedure being deemed biased in favour of the investors or traders.

Turning our attention to the emerging case law, it is becoming clear that there is no such thing as a typical dispute involving cultural diversity. Adopting the broader meaning of cultural diversity, the analyzed disputes operate *across the board*, arising in relation to investment in mineral exploitation, tourism, the media and other sectors (Peterson 2010). For instance, investors may claim that certain forms of regulation constitute an indirect expropriation or regulatory taking, and that compensation has to be paid. If a direct expropriation has occurred, claims may concern the amount of compensation. In other cases, investors may claim that a stabilization clause has not been respected due to regulatory change or that certain regulations amount to prohibited performance requirements. Other claims may concern discrimination or the violation of the fair and equitable treatment. At the WTO level, a number of disputes have related to the principle of non-discrimination or the prohibition of quantitative restrictions.

These disputes illustrate a potential 'clash of cultures' (Hahn 2006 and Voon 2006) between the neo-liberalism embedded in contemporary international economic

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governance and the regulatory power of the host state to enact measures to protect and promote cultural diversity. Therefore, it is important to analyze recent case law that has involved elements of cultural diversity, in order to verify whether these cases have adequately dealt with non-investment values.

5. Investment Disputes Involving Cultural Diversity

A survey of the relevant investor-state arbitrations shows that international investment law has not yet developed any institutional machinery for the protection of cultural diversity through investment dispute settlement. After all, international investment law is not intended to protect cultural diversity. However, in recent years, a jurisprudential trend has emerged which not only takes cultural diversity into consideration, but strikes an appropriate balance between the different interests concerned (Vadi 2009).

The *Glamis Gold Case* involved a *cathedral without walls* (Cantegreil 2007 and Vadi 2011) an area of cultural importance to a Quechan tribe which deems it to be a sacred place. When Glamis Gold, a Canadian mining company, planned to mine gold in the area, the tribe opposed the project. As the 2000 environmental impact study indicated that the best option was that of 'no action', the Department of the Interior withdrew the Imperial Project from further mineral entry for 20 years to protect historic properties (*Glamis Gold v. US* § 152). In 2002, however, permission for the project was granted and the State Mining and Geology Board enacted emergency regulations requiring the backfilling of all open-pit mines to re-create the approximate contours of the land prior to mining (*Glamis Gold v. US* § 183).

Because the Interior Department failed to promptly approve the project and California's regulation required the backfilling of open-pit gold mines, allegedly making its mining operation uneconomical, the investor filed an investor state arbitration, arguing that state and federal measures constituted an indirect expropriation in violation of Article 1110 of NAFTA. The claimant asserted that the federal and state actions constituted a 'continuum of facts' which deprived its property rights of their value (*Glamis Gold v. US* § 358). In particular, backfilling would be uneconomical and arbitrary since it would not be rationally related to its stated purpose of protecting cultural resources (*Glamis Gold v. US* § 321). The claimant pointed out that 'once you take the material out [of] the ground and if there are cultural resources on the surface, they are destroyed. Putting the dirt back in the pit actually does not protect those resources' but may lead to the burial of more artifacts and cause greater environmental degradation (*Glamis Gold v. US* § 687). Thus, the claimant argued that the California measures aimed 'to stop the Imperial project from ever proceeding while seeking to avoid payment of compensation it knew to be required had it processed transparently and directly through eminent domain' (*Glamis Gold v. US* § 703).

The arbitral tribunal found the claimant's argument to be without merit (*Glamis Gold v. US* § 360). In order to distinguish a non-compensable regulation and a compensable expropriation, the tribunal established a two-tiered test, under which it had to ascertain: (1) the extent to which the measures interfered with reasonable and investment-backed expectations of a stable regulatory framework; and (2) the purpose and the character of the governmental actions taken (*Glamis Gold v. US* § 356). *First*, the tribunal found that the California backfilling measures 'did not cause a sufficient economic impact to the Imperial Project to effect an expropriation of claimant's investment' (*Glamis Gold v. US* § 536). *Second*, the tribunal deemed the measures to be rationally related to its stated purpose (*Glamis Gold v. US* § 803). The tribunal admitted that 'some cultural artefacts will indeed be disturbed, if not buried, in the process of excavating and backfilling'(*Glamis Gold v. US* § 805), but concluded that, without such legislative measures, the landscape would be harmed by significant pits and waste piles in the near vicinity (*Glamis*

Gold v. US § 805). Remarkably, the arbitral tribunal also expressly referred to Article 12 of the World Heritage Convention, which requires States to protect their cultural heritage even if it is not listed in the World Heritage lists. This is rather extraordinary as cultural heritage experts have repeatedly stressed that Article 12 of the WHC is an often neglected provision (Lenzerini 2008, O'Keefe 1994).

The *Lemire case* also represents an excellent case study as it involved several claims related to media rights and may be related to cultural diversity in the form of intangible cultural heritage, linguistic diversity and cultural freedom. Mr. Lemire *inter alia* challenged the fact that a tender for a radio channel required it to broadcast in Ukrainian only. Mr. Lemire argued that the 100% Ukrainian language content requirement favoured national vis-à-vis foreign investors. It was no surprise that the foreign investor who was participating to the bidding process was not awarded the license. The arbitral tribunal dismissed the arguments in support of *cultural freedom* brought by Mr. Lemire that 'We should allow the audience to determine what it wants' and that 'since Ukraine is seeking the status of a country with a market economy, it should not introduce Ukrainian culture by force' (*Lemire v Ukraine*, § 407). Instead, the arbitral tribunal held that this condition of the bidding process 'was a legitimate decision, based on a public interest choice to extend the use of Ukrainian in the media' arguably contributing to the preservation and diffusion of *Ukrainian culture* (*Lemire v Ukraine*, § 407).

Finally, as the Ukrainian *Law on Television and Radio Broadcasting* required that at least 50% of the general broadcasting of each radio company should be music produced in Ukraine (*Lemire v Ukraine* § 227), the claimant argued that the 50% local music requirement implied a violation of Article II.6 of the US-Ukraine BIT, namely of the prohibition to 'impose performance requirements …which specify that goods and services must be purchased locally, or which impose any other similar requirements' (*Lemire v Ukraine*, § 503). In the claimant's opinion, the abnormal high level of the requirement caused significant damages, because its program concept was based 100% on hits. As there were too few hits of Ukrainian music, it had to continuously replay the same few Ukrainian hits (*Lemire v Ukraine*, § 503). Thus, the claimant stated that he suffered loss of advertising revenue.

In the opinion of the respondent, however, local music requirements were justified on 'public policy grounds' (*Lemire v Ukraine*, § 218). and the *Ukrainian Law on Television and Broadcasting* (LTR) should be considered 'as part of the State's legitimate right to organize broadcasting' (*Lemire v Ukraine*, § 227). In the Annex to the BIT both States reserved the right to make or maintain limited exceptions to the national treatment principle with regard to radio broadcasting stations (*Lemire v Ukraine* § 242). More importantly, Ukraine claimed that:

"In all jurisdictions, Radio and TV are special sectors subject to specific regulations. There are two reasons for this: - first, radio frequencies are by technical nature scarce assets, and consequently the law must articulate systems for allocating licenses to prospective bidders; - but there is also a second reason: when regulating private activity in the media sector, states can, and frequently do, take into consideration a number of legitimate policy issues: thus media companies can be subject to specific regulation and supervision in order to guarantee transparency, political and linguistic pluralism, protection of children or minorities and other similar factors"(Lemire v Ukraine § 241).

The Arbitral Tribunal upheld Ukraine's line of argument. In a preliminary fashion, it considered that the local music requirement applied to all broadcasters in Ukraine (*Lemire v Ukraine* § 501). Then, it affirmed:

> "As a sovereign state, Ukraine has the *inherent right to regulate its affairs* and adopt laws in order *to protect the common good of its people*, as defined by its

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> Parliament and Government. The prerogative extends to promulgating regulations which define the State's own *cultural policy*. *The promotion of domestic music may validly reflect a State policy to preserve and strengthen cultural inheritance and national identity*. The "high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their own borders" is reinforced in cases when *the purpose of the legislation affects deeply felt cultural or linguistic traits of the community*." [emphasis added, internal citations omitted] (*Lemire v Ukraine* § 505).

The arbitral tribunal inquired about the international society's prevailing ideas about ways to protect national culture. In this sense, the Lemire tribunal held: 'the desire to protect national culture is not unique to Ukraine' and took into account the fact that 'a number of other countries impose similar requirements' (*Lemire v Ukraine* § 501). For instance, France requires that radio stations broadcast a minimum of 40% of French music, and Portugal has a 25-40% Portuguese music quota (*Lemire v Ukraine* § 501). Therefore, the tribunal held that such requirement could not be deemed to be 'unfair' or 'inequitable' (*Lemire v Ukraine* § 507).

The tribunal then asked whether the prohibition of performance requirements was applicable to a cultural restriction like the 50% Ukrainian music requirement. To answer to this question, the tribunal interpreted Article II.6 of the BIT adopting two different interpretation criteria: the textual interpretation and teleological interpretation (*Lemire v Ukraine* § 508). Looking at the ordinary meaning of Article II.6 of the BIT, this provision clearly prohibited local laws' requirements that 'goods or services …must be purchased locally'. While the Ukrainian law did not specify that radio stations should purchase local goods and it did not prohibit them from obtaining Ukrainian music from non-Ukrainian sources, Ukrainian music was *de facto* produced and commercialized locally (*Lemire v Ukraine* § 509). With regard to the object and purpose of Article II.6 of the BIT, the arbitral tribunal held that it was 'trade-related: to avoid that states imposed local content requirements as a protection of local industries against competing imports' (*Lemire v Ukraine* § 510). Since the objective of the local law was 'not to protect local industries and restrict imports, but rather to promote Ukraine's cultural inheritance' it was deemed to be 'compatible with Article II.6 of the BIT' (*Lemire v Ukraine* § 510).

6. Cultural Diversity Trade Related Disputes

GATT/WTO Panels and the Appellate Body have confronted the issue of culture versus trade several times, and 'have consistently confirmed that culture does not have any special status in the GATT/WTO regime' (Peng 2008). Both panels and the AB tend 'not to radically alter the "delicate and carefully negotiated balance" of the WTO Agreements', but rather 'follow the conventional analysis' and 'concentrate on the core trade-related questions that fall within the DSB's authority'(Burri Nenova 2008).

In an early case, *Japan- Measures on Imports of Leather*, Japan had established an import licensing scheme to limit the imports of certain leather goods, in order to protect a cultural minority, the Dowa mainly employed in the leather industry. Japan explained that a segment of the Japanese society had suffered discrimination for centuries due to social exclusion originated during the Japanese feudal period (*Japan- Leather* § 21.i) Although the people of Dowa districts had already been emancipated from institutional discrimination in the XIX century, 'this emancipation was only formal as in actual social life, these people continued to lead a destitute life under miserable conditions…' (*Japan- Leather* § 21.iv) Japan added that the measures at stake 'constituted more than a minority problem' and related to 'subsistence and survival' (*Japan- Leather* § 22). The US however argued that import quotas were not an acceptable way of solving domestic social problems

which were irrelevant to the case and irrelevant to the terms of reference of the panel (*Japan- Leather* § 20).

The GATT Panel noted that while the United States approach was based essentially on legal arguments, 'Japan's case, on the other hand, rested almost entirely on considerations resulting from the particular problems connected with […] the Dowa people (*Japan- Leather* § 41). It also noted that Japan had not invoked any provision of the GATT to justify the maintenance of the quota. The panel concluded that the import licensing scheme constituted an import quota which was in violation of GATT Article XI and that

> "[…] it was not for it to establish whether the present measures would be justified under any GATT provision […] The Panel considered that *the special historical, cultural and socio-economic circumstances referred to by Japan could not be taken into account by it in this context since its terms of reference were to examine the matter 'in the light of the relevant GATT provisions' and these provisions did not provide such a justification for import restrictions"*. [emphasis added] (*Japan-Leather* § 44)

In the *Canada-Periodicals* case, Canada restricted the publication of split-run magazines marketed in Canada. A split-run magazine has substantially the same content as a foreign publication, but contains advertisements aimed at the Canadian market. The Canadian government argued that larger US publications which run split run Canadian editions threatened to supplant Canadian culture unless Canada adopted import restrictions. Canada indeed prohibited the import of split-run periodicals that contained advertisement directed at the Canadian market that did not appear in the home country edition of that periodical. In 1993, a US corporation found a way around the import ban, publishing a Canadian edition of *Sports Illustrated* by transmitting electronically the editorial content from its US edition to a press in Canada. In response, the parliament imposed a tax on split-run periodicals equal to 80% of the value of all the advertising revenue earned by the edition. The tax made it unprofitable to publish a split run edition in Canada. The US challenged the Canadian measure before a WTO panel, arguing that the Canadian ban violated the prohibition on import ban under GATT Article XI and that the tax violated the national treatment provision under GATT Article III.

Canada responded *first* that the dispute concerned access to advertising services and should be subject to the General Agreement on Trade in Services (GATS). Under GATS, Canada did not make any commitment to grant national treatment to advertising services. *Second*, Canada argued that even if the GATT did apply, split-run magazines are not like products as their intellectual content make them different. As an author puts it, 'at its heart, this disagreement mirrored an underlying value difference between the United States and Canada; in the view of the United States, there was no essential difference between cultural commodities like magazines or books and other commodities like automotive parts' (Paul 2000-2001). In the view of Canada, cultural products had a specificity that distinguished them from ordinary items of trade.

The panel found that both GATT and GATS were applicable and accepted the US view that split-run periodicals were like Canadian magazines, and thus deemed that the Canadian measures were inconsistent with the GATT. The Panel highlighted that 'despite the Canadian claim that the purpose of the legislation is to promote publications of original Canadian content, this definition essentially relies on factors external to the Canadian market- whether the same editorial content is included in a foreign edition and whether the periodical carries different advertisements in foreign editions'(*Canada-Periodicals Panel Report*, § 5.24). The Appellate Body voided the Panel's finding that split-run periodicals and domestic periodicals were

like products; rather it deemed them to be directly competitive or substitutable products. In conclusion, the AB concurred with the Panel that the tax afforded protection to domestic products in violation of GATT Article III.

More recently, in *China-Publications and Audiovisual Entertainment Products*, the US alleged that various Chinese restrictions on the importations and distribution of US films sound recordings and publications violated provisions of the GATT, GATS and the Accession Protocol. The challenged measures included prohibiting foreign owned enterprises from importing the relevant products, requiring publication import entities to be fully owned and subject to an approval system pursuant to a state plan, granting trading rights in a discretionary manner. China tried to justify diverse measures in the media domain invoking, *inter alia*, the UNESCO Convention and the related UNESCO Declaration on Cultural Diversity. The US, however, recalled that 'the UNESCO Convention expressly provides: "Nothing in this Convention shall be interpreted as modifying the rights and obligations of the parties under any other treaties to which they are parties"'. The US went on to say that 'in any event, nothing in the text of the WTO Agreement provides an exception from WTO disciplines in terms of "cultural goods", and China's Accession Protocol likewise contains no such exception'(*China- Publications and Audiovisual Products* § 4.207, citing the Oral statement of the United States at the first substantive meeting of the Panel).

China's attempt to use the CCD as a shield was unsuccessful. The Panel held that restrictions on the distribution of publications violated Articles XVI and XVII of GATS and the national treatment requirement under GATT and found a number of Chinese measures inconsistent with the Accession Protocol. The Panel's report was uphold by the Appellate Body, despite China's request to be 'mindful' of the specific dual nature of cultural goods and services (*China- Publications and Audiovisual Products* AB Report § 25).

China also invoked Article XX(a) GATT which embodies the public morals exception, arguing that '[…] reading materials and finished audiovisual products are so-called cultural goods, i.e. goods with cultural content […] with a potentially serious negative impact on public morals'(*China- Publications and Audiovisual Products* Panel Report § 7.751). China explained that 'as vectors of identity, values and meaning, cultural goods play an essential role in the evolution and definition of elements such as societal features, values, ways of living together, ethics and behaviours.' (*China- Publications and Audiovisual Products* Panel Report § 7.751). In this sense, China made express reference to Article 8 of the *Universal Declaration on Cultural Diversity*, which states that cultural goods 'must not be treated as mere commodities or consumer goods'(*China- Publications and Audiovisual Products* Panel Report § 7.751). Therefore, in consideration of the major impact that cultural goods can have on public morals, China argued that it was legitimate to adopt a content review mechanism so as to prevent the dissemination of cultural goods that may negatively affect public morals(*China-Publications and Audiovisual Products* Panel Report § 7.752). China noted that the forbidden content ranged from 'violence or pornography to other important values, including the protection of the *Chinese culture and traditional value* [emphasis added].' (*China- Publications and Audiovisual Products* Panel Report § 7.753).

The United States did not challenge the argument that the measures at stake were measures to protect public morals but the appropriateness of the selected means to achieve the objective to protect public morals (*China- Publications and Audiovisual Products* Panel Report § 7.756). The Panel noted China's reference to the *Declaration on Cultural Diversity* and stated that since China had not invoked the Declaration as a defence to its breaches of trading rights commitments, but it had referred to the Declaration 'as support for the general proposition that the importation of products of the type at issue in this case could, depending on their content have a negative impact on public morals in China', 'it had no difficulty in

accepting this general proposition'(*China- Publications and Audiovisual Products* Panel Report footnote 538).

The panel admitted the applicability of Article XX (a) referring to the previous decision *US-Gambling*:

> "The panel in *US-Gambling*, in an interpretation not questioned by the Appellate Body, found that 'the term public morals denotes standards of right and wrong conduct maintained by or on behalf of a community or nation'. The panel went on to note that 'the content of these concepts for Members can vary in time and space, depending upon a range of factors, including prevailing social, cultural, ethical and religious values'. The panel went on to note that Members in applying this and other similar societal concepts, 'should be given some scope to define and apply for themselves the concepts of public morals […] in their respective territories, according to their own systems and scales of values' [internal citations omitted]". (*China- Publications and Audiovisual Products* Panel Report § 7.759)

However, the panel found that, because there was at least one other reasonably available alternative, China had not demonstrated that the relevant provisions were 'necessary' (*China- Publications and Audiovisual Products* Panel Report § 7.913). This holding was confirmed by the AB.

7. Critical Assessment

Two competing epistemic perspectives seem to emerge from the available case law: while WTO adjudicators have tended to adopt a rather strict trade-oriented approach, arbitral tribunals have adopted a more flexible approach. If one analyses the rhetorical structure of WTO bodies, it is evident that the cultural claim has never been addressed explicitly. In *Japan- Leather*, the Panel noted that Japan had not made reference to any GATT provision in its pleading to justify the maintenance of its quota and held that 'the special historical, cultural and socio-economic circumstances referred to by Japan could not be taken into account by it in this context since its terms of reference were to examine the matter 'in the light of the relevant GATT provisions' and these provisions did not provide such a justification for import restrictions' (*Japan- Leather*, at § 44). Rightly or wrongly, in the *Canada-Periodicals* case, the panel incidentally dismissed the cultural arguments put forward by Canada holding that 'the ability of a Member to take measures to protect its cultural identity was not an issue in the present case' (*Canada – Periodicals Panel Report*, § 5.45). More importantly, cultural arguments were not discussed autonomously but were 'encoded in the determination of what is a like, directly competitive or substitutable product' and 'translated … into a more technocratic argument about the common characteristics of different products' (Paul 2000-2001 p. 51).

The *China-Publications and Audiovisual Entertainment Products*, albeit adjudicated after the inception of the CCD, does not significantly change the argumentative framework of both panel and AB. The panel did not make reference to the CCD in its *ratio decidendi*, and noted China's reference to the *Declaration on Cultural Diversity* only incidentally. While the panel considered the declaration, it did so in a footnote. Do footnotes have the same value as the main text of the report? What if China had referred to the Declaration as a defence to possible breaches of trading rights? Finally, scrutinizing the very lexicon adopted by the panel and the AB in this case one also spots the singularity that the panel did not refer to reading materials and audiovisual products as 'cultural products' but adopted the periphrasis 'products of the type at issue in this case' (*China- Publications and Audiovisual Products*, Panel report, footnote 538). Similarly the AB did not refer to audiovisual

products as cultural products but again indicated them as 'specific types of goods that China considers to be 'cultural goods' (*China- Publications and Audiovisual Products*, AB Report § 141). Instead, international law scholars have made use of the term cultural products (Voon 2007 and 2010).

Instead, the focus of both panels and AB was the question as to whether given regulatory measures were authentically cultural or a disguised restriction to trade. This is the hard core of economic law adjudication. The claimant who brings a claim before the WTO bodies will always attempt to have her claims rooted in WTO law mainstream provisions. Third parties will also be interested in the further liberalization of a given market. For instance, in *Japan- Measures on Imports of Leather*, Pakistan expressed concerns that 'some hidden elements of discrimination were involved in the quota allocation' (*Japan- Leather*, § 39). In the *Canada- Periodicals* case, as culture was assimilated to a commodity, the Canadian motive became indistinguishable from protecting any other domestic industry threatened by imports. In sum, 'economic factors drive the WTO analysis' and 'in the cultural arena, the prism will be focused on economic values only' (Loeb 2000). International economic law scholars have somehow ratified this approach deeming it 'less imaginative but solid' (Burri Nenova 2008, p. 28). In case of a direct collision between international cultural norms and WTO norms, it has been argued that 'applying the UNESCO Convention conflict of norms provision, as formulated in Article 20, can achieve little, since no modification of rights and obligations of the parties […] follows' (Burri Nenova 2008, p. 29). Again, when referring to Article 20, reference is made to Article 20 (2) of the CCD instead of referring to this provision in a holistic fashion (Burri Nenova 2008, p. 29). Instead, as Pauwelyn puts it, Article 20 CCD 'goes both ways' (Pauwelyn 2005). As WTO law does not provide for a cultural exception arguably the clash will always be deemed as 'indirect' by WTO adjudicative bodies.

Instead, within investor-state arbitration, one may identify underlying processes that lead to a different consideration of cultural concerns. In the *Glamis Gold* Case, the arbitral tribunal adopted a high standard of review, according deference to the federal and state legislative measures. The arbitral tribunal recognized that: 'It is not the role of this Tribunal or any international tribunal, to supplant its own judgment of underlying factual material and support for that of qualified domestic agency' vicinity' (*Glamis Gold* Award, § 779) and that 'governments must compromise between the interests of competing parties.' vicinity' (*Glamis Gold* Award, § 803). The tribunal admitted that 'some cultural artifacts will indeed be disturbed, if not buried, in the process of excavating and backfilling' (*Glamis Gold* Award, § 805), but it held that 'the sole inquiry for the tribunal […] is whether or not there was a manifest lack of reasons for the legislation'. The tribunal deemed that there was a reasonable connection between the harm and the proposed remedy and that the claimant was using too narrow a definition of artefacts: 'there are, in addition to pot shards, spirit circles, and the like, sight lines, teaching areas and view shields that must be protected and would be harmed by significant pits and waste piles in the near vicinity' (*Glamis Gold* Award, § 805).

In *Lemire v Ukraine*, the arbitral tribunal widely acknowledged Ukraine's cultural concerns, but also imposed schemes of good governance, requiring the respect of investment treaty provisions prohibiting discrimination. With regard to the domestic content requirements, the arbitral tribunal adopted an *evaluative comparative approach* (Vadi 2010) that can contribute to develop global administrative law principles (Wuertenberger and Karacz 2008-2009). In particular, the arbitral tribunal held that 'a rule cannot be said to be unfair, inadequate, inequitable or discriminatory when it has been adopted by many countries around the world' (*Lemire v Ukraine*, § 506). Although the tribunal did not reflect on the systemic consequences of this comparative rule, one may clearly identify the positive role that such an approach has to build coherence at the international law level. More importantly, the tribunal was not driven by a cost-benefit analysis or a review of

the efficiency of the national measure; rather it was interested in its 'normality' i.e. assessing whether it was a regulatory choice divergent from the canons commonly accepted by the international community.

8. The Role of Adjudicators

What is the role of adjudicators in the potential convergence, or indeed fragmentation of international cultural law and international economic law? Since the interplay between these regulatory fields is not clearly spelt out in the text of treaties, with some exceptions, there no sort of pre-established harmony. In this fragmented landscape where arbitral tribunals and WTO bodies seem to have the last word on important themes at the cross road between culture and economics, the role of epistemic communities that is adjudicators is of fundamental importance. This section shall investigate whether the appointment process and the different composition of WTO panels and the AB on the one hand, and arbitral tribunals on the other, can shape the different epistemic approaches adopted by these bodies.

WTO panels are established by the Dispute Settlement Body which is a political organ composed by the representatives of all members (Van Den Bossche 2008 p. 235). The DSB also appoints the Members of the Appellate Body and adopt panel and Appellate Body Reports (DSU, Article 2.4). Once a panel is established by the DSB, the Secretariat proposes nominations for the panel to the parties to the dispute. The Secretariat maintains a list of potential panellists, which is composed by people nominated by Member States. The importance of the composition of the panel is shown by the fact that although the DSU requires the parties to the dispute not to oppose nominations except for compelling reasons (DSU Article 8.6), parties 'often reject the nominations initially proposed by the Secretariat without much justification', thus the composition of the panel 'is often a difficult and contentious process, which may take many weeks' (Van Den Bossche 2008, p. 246). If the parties are unable to agree on the composition of the panel, either party may request the Director-General of the WTO to determine the composition of the panel. The Director General has determined the composition of about half of the panels (DSU Article 8.6).

Panels are often composed of well-qualified government trade officials with a background in law, diplomats of WTO members, legal practitioners and, increasingly, academics who may have taught or published on international trade law or policy (DSU, Article 8.1). The DSU explicitly provides that panellists shall serve in their individual capacities and not as government representatives(DSU, Article 8.9). Nationals of members that are parties or third parties to the dispute shall not serve on a panel concerned with that dispute unless the parties to the dispute agree otherwise (DSU, Article 8.3). With regard to disputes involving a developing country member and a developed country member, the panel shall, if the developing country so requests, include at least one panellist from a developing country Member (DSU, Article 8.9).

Unlike panels, the AB is a standing international tribunal, composed of seven persons 'of recognized authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally'(DSU, Article 17.3). Its membership shall be broadly representative of membership in the WTO (DSU, Article 17.3).

Instead, in investor-state arbitration, the parties to the dispute select two arbitrators who will appoint the third arbitrator or the president of the arbitral tribunal (Parra 2007, p. 47). Although 'the rationale underlying international judicial appointments remains mostly implicit in both the law and political science literatures' (Voeten 2008-2009, p. 391), sociological factors matter when one

scrutinizes whether and how the parties take advantage of the freedom offered to them (Goldštajn 1989). The parties perceive the selection of their own arbitrator as an advantage (Park 2010). In general terms, arbitrators are usually selected among persons who have expertise or experience in international law, international trade, or dispute resolution. For instance, '[NAFTA] panelists are chosen from rosters of experts established by the Parties in each NAFTA country. Panelists must be of high standing, good character, objective, reliable and have sound judgment and general familiarity with international trade law. The majority of the members of a panel, including the Chair, must be lawyers'(NAFTA Secretariat 2010)

While WTO panels have not always included persons with legal background, a legal background is a commonality in investment arbitration (Costa 2011), although there is no requirement for arbitrators to have *expertise* or experience relevant to the peculiar subject matter of the dispute. On the other hand, arbitrators tend to be a more homogenous group than WTO panellists and AB members. Authors have pointed out the inadequate representation of developing countries (Waibel *et al.* 2010) and gender imbalance among arbitrators. In 2005 women comprised only five percent of ICSID conciliators and arbitrators (Goldhaber 2004, Gal-Or 2007). Usually, arbitrators are 'exceptionally talented individuals', speak 'multiple languages'(Rogers 2004-2005) and have studied at prestigious universities (Dezaley and Garth 1996), exercised the legal profession or taught in two or more jurisdictions and are therefore exposed to more than one legal culture. Globalization has globalized legal careers (Ginsburg 2003 and Vadi 2010). Expertise in public international law or constitutional and administrative law is a common feature in the arbitrator's profile (Costa 2011). Indeed, some arbitrators have been professors of public international law or administrative law or judges in other international *fora*, including but not limited to the ICJ and regional human rights courts. This feature is of relevance and may informally promote the coherence of international law. On the other hand, the fact that the profile of these scholars is not strictly speaking rooted in a single country make them less dependant on possible national influences. Finally, 'different career background may have predictable behavioural implications' as former diplomats 'show a much greater respect for the *raison d'état* than do…academics' (Voeten 2008-2009 p. 390).

Some studies have analysed the arbitrators' judicial patterns through economic spectacles, theorizing that as utility maximizers, arbitrators may have an economic incentive to rule in favour of prospective claimants i.e. foreign companies to increase their chances of reappointment in future disputes. To counter the appearance of bias, some authors have proposed the establishment of a World Investment Court (Van Harten 2007 and 2008), or that any arbitrator should be chosen jointly or selected by a neutral body (Paulsson 2010). Nonetheless recent empirical studies based on statistical analysis have shown 'no tendency of any group of arbitrators […] to rule in favour of investors' (Franck 2009, Kepeliuk 2010 p. 54). Authors have stressed that the arbitrators' valuable professional reputation is a key incentive for them to be impartial (Kepeliuk 2010 p. 54).

This paper questions whether the background of arbitrators in international law results in the absence of any superiority complex vis-á-vis other branches of international law. In the mentioned cases, arbitrators have settled cultural diversity related disputes in a contextual, dynamic fashion. While the ability of adjudication to function and to achieve desirable adjudicatory results is clearly important, the interest of society in the legitimate exercise of authority and the maintenance of juridical values is equally important (Carbonneau 2003 p. 1205). The fact that economic standards of valuation are not the only ones that are taken into account by arbitral tribunals is distinctive. Economics cannot supply the single standard for adjudication. While investor-state arbitration deals with an area at the crossroad between economics and law, the legal dimension of these disputes cannot be neglected or dismissed in favor of purely economical considerations.

The applicable law surely plays a role: the "covered agreements" under the aegis of the WTO differ from investment treaties. Analyzing the arbitrators' patterns through socio-legal lens may lead to nuanced outcomes. Socio-legal studies conceive 'law as a social product – a complex of activities of real people with socially shared and produced but individually carried out legal and non legal ideas, beliefs, motivations and purposes' (Tamanaha 2008, p. 89-90). For sure, arbitrators have a cultural capital which encompasses a set of attitudes, knowledge and language as well as the structural constraints within which international lawyers live and work (Koskenniemi 2001, p. 2). The background of arbitrators influences their cognitive framework, heuristics and legal reasoning. However, the hypothesis that the socio-legal factors that characterize the composition and the selection process of WTO bodies and investment tribunals matter remains unproven. Whether the cultural capital of some arbitrators leads to "better" settlement of cultural diversity related disputes remains an open question; whether and how sociological factors impact the final outcome of the arbitral process remain immeasurable. Broad judgements about the adjudicators in either context based on a review of a limited number of cases cannot be made. Further research is needed in this sense.

Conclusions

Cultural diversity is a legacy for everyone as it reveals the past and yields a sense of identity for present and future generations. In the broad sense, cultural diversity does not merely refer to audiovisual products or cultural goods, but to culture meant in a broad and sophisticated manner inclusive of both tangible and intangible cultural heritage. The UNESCO has provided an articulated regulatory framework for the protection of cultural diversity in its broad sense and has framed the protection of cultural diversity within the limits of the respect of human rights and fundamental freedoms. As cultural diversity represents a precondition for human development and economic growth, it needs to be brought to the mainstream of development thinking and practice.

The impact of economic globalization on cultural diversity is by no means a novel area of study. However, a comparison of the dissonant judicial modes of cultural economic governance of WTO panels and AB on the one hand and arbitral tribunals on the other was missing. This article has provided a snapshot of a number of cultural diversity related disputes adjudicated before arbitral tribunals and WTO panels and AB. While space constraints have prevented a full discussion of normative issues (Vadi 2009), this paper has analysed and critically assessed the rhetoric and argumentative patterns used within international economic adjudication.

Because international cultural treaties do not include compulsory dispute settlement mechanisms, cultural diversity related disputes have gravitated towards international economic *fora.* The magnetism of international economic *fora* has been a mixed blessing (Cho 2009 p.675). On the one had the global administrative review of substantive domestic regulations can improve good governance and the transparent pursuit of legitimate cultural policies. On the other hand, the hermeneutical pathways that the WTO DSB and arbitral tribunals have adopted have sensibly diverged. While the WTO DSB has opened itself to 'charges of epistemological imperialism, and positive simple mindedness' (Scott 2007 p. 3), arbitral tribunals have adopted a different approach. While WTO panels and AB have not considered cultural concerns as related to the subject matter of the dispute, arbitrators have often referred to international law principles and cases in their reasoning. These results open up new lines of enquiry that can enrich international economic law scholarship. Whether these different outcomes may depend on the different appointment mechanism and legal background of the arbitrators is open to debate and further study.

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