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# Culture and International Economic Law

Edited by  
Valentina Vadi and Bruno de Witte



ROUTLEDGE

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Valentina Vadi and  
Bruno de Witte



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# Culture and International Economic Law

Globalization and international economic governance offer unprecedented opportunities for cultural exchange. Foreign direct investments can promote cultural diversity and provide the funds needed to locate, recover and preserve cultural heritage. Nonetheless, globalization and international economic governance can also jeopardize cultural diversity and determine the erosion of the cultural wealth of nations. Has an international economic culture emerged that emphasizes productivity and economic development at the expense of the common wealth?

This book explores the 'clash of cultures' between international law and international cultural law, and asks whether States can promote economic development without infringing their cultural wealth. The book contains original chapters by experts in the field. Key issues include how international courts and tribunals are adjudicating culture-related cases; the interplay between Indigenous peoples' rights and economic globalization; and the relationships between culture, human rights, and economic activities.

The book will be of great interest and use to researchers and students of international trade law, cultural heritage law, and public international law.

**Valentina Vadi** is a Reader (Associate Professor) in international economic law at Lancaster University, in the UK. She formerly was an Emile Noël Fellow at the Jean Monnet Centre for International and Regional Economic Law, New York University, and a Marie Curie Postdoctoral Fellow at Maastricht University.

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Her research interests are culture and cultural heritage with a focus on children's, Indigenous and human rights in public international law. She has published articles on children's rights and Indigenous rights, and is the editor of a forthcoming book on the impact of the United Nations Declaration on the Rights of Indigenous Peoples on Indigenous rights.

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Selected representative publications: Editor of the volume *Ten Reflections on the Constitutional Treaty for Europe* (2003) and co-editor of the volumes, *Social Rights in Europe* (2005), *Constitución Europea y Constituciones nacionales* (2005), *Genesis and Destiny of the European Constitution* (2007), *The Framework Convention for National Minorities – a Useful Pan-European Instrument?* (2008), and *EU Foreign Relations Law – Constitutional Fundamentals* (2008).

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# 1 Introducing culture and international economic law

*Valentina Vadi<sup>1</sup> and Bruno de Witte<sup>2</sup>*

## Introduction

Can states promote economic development without infringing their cultural wealth? Culture represents inherited values, ideas, beliefs, and traditions, which characterize social groups and their behaviour. Culture is not a static concept but rather a dynamic force, which evolves through time and shapes countries and civilizations. As such, culture has always benefitted from economic exchange. Nowadays globalization and international economic governance have spurred a more intense dialogue and interaction among nations: thus, they offer unprecedented opportunities for cultural exchange. In parallel, foreign direct investment and financial transactions can promote cultural diversity and provide the funds needed to locate, recover and preserve cultural heritage.

Nonetheless, globalization and international economic governance can also jeopardize cultural diversity and determine the erosion of cultural heritage. While trade in cultural products can lead to cultural homogenization and even to cultural hegemony, foreign direct investments have an unmatched penetrating force with the ultimate capacity to change landscapes and erase memory. At the same time, the increase in global trade and foreign direct investment (hereinafter FDI) has determined the creation of legally binding and highly effective regimes which demand that states promote and facilitate trade and FDI. Has an international economic culture emerged that emphasizes productivity and economic development at the expense of the common wealth?

Against this background, this book aims to explore the 'clash of cultures' between international (economic) law and international cultural law<sup>3</sup> exploring

1 Reader, Lancaster University. Valentina Vadi has received funding from the European Union Seventh Framework Programme (FP7/2007–2013) under grant agreement n. 273063 for conducting research in the area of cultural heritage and international and European law. The views expressed in this chapter are the author's only and do not necessarily reflect those of the European Union. The usual disclaimer applies.

2 Professor of EU Law, Maastricht University and European University Institute. Bruno De Witte authored section 1 (Structure of the book).

3 J.A.R. Nafziger 'Cultural Heritage Law: The International Regime' in J.A.R. Nafziger and T Scovazzi (eds) *Le Patrimoine Culturel de l'Humanité* (Leiden: Martinus Nijhoff 2008).



some key questions which remain unaddressed by the relevant literature thus far.<sup>4</sup> The clash of cultures between economics and culture has been scrutinized through a number of perspectives. While economists have used economics lenses to observe this interplay, international law scholars have focused on the well-known *trade v. culture* debate. However, several facets of the interplay remain underexplored. For instance, is economic globalization affecting the protection of cultural heritage? How are international (economic) courts and tribunals adjudicating culture-related cases? Has any grass root resistance developed to cope with the threats posed by economic globalization? Is there a global (economic) resistance to cultural governance, often perceived as anti-democratic and at times infringing individual (economic) freedom and/or the same cultural rights it would aim to reinforce? This book addresses these questions, bringing greater attention from a number of perspectives to an increasingly important and under explored topic within international law.

### Structure of the book

The book is divided into four parts: the first part introduces the main themes and challenges to be addressed. Parts II, III and IV explore the interplay between culture and international economic law, international intellectual property law, and European law respectively.<sup>5</sup>

Part I addresses the interplay between culture and economic globalization in international law and human rights law. While the general linkage between economic globalization and human rights more generally is beyond the scope of the book, the book focuses on the interaction between culture and economic interests in human rights law to provide a powerful counter narrative to the analogous interplay between culture and economic interests in international economic law. In a sense, Part I is a sort of prologue, to understand how the linkage between culture and economic interests has been approached by human rights courts. This part allows fruitful comparisons between the adjudication of human rights courts and tribunals, on the one hand, and international economic *fora*, on the other, to verify whether there is convergence or divergence between these different streams of international law. Has there

4 The book stems from an academic conference organized in June 2013 at Maastricht University, the Netherlands, financed by the Faculty of Law and the European Commission.

5 The views in this edited volume are those of the individual authors and do not necessarily correspond to those of the editors. The editing was also relatively non-intrusive, in order to allow each author to maintain their own voice and perspective. The use of particular designations of countries or territories does not imply any judgment by the publisher or the editors as to the legal status of such countries or territories, of their authorities and institutions or of the delimitation of their boundaries. The mentioning of names of specific companies or products does not imply any intention to infringe proprietary rights, nor should it be construed as an endorsement or recommendation by the editors. The authors are responsible for having obtained the necessary permission to reproduce, translate or use material from sources already protected by copyright.

been judicial borrowing between courts belonging to different subsystems of international law, or is there a fragmentation? Answering this question contributes to the ongoing debate on the unity or fragmentation of international law while allowing the interpreter to verify whether there is coalescence of general principles of law demanding the protection of cultural heritage in times of peace. Part I contextualizes international economic law in the broader framework of international law because, in the editors' view, international economic law is not a self-contained regime, but is rather a part of international law. Therefore, it may be useful to ascertain whether and how international economic law is addressing the interplay between culture and economic activities contextualizing the analysis in the broader matrix of international law. This juxtaposition is significant because arbitral tribunals often refer to human rights cases in arbitral awards.

In Part I, Francioni focuses on the interplay between culture, human rights and economic globalization in international law, highlighting that on the one hand, 'economic globalization has spurred a movement towards the recognition of some "cultural human rights", such as the right to cultural identity, the right to access and participate in community culture, linguistic rights, rights related to the preservation of minorities, and more recently, Indigenous peoples' rights'.<sup>6</sup> On the other hand, Francioni also reflects that 'the protection of culture and cultural heritage is becoming a component of international economic law and an important consideration in the adjudication of international economic disputes'.<sup>7</sup>

Donders develops this thread further, focusing on the interplay between culture, human rights, and economic activities in international human rights jurisprudence. Donders argues that 'human rights should be taken into account in connecting cultural diversity and economy'.<sup>8</sup> Such a connection is also increasingly reflected in a number of international law instruments, including the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions.<sup>9</sup> Donders explores the tripartite linkage between economic activities, culture and human rights, investigating the jurisprudence of international human rights courts concerning Indigenous peoples. States have often granted concessions for economic activities on lands inhabited by Indigenous tribes. This practice has raised a number of human rights concerns, and human rights courts have increasingly adjudicated on the legitimate boundaries between the human rights of Indigenous peoples, including their cultural rights, and the states' developmental needs.

6 See Francioni's chapter in this volume.

7 Ibid.

8 See Donders' chapter in this volume.

9 Convention on the Protection and Promotion of the Diversity of Cultural Expressions, Paris, 20 October 2005, in force 18 March 2007. 2440 UNTS 311.

Part II explores the interplay between culture and economic interests in international economic law, including international investment law, international trade law and international financial law. In this part, Vadi questions whether international economic law puts emphasis on economic development and favours macroeconomic notions of growth regardless of actual or potential infringement of cultural entitlements. To answer this question, she focuses on a cases study, analysing the specific interplay between Indigenous cultural heritage and economic interests in the jurisprudence of international economic courts and tribunals. In particular, she examines the *Seal Products* dispute,<sup>10</sup> and the *John Andre v. Canada* case,<sup>11</sup> both of which concern Indigenous heritage and economic activities.

Lenzerini examines the interplay between the protection of Indigenous heritage and foreign direct investments in international investment law and arbitration. He points out that land plays a crucial role in the preservation of the identity of Indigenous peoples. As Indigenous heritage is protected under international law, and the 2007 United Nations Declaration on the Rights of Indigenous Peoples<sup>12</sup> has gained momentum, Lenzerini argues that Indigenous heritage should be taken into account when states consider the feasibility of investment projects in Indigenous peoples' traditional lands. He also highlights that in some circumstances, investments risk jeopardizing 'the spiritual relationship of Indigenous peoples with their ancestral lands', thus leading to results that are incompatible with the protection of Indigenous heritage. To prevent such negative outcomes, Lenzerini calls for proper consultations between state representatives and communities of Indigenous peoples to obtain the free prior and informed consent of the latter. He also argues that whenever an investment project may seriously jeopardize the cultural integrity of the Indigenous communities concerned, the requirement of a prior informed consent should become compulsory.

Moving to international financial law, Sarah Sargent examines the policies of the International Finance Corporation (IFC), which is the arm of the World Bank which provides advice, loans, equity and technical assistance to stimulate private sector investment in developing countries, with regard to Indigenous cultural heritage. For projects that rely on international sources of financing, compliance with the IFC standards for cultural heritage protection are a condition of financing.<sup>13</sup> The IFC's performance standards include specific

10 *European Communities – Certain Measures Prohibiting the Importation and Marketing of Seal Products*, Panel report, 25 November 2013, WT/DS369/2. Online. Available [http://wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds400\\_e.htm](http://wto.org/english/tratop_e/dispu_e/cases_e/ds400_e.htm) (accessed 25 May 2014).

11 *John R. Andre v. Government of Canada*, Notice of Intent to Submit Claim to Arbitration Pursuant to Chapter Eleven of the North American Free Trade Agreement, 19 March 2010, para. 8. Online. Available [http://international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/JohnR\\_Andre\\_FiledNOI.pdf](http://international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/JohnR_Andre_FiledNOI.pdf) (accessed 25 May 2014).

12 United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), GA res. 61/295, 13 September 2007.

13 See A. Mason, 'International Project Financing and Cultural Heritage Protection' 19 *International Journal of Cultural Property* (2012) 556, 557.