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## Intangible Cultural Heritage and Trade

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Valentina Vadi\*

## INTRODUCTION

Intangible cultural heritage (ICH) ‘includes traditions or living expressions inherited from our ancestors and passed on to our descendants, such as oral traditions, performing arts, social practices, rituals, festive events, and specific knowledge and practices concerning nature and the universe, as well as the knowledge and skills to produce traditional crafts’.<sup>1</sup> As this working definition demonstrates, ICH is a type of living heritage that specific communities create, develop, and maintain often in response to environmental conditions and political, economic, and social changes. ICH is inextricably connected with people’s lives and constitutes ‘an essential element of the identity of its creators and bearers’,<sup>2</sup> providing them with a sense of belonging and continuity.<sup>3</sup>

The safeguarding of ICH can foster cultural resilience, which is defined as the capability to rise above challenges and adapt quickly to new circumstances using one’s own tradition and cultural background. For example, when a 6.2 magnitude earthquake almost destroyed the Italian town of Amatrice on 23 August 2016, Italian restaurants across the world made donations for every plate served of *pasta all’Amatriciana* – the pasta dish named after the town. Although the town was largely destroyed, such acts of solidarity made ‘the tradition liv[e] on’, and contributed to reconstruction efforts and cultural resilience.<sup>4</sup> Furthermore, in the aftermath of May 2012 earthquake waves that shook North-Eastern Italy, sales of *parmigiano reggiano*, a type of cheese long produced in Parma according to traditional cultural practices, similarly helped the gradual recovery of the local communities.<sup>5</sup> Cultural resilience empowers individuals not only to survive and recover, but also to evolve and even thrive after stressful events.<sup>6</sup>

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<sup>1</sup> UNESCO, ‘What is Intangible Cultural Heritage?’ <<http://www.unesco.org/culture/ich/en/what-is-intangible-heritage-00003>> accessed 20 June 2018.

<sup>2</sup> Federico Lenzerini, ‘Intangible Cultural Heritage: The Living Culture of Peoples’ (2011) 22 *European Journal of International Law* 101.

<sup>3</sup> Cristina Amescua, ‘Anthropology of Intangible Cultural Heritage’ in Lourdes Arizpe and Cristina Amescua (eds) *Anthropological Perspectives on Intangible Cultural Heritage* (Springer 2013) 107.

<sup>4</sup> See James McAuley, ‘Italian Town Known for its Pasta Dish ‘is no More’ after Earthquake’ *Chicago Tribune* (Chicago, 24 August 2016).

<sup>5</sup> ‘Terremoto, parmigiano e solidarietà’ *L’Espresso* (7 June 2012).

<sup>6</sup> Caroline S Clauss-Ehlers, ‘Cultural Resilience’, in Caroline S Clauss-Ehlers (ed) *Encyclopedia of Cross-Cultural School Psychology* (Springer 2015) 324–6 (noting that ‘Cultural resilience considers how cultural background (i.e., culture, cultural values, language, customs, norms) helps individuals and communities overcome adversity’).

ICH also denotes a set of ‘fragile … traditions and practices … that … are increasingly endangered by modern civilization’.<sup>7</sup> While ICH can spread and cross-pollinate through global migration flows, international trade and foreign investments, and thereby promote cultural diversity, it is increasingly perceived to be at risk due to the distinct phenomena of economic globalisation and cultural commodification. While economic globalisation – the increasing economic integration and interdependence of domestic, regional and megaregional economies across the globe – has spurred a more intense dialogue and interaction among nations – potentially promoting cultural diversity – it can also jeopardise the protection of ICH and associated cultural practices.<sup>8</sup> The expansion of trade in cultural products facilitated by the reduction of trade barriers, the increasing food processing and marketing through multinational corporations and the development of biotechnology can all affect local cultural practices. Moreover, the transformation of traditional cultural practices into profitable economic activities and commodities, led by economic globalisation and an emerging cultural globalisation – the process of increasing cross-cultural communication, exchange and borrowing due to globalisation – can lead to cultural commodification and homogenisation, and even to cultural hegemony. Dominant cultures – which also reflect the global distribution of power – tend to dominate in the global markets.<sup>9</sup> Therefore, as economic globalisation and cultural commodification can damage the safeguarding of cultural practices, ‘state intervention is required in order to ensure their … continuation’.<sup>10</sup>

States have previously brought ICH controversies before the World Trade Organization (WTO)<sup>11</sup> Dispute Settlement Mechanism (DSM), where they have claimed that regulatory measures affecting their economic interests are in breach of the relevant international trade law provisions. Such disputes highlight the emergence of a clash of cultures between international economic governance and the safeguarding of (intangible) cultural heritage. International economic law fosters a culture that emphasises comparative advantage, productivity and economic development, while international cultural law emphasises the importance of safeguarding cultural heritage for promoting cultural diversity, respecting human rights and promoting peaceful relations among nations. This chapter questions whether international law adequately protects ICH vis-à-vis economic globalisation and explores how WTO dispute settlement bodies deal with ICH, specifically examining whether they consider cultural concerns when adjudicating ICH-related disputes, or whether they consider such concerns a disguised form of protectionism. In order to address these questions, the chapter proceeds as follows. First, it addresses the question of whether international law adequately protects ICH vis-à-vis economic globalisation by briefly examining how international law governs ICH. After illustrating the general concept of ICH, the chapter discusses and critically assesses the main features, promises and pitfalls of the 2003 UNESCO Convention on the Safeguarding of Intangible Cultural Heritage (2003

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<sup>7</sup> Marilena Alivizatou, ‘Intangible Heritage and Erasure: Rethinking Cultural Preservation and Contemporary Museum Practice’ (2011) 18(1) *International Journal of Cultural Property* 37, 54.

<sup>8</sup> See also Brown, this volume.

<sup>9</sup> Thomas L Friedman, *The Lexus and the Olive Tree* (Farrar 1999) 8.

<sup>10</sup> Marilena Alivizatou, ‘Contextualising Intangible Cultural Heritage in Heritage Studies and Museology’ (2008) 3 *International Journal of Intangible Heritage* 43, 46.

<sup>11</sup> Agreement Establishing the World Trade Organization (Marrakesh Agreement), 15 April 1994, 1867 UNTS 154; 33 ILM 1144 (1994).

Convention).<sup>12</sup> The chapter subsequently illustrates the specific ‘clash of cultures’ between international economic law and the international, regional and domestic law safeguarding various aspects of ICH. Section III specifically examines recent heritage wars and critically assesses how WTO dispute settlement bodies deal with ICH, investigating whether such bodies take cultural concerns into account when adjudicating ICH-related disputes or whether they consider such concerns as a disguised form of protectionism. Finally, the chapter draws several preliminary conclusions.

## CONCEPTUALISING AND SAFEGUARDING INTANGIBLE CULTURAL HERITAGE

The concept of ICH refers to the wealth of cultural traditions and practices passed on from one generation to another. It includes practices, representations, expressions, knowledge, and skills – as well as the instruments, objects, artefacts and cultural spaces associated therewith – that communities, groups and, in some cases, individuals, recognize as part of their cultural heritage.<sup>13</sup> ICH therefore reflects a given community’s response to historical, environmental and social challenges.<sup>14</sup> Moreover, as ICH has a ‘dynamic and changeable nature’,<sup>15</sup> its safeguarding requires protecting the significance that an object or practice has in the life of a community, rather than protecting a given cultural expression or cultural practice *per se*.

From the perspective of international law, minority protection treaties have incorporated early expressions of ICH safeguarding, and the jurisprudence of the Permanent Court of International Justice has touched upon related elements.<sup>16</sup> In addition, the international community adopted several instruments to protect cultural heritage in the aftermath of World War II. However, these instruments focused on the protection of tangible heritage.<sup>17</sup> It is therefore evident that international law has overall largely neglected ICH. This is not to say that there have been no international instruments to protect ICH, but that any safeguarding has had an oblique character. In fact, a number of international law instruments, such as human rights treaties, have indirectly governed aspects of intangible heritage. For example, human rights treaties require the protection of cultural rights, which include a respect for ICH.<sup>18</sup>

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<sup>12</sup> UNESCO, Convention for the Safeguarding of the Intangible Cultural Heritage, Paris, 17 October 2003, in force 20 April 2006, 2368 UNTS 1 (2003 Convention).

<sup>13</sup> 2003 Convention, Art 2.

<sup>14</sup> Paolo Davide Farah and Riccardo Tremolada, ‘Conflict between Intellectual Property Rights and Human Rights: A Case Study on Intangible Cultural Heritage’ (2015) 94 *Oregon Law Review* 125, 137.

<sup>15</sup> *Ibid.* 138.

<sup>16</sup> Ana F Vrdoljak, ‘Minorities, Cultural Rights and the Protection of Intangible Heritage’, paper presented at the European Society for International Law Research Forum on International Law Contemporary Issues, Held at the Graduate Institute of International Studies in Geneva on 26–28 May 2005, 1.

<sup>17</sup> Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations for the Execution of the Convention 1954, The Hague, 14 May 1954, in force 7 August 1956, 249 UNTS 240; 1972 Convention concerning the Protection of the World Cultural and Natural Heritage (World Heritage Convention), 16 November 1972, in force 17 December 1975, 1037 UNTS 151.

<sup>18</sup> See, *inter alia*, International Covenant on Civil and Political Rights (ICCPR) 16 December 1966, in force 23 March 1976, 999 UNTS 171; 6 *ILM* 368 (1967), Art 27; International Covenant on Economic,

The historic lack of specific instruments for safeguarding ICH is likely due to the belief that ICH, as a key element of ‘the cultural and social identity of human communities’, would be ‘appropriately preserved and developed at the local level’.<sup>19</sup> The prevailing assumption has been that ‘the depositaries of ICH’ would ‘transmi[t] to future generations the necessary knowledge to preserve and perpetuate their own immaterial heritage’, and that there was ‘no need’ for ‘any international action in that respect’.<sup>20</sup>

In recent decades, however, it has become evident that ICH demands more explicit and specific safeguarding at the international level. Globalisation has intensified commerce and intercultural contacts, potentially contributing to the predominance of certain cultural models over others.<sup>21</sup> In response to such trends, UNESCO has adopted specific instruments expressly devoted to the safeguarding of ICH. In 1989, UNESCO issued a Recommendation on the Safeguarding of Traditional Culture and Folklore,<sup>22</sup> illustrating policies that countries could implement to preserve their ICH. However, the recommendation was a ‘soft’ international instrument and had little impact due to its ‘top-down’ and ‘state-oriented’ approach,<sup>23</sup> focusing on the ‘product’ rather than the local communities which produced it.<sup>24</sup> Very few states took action in this regard. Moreover, many non-European UNESCO member states considered the term ‘folklore’ to have derogatory connotations.<sup>25</sup> In 2001, the Masterpieces of the Oral and Intangible Heritage programme established three rounds of proclamations of certain traditions as representative ‘Masterpieces’ in order to raise awareness about intangible heritage, which paved the way for the elaboration of the 2003 Convention.<sup>26</sup>

The creation of an ICH regime aims to counteract a system that previously tended to protect only monumental heritage. The safeguarding of intangible heritage through a legally binding instrument also enables non-European countries to bring their heritage to the fore.<sup>27</sup> The intangible heritage regime can contribute to achieving a ‘world heritage balance’<sup>28</sup> and provides a counter-narrative to the dominant notion of material heritage,<sup>29</sup> thereby complementing the 1972 World Heritage Convention

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Social and Cultural Rights (ICESCR), 16 December 1966, in force 3 January 1976, 993 UNTS 3; 6 ILM 368 (1967), Art 15. See also Donders and Waelde’s contributions to this collection.

<sup>19</sup> Lenzerini (n 2) 102. See also Lixinski and Blake, in this volume.

<sup>20</sup> Lenzerini *ibid*.

<sup>21</sup> *Ibid.*

<sup>22</sup> Recommendation on the Safeguarding of Traditional Culture and Folklore, 15 November 1989, [http://portal.unesco.org/en/ev.php-URL\\_ID=13141&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html?>](http://portal.unesco.org/en/ev.php-URL_ID=13141&URL_DO=DO_TOPIC&URL_SECTION=201.html?>) (accessed on 28 September 2016).

<sup>23</sup> Richard Kurin, ‘Safeguarding Intangible Cultural Heritage in the 2003 UNESCO Convention: a Critical Appraisal’ (2004) *Museum International* 66, 68.

<sup>24</sup> Alivizatou ‘Contextualising Intangible Cultural Heritage in Heritage Studies and Museology’ (n 10) 46.

<sup>25</sup> *ibid.*

<sup>26</sup> See Noriko Aikawa-Faure, ‘From the Proclamation of Masterpieces to the Convention for the Safeguarding of Intangible Cultural Heritage’ in Laurajane Smith and Natsuko Akagawa (eds), *Intangible Heritage* (Routledge 2009).

<sup>27</sup> Lenzerini (n 2) 104.

<sup>28</sup> Gábor Soós, ‘Communities and the Convention for the Safeguarding of Intangible Cultural Heritage (2003) – a New Tool for Development’, in Florent Le Duc (ed), *Culture as a Tool for Development. Challenges of Analysis and Action* (Acted 2009) 29, 34.

<sup>29</sup> Sarah Sargent, ‘Classical Horsemanship and the Dangers of the Emergent Intangible Cultural Heritage Authorised Discourse’ (2016) 11 *International Journal of Intangible Cultural Heritage* 36, 37.

(WHC).<sup>30</sup> Whereas the WHC requires outstanding universal value for items to be inscribed on its list, the ICH regime has a representative list. The ‘shift from ‘outstanding’ to ‘representative’ fosters comprehensiveness and inclusion’,<sup>31</sup> and challenges the previously predominant ‘Authorised Heritage Discourse’, which privileged Euro-centric, Western and material views of heritage.<sup>32</sup> While the WHC focuses on ‘static and monumental’ heritage, the ICH regime safeguards ‘dynamic and living’ heritage.<sup>33</sup> As such, the ICH regime does ‘not envision cultural heritage as a dead relic of the past, but as a corpus of processes and practices that are constantly recreated and renewed by present generations’.<sup>34</sup> Furthermore, while the WHC allows only for limited participation of non-state actors, the ICH regime places ‘communities and grassroots initiatives at the centre of its activities’,<sup>35</sup> enabling ‘a diversity of perspectives’.<sup>36</sup> The ICH regime implicitly recognises that ‘there is no folklore without the folk’,<sup>37</sup> and that communities shape their ICH as much as ICH shapes their values. Therefore, the regime highlights the importance of involving communities in all processes related to their ICH.<sup>38</sup>

The creation of the ICH regime, however, has raised some questions. For example, the question of whether ICH is separate from tangible heritage has been the source of extensive debate and scrutiny.<sup>39</sup> Scholars have suggested adopting a ‘more holistic approach to cultural heritage’ to overcome ‘institutional compartmentalisation and polarisation’.<sup>40</sup> Critics of the ICH regime have also questioned the effectiveness of the listing mechanism, contending that the listing process can be subject to abuse.<sup>41</sup> States can arguably utilise such listing in the pursuit of political, economic and/or other non-cultural interests. A certain politicisation is perhaps unavoidable, that is, states often list ICH in the pursuit of both cultural and economic goals. However, an excessive politicisation of the listing process, i.e., using the listing process for predominantly, if not exclusively, purposes beyond cultural goals, risks affecting the functioning of international cultural instruments, and endangering, rather than safeguarding, heritage. The listing process itself betrays a ‘top-down’ system of creating items and inventories,<sup>42</sup>

<sup>30</sup> Convention Concerning the Protection of the World Cultural and Natural Heritage, 16 November 1972, in force 17 December 1975, 1037 UNTS 151.

<sup>31</sup> Ned Kaufman, ‘Putting Intangible Heritage in its Place(s): Proposals for Policy and Practice’ (2013) 8 *International Journal of Intangible Cultural Heritage* 20, 26.

<sup>32</sup> See generally, Laurajane Smith, *Uses of Heritage* (Routledge 2006).

<sup>33</sup> Alivizatou (n 10) 47.

<sup>34</sup> *Ibid.* 48.

<sup>35</sup> Britta Rudolff and Susanne Raymond, ‘A Community Convention? An Analysis of Free, Prior and Informed Consent given under the 2003 Convention’ (2013) 8 *International Journal of Intangible Heritage* 154.

<sup>36</sup> Kaufman (n 31) 29; noting that in fact, ‘heritage debates usually have more than two points of view’.

<sup>37</sup> Alivizatou (n 10) 47.

<sup>38</sup> 2003 Convention, Art 15.

<sup>39</sup> See for example, Kaufman (n 31) 20 (arguing that: ‘The regrettable split between tangible and intangible heritage specialisations should be brought to an end. Just as many ... places owe their importance to intangible values, so too are many aspects of intangible heritage grounded in specific places.’)

<sup>40</sup> Alivizatou (n 10) 47.

<sup>41</sup> Sargent (n 29) 42.

<sup>42</sup> Michelle Stefano, ‘Reconfiguring the Framework: Adopting an Ecomuseological Approach for Safeguarding Intangible Cultural Heritage’, in Michelle L Stefano, Peter Davis, and Gerard Corsane (eds) *Safeguarding Intangible Cultural Heritage: Touching the Intangible* (Boydell Press 2012) proposing an approach that is more centered in the needs of local communities.

as it is up to states, not local communities, to nominate items for inscription. Moreover, the listing also risks fossilising the dynamic elements of cultural creativity.

## THE PROMISES AND PITFALLS OF THE 2003 CONVENTION ON THE SAFEGUARDING OF THE INTANGIBLE CULTURAL HERITAGE

The 2003 Convention constitutes the principal instrument governing ICH at the international level. It defines ICH as ‘the practices, representations, expressions, knowledge and skills – as well as the instruments, objects, artefacts and cultural spaces associated therewith – that communities, groups and, in some cases, individuals recognize as part of their cultural heritage’.<sup>43</sup> ‘[T]ransmitted from generation to generation’, ICH provides groups and communities with ‘a sense of identity and continuity, thus promoting respect for cultural diversity and human creativity’.<sup>44</sup> The convention considers solely ‘such intangible cultural heritage as is compatible with existing international human rights instruments, as well as with the requirements of mutual respect among communities, groups and individuals, and of sustainable development’.<sup>45</sup> Moreover, the convention has been very successful since its inception. No state voted against its adoption,<sup>46</sup> and it rapidly entered into force. Today the convention boasts 178 state parties.<sup>47</sup>

The 2003 Convention requires state parties to draw inventories of their ICH and to collaborate with local communities on various appropriate means of ‘safeguarding’ those traditions.<sup>48</sup> The UNESCO Committee established under the 2003 Convention oversees two international lists: (1) the list of ‘representative’ intangible cultural heritage (‘Representative List of the Intangible Cultural Heritage of Humanity’),<sup>49</sup> and (2) the list of endangered cultural heritage (‘List of Intangible Cultural Heritage in Need of Urgent Safeguarding’).<sup>50</sup> The former includes, *inter alia*, the items already designated as Masterpieces of Oral and Intangible Heritage by UNESCO and is comparable to the World Heritage List. The latter is comparable to the List of World Heritage in danger.

The 2003 Convention aims to remedy two structural imbalances within international law. First, it aims to remedy a gap in global cultural governance, which has traditionally favoured the protection of tangible heritage, such as monuments and sites, over the protection of intangible heritage. For example, within UNESCO, the 1972 World Heritage Convention (WHC) has focussed on the conservation of monuments

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<sup>43</sup> 2003 Convention, Art 2(1).

<sup>44</sup> Ibid.

<sup>45</sup> Ibid.

<sup>46</sup> Kurin (n 23) 66.

<sup>47</sup> List of States Parties to the 2003 Convention, <<http://www.unesco.org/eri/la/convention.asp?language=E&KO=17116>> (accessed on 20 June 2018).

<sup>48</sup> Janet Blake, ‘UNESCO’s 2003 Convention on Intangible Cultural Heritage: The Implication of Community Involvement in “Safeguarding”’, in Laurajane Smith and Natsuko Akagawa (eds) *Intangible Heritage* (Routledge 2009).

<sup>49</sup> 2003 Convention, Art 16.

<sup>50</sup> Ibid. Art 17.

and sites. Only recently has the WHC expanded its purview to comprehend elements of intangible heritage. In fact, it now protects mixed forms of cultural heritage, such as cultural landscapes, which include both tangible and intangible features.<sup>51</sup> Nevertheless, the World Heritage List remains imbalanced, including more cultural sites than natural or mixed sites.<sup>52</sup>

Second, the 2003 Convention aims to counterbalance the regulation of cultural resources by international trade law. Globalisation and trade in cultural products can potentially promote cultural exchange, but they can also jeopardise local and regional cultural practices. The diffusion of a global mass culture has raised the fundamental question of whether ‘valuable traditions, practices, and forms of knowledge rooted in diverse societies would survive the next generation’.<sup>53</sup> In this regard, the 2003 Convention can counter both the perceived commodification of culture, i.e., its reduction to a good or merchandise to be bartered or traded, and the hegemonic tendencies of dominant cultures. To do so, the 2003 Convention proposes an alternative view that perceives oral traditions and expressions – including music, dance, and theatre – and knowledge and practices concerning nature and the universe – e.g., traditional medicine and artisanship – as forms of ICH, rather than mere cultural commodities.<sup>54</sup> Moreover, as the ICH Convention sees communities ‘as part and parcel of heritage, not only as guardians but also as heritage creators’,<sup>55</sup> it inherently shapes safeguarding efforts requiring the involvement of the relevant communities. Not only is the ICH convention ‘more participatory than any other global heritage instrument to date’,<sup>56</sup> but it is also much more participatory than international trade law.

Despite its achievements, the 2003 Convention has been criticised because of its alleged ‘compromise and vagueness’.<sup>57</sup> This chapter suggests that the 2003 Convention risks both ‘substantive overreach’<sup>58</sup> and procedural underachievement. On the substantive level, the definition of ICH is too broad and descriptive,<sup>59</sup> risking an unwelcome ‘politicization of culture’.<sup>60</sup> As many things can fit within the definition of

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<sup>51</sup> On cultural landscapes, see for example, Valentina Vadi, ‘The Protection of Cultural Landscapes and Indigenous Heritage in International Investment Law’, in Laura Westra, Colin Soskolne and Donald Spady (eds) *Human Health and Ecological Integrity—Ethics, Law and Human Rights* (Earthscan 2012) 250–61.

<sup>52</sup> Michael F Brown, ‘Heritage Trouble: Recent Work on the Protection of Intangible Cultural Property’ (2005) 12 *International Journal of Cultural Property* 40–61, 41.

<sup>53</sup> Kurin (n 23) 68.

<sup>54</sup> See for example, Valentina Vadi, ‘Intangible Heritage, Traditional Medicine and Knowledge Governance’ (2007) 10(2) *Journal of Intellectual Property Law and Practice* 682; Silke von Lewinski (ed) *Indigenous Heritage and Intellectual Property—Genetic Resources, Traditional Knowledge and Folklore* (Wolters Kluwer 2008) 510.

<sup>55</sup> Rudolff and Raymond (n 35) 155.)

<sup>56</sup> Ibid. 156.

<sup>57</sup> Marc Jacobs, ‘The Spirit of the Convention – Interlocking Principles and Ethics for Safeguarding Intangible Cultural Heritage’ (2016) 11 *International Journal of Intangible Cultural Heritage* 72, 74.

<sup>58</sup> Tomer Broude, ‘A Diet too Far? Intangible Cultural Heritage, Cultural Diversity, and Culinary Practices’ in Irene Calboli and Srividhya Radavan (eds), *Protecting and Promoting Diversity with Intellectual Property Law* (CUP 2015) 3.

<sup>59</sup> See generally, Tullio Scovazzi, Benedetta Ubertazzi and Lauso Zagato (eds) *Il Patrimonio culturale intangibile nelle sue diverse dimensioni* (Giuffrè 2012) 93–126; Tullio Scovazzi, ‘La notion de patrimoine culturel de l’humanité dans les instruments internationaux’ in James A R Nafziger and Tullio Scovazzi (eds) *Le patrimoine culturel de l’humanité/ The Cultural Heritage of Mankind* (Brill 2008).

<sup>60</sup> Broude (n 58) 3.

ICH, there is a significant risk of unwelcome political attempts to list items that in truth have very little to do with culture. Meanwhile, on the procedural level, the listing approach ‘convert[s] selected aspects of localized … heritage into … the heritage of humanity’.<sup>61</sup> However, inventories do not do justice to ICH as a living phenomenon; rather, they risk creating ‘cultural islands’ that are quarantined from the progression of time, atomising culture and freezing its vitality.<sup>62</sup> In this sense, ‘fears have been expressed that the adoption of measures for the protection of living cultural expressions may possibly hinder their further development and make them less relevant to contemporary communities’.<sup>63</sup> Furthermore, the very effectiveness of such listing is controversial, as mere inventories will hardly save ICH.<sup>64</sup>

Conflicts and incoordination between the 2003 Convention and other international norms – whether customary or conventional – have demonstrated additional procedural shortcomings of the 2003 Convention. The interaction between the 2003 Convention and other international law regimes raises the general question of whether international law is by nature a fragmented system.<sup>65</sup> It also raises the specific question of whether the protection of ICH should be taken into account in the implementation of other international law regimes. It is clear that the protection of intangible heritage presents significant overlaps with various fields of international law.<sup>66</sup> Furthermore, the internal convergences between international cultural law instruments requires coordination to ensure that no cultural item or expression worthy of protection slips through the cracks of the various instruments. However, such coordination does not only represent a challenge, but also an opportunity. The fact that international cultural instruments all aim at protecting different types of heritage can create synergy among the regimes, and ideally reinforce the protection of heritage. The convergence among international cultural law instruments is certainly not as problematic as the conflict between the 2003 Convention and other instruments of international law, such as the covered agreements under the aegis of the WTO.

The 2003 Convention intersects with several instruments of international trade law, which have dramatically different aims and objectives. While the 2003 Convention aims to safeguard ICH, international trade law instruments aim to promote free trade. Furthermore, while the 2003 Convention does not provide a binding dispute settlement mechanism, the WTO is characterised by a compulsory, highly effective and sophisticated DSM. As such, when a substantive clash between the promotion of free trade and the safeguarding of ICH has arisen, such disputes have been brought before the WTO Dispute Settlement Mechanism. The following section explores cases of trade wars, when the protection of ICH clashed with the promotion of free trade.

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<sup>61</sup> Barbara Kirshenblatt-Gimblett, ‘Intangible Heritage as Metacultural Production’ (2004) 56 *Museum International* 52, 57.

<sup>62</sup> Katja Lubina, ‘Protection and Preservation of Cultural Heritage in the Netherlands in the 21st Century’ (2009) 13 *Electronic Journal of Comparative Law* 1, 50.

<sup>63</sup> Alivizatou (n 10) 47.

<sup>64</sup> Kurin (n 23) 74.

<sup>65</sup> International Law Commission, *Report of the Study Group of the International Law Commission, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, UN Doc. A/CN.4/L.682, 13 April 2006.

<sup>66</sup> On the fuzzy boundaries between tangible and intangible heritage, see Lucas Lixinski, *Intangible Cultural Heritage in International Law* (OUP 2013) 18. See also Lixinski and Blake, this volume.

## INTANGIBLE HERITAGE-RELATED TRADE WARS

Intangible heritage-related trade conflicts and disputes do not have a typical form and may relate to diverse areas of international trade law, ranging from international intellectual property law to agricultural law. For example, although not all intellectual property constitutes intangible heritage, and vice versa,<sup>67</sup> there is significant interaction between the 2003 Convention and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement).<sup>68</sup> The TRIPS Agreement sets minimum standards for the protection of several types of intellectual property and is administered by the WTO. Meanwhile, the 2003 Convention provides for a compatibility clause, stating that none of its provisions can be interpreted as affecting 'the rights and obligations of States Parties deriving from any international instrument relating to intellectual property rights'.<sup>69</sup> The 2003 Convention also lacks specific rules over ownership and control over ICH.<sup>70</sup> In turn, while the TRIPS Agreement formally recognises the non-economic interests associated with intangible assets,<sup>71</sup> it is often under scrutiny in high-profile cases where it may be difficult to strike the right balance between public and private interests.<sup>72</sup>

The inability of the TRIPS Agreement to adequately safeguard ICH is particularly evident with regard to controversies and disputes related to the patenting by multinational corporations of ethnic food or medicine traditionally prepared by local communities.<sup>73</sup> Without a sensible remodelling, intellectual property rights risk overprotecting individual economic interests, while ignoring the collective entitlements of the relevant cultural communities.

A further area of overlap between intangible heritage and intellectual property is presented by geographical indications. Geographical indications (GIs) are signs used to identify products whose quality, reputation or other characteristics depend on their specific geographical origins.<sup>74</sup> Examples of GIs include parmesan reggiano, champagne, and gouda. GIs are a possible vector for protecting ICH.<sup>75</sup> By protecting regional food products that have acquired a strong reputation among consumers and

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<sup>67</sup> See for example, Daniel Gervais, 'Spiritual but not Intellectual: The Protection of Sacred Intangible Traditional Knowledge' (2003–2004) 11 *Cardozo Journal of International and Comparative Law* 633.

<sup>68</sup> Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement), 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 UNTS 299, 33 ILM 1197 (1994).

<sup>69</sup> 2003 Convention, Art 3(b).

<sup>70</sup> Amanda Kearney, 'Intangible Cultural Heritage (Global Awareness and Local Interest)' in Laurajane Smith and Natsuko Akagawa (eds) *Intangible Heritage* (Routledge 2009) 209, 216.

<sup>71</sup> See for example, TRIPS Agreement, Arts 7 and 8.

<sup>72</sup> Valentina Vadi, 'Towards a New Dialectics – Pharmaceutical Patents, Public Health and Foreign Direct Investments' (2015) 5 *New York Journal of Intellectual Property and Entertainment Law* 1.

<sup>73</sup> Michael Woods, 'Food for Thought: The Biopiracy of Jasmine and Basmati Rice' (2002–2003) 13 *Albany Law Journal of Science and Technology* 123.

<sup>74</sup> TRIPS Agreement, Art. 22.1.

<sup>75</sup> Dev S Gangjee, 'Geographical Indications and Cultural Rights: The Intangible Cultural Heritage Connection?' in Christophe Geiger (ed), *Research Handbook on Human Rights and Intellectual Property* (Edward Elgar 2015).

have been produced using centuries-old manufacturing techniques, GIs can indirectly protect the ICH associated with the production of these goods. Three dimensions of culture are relevant to GIs: (1) the culture of producing a given type of food, (2) the culture of consuming certain food and (3) ‘the culture of identity in which a good is somehow representative of a group’s cultural identity’.<sup>76</sup>

However, there is a transatlantic divide over the protection of GIs. While the TRIPS Agreement provides for the protection of GIs in order to avoid misleading the public and to prevent unfair competition,<sup>77</sup> with limited exceptions,<sup>78</sup> its provisions are vague. Furthermore, while European states have protected certain foodstuffs originating from specific geographical locations since the 15<sup>th</sup> century,<sup>79</sup> other countries led by the United States consider GIs as obstacles to trade. The divergent approaches by the US and the EU toward the issue of GIs have fostered intense conflicts at various levels. At the multilateral level, for example, WTO members are currently debating the adoption of a multilateral register for wines and spirits.<sup>80</sup> The EU is pushing for an amendment of the TRIPS Agreement and the creation of a register with binding effects.<sup>81</sup> Other countries, led by the United States, are advocating for a non-binding system under which the WTO would simply be notified of the members’ respective geographical indications.<sup>82</sup> Although these negotiations were slotted to be completed in 2003, no agreement has been reached on such a system. A parallel issue is the question as to whether the higher level of protection currently given to wines and spirits<sup>83</sup> should be expanded to cover other geographical indications (the so-called GI extension).<sup>84</sup> The EU has proposed negotiating the GI extension as part of the agriculture negotiations, but other countries remain opposed to such negotiation.<sup>85</sup>

This divergence between the EU and the US also played a central role in the negotiations around the Transatlantic Trade and Investment Partnership (TTIP) – the

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<sup>76</sup> Broude (n 58) 15.

<sup>77</sup> TRIPS Agreement, Art 22.2.

<sup>78</sup> Ibid. Art 24.

<sup>79</sup> Kaiko Shimura, ‘How to Cut the Cheese: Homonymous Names of Registered Geographic Indicators of Foodstuffs in Regulation 510/2006’ (2010) *Boston College International & Comparative Law Review* 129.

<sup>80</sup> TRIPS Agreement, Art. 23.4

<sup>81</sup> WTO, General Council Trade Negotiations Committee Council for Trade-Related Aspects of Intellectual Property Rights Special Session, Geographical Indications—Communication from the European Communities, T/GC/W/547

TN/C/W/26, TN/IP/W/11, 14 June 2005.

<sup>82</sup> WTO, Council for Trade-Related Aspects of Intellectual Property Rights Special Session, Proposed Draft TRIPS Council Decision on the Establishment of a Multilateral System of Notification and Registration of Geographical Indications for Wines and Spirits, Submission by Argentina, Australia, Canada, Chile, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Israel, Japan, Korea, Mexico, New Zealand, Nicaragua,

Paraguay, the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, South Africa and the United States, TN/IP/W/10/Rev.4, 31 March 2011.

<sup>83</sup> WTO, General Council Trade Negotiations Committee, Issues Related to the Extension of the Protection of Geographical Indications Provided for in Article 23 of the TRIPS Agreement to Products Other than Wines and Spirits and those related to the Relationship between the TRIPS Agreement and the Convention on Biological Diversity, Report by the Director-General, WT/GC/W/591, TN/C/W/50, 9 June 2008.

<sup>84</sup> TRIPS Agreement, Art 23.

<sup>85</sup> WTO, General Council Trade Negotiations Committee, Issues Related to the Extension of the Protection of Geographical Indications, paras 2–3.

free trade agreement between the two actors.<sup>86</sup> Although the future of the TTIP remains uncertain, the negotiations concerning GIs are particularly interesting, because they reflect fundamentally different appreciations of GIs. While the EU wanted to prevent American producers from commercialising and labelling products bearing their GI-protected names, the US favoured free trade.<sup>87</sup> This lack of protection – the European negotiators argued – allows an unacceptable exploitation of European intangible heritage, and affects the economic interests of European producers. The US negotiators conversely contended that such names have become generic, and therefore cannot be protected as GIs. Moreover, EU-style legal protection would constitute a barrier to trade, allow monopolies and ultimately increase final prices for consumers. Finally, the US negotiators posited that the EU system would be unfair because European immigrants in the New World have long produced such products, thus sharing the same ICH of their countries of origin. Denying them the possibility to commercialise their products using the traditional names for indicating such items would deny their rightful association with a specific production process and cultural practice.

Beyond its evident economic component, the continuing debate over GIs also has a cultural character. In fact, proponents of GIs consider food as something more than a tradable commodity: as an artefact characterised by both visible features and intangible cultural qualities related to the traditional manufacturing processes and place of origin. In other words, ‘as a forged painting and the original one may not differ at all materially, while still being quite different artworks, in the same way a GI cannot be equated to its material constitution: some aspects of its making are key to its identity’.<sup>88</sup>

The interaction between international economic law and the protection of intangible heritage also includes additional areas of trade. For example, the EU ban on the commercialisation of seal products caused a cultural skirmish across the Atlantic.<sup>89</sup> As Europeans perceive the hunting of seals to be morally objectionable, the EU banned the trade of seal products except those derived from hunts traditionally conducted by the Inuit and other indigenous communities for cultural and subsistence reasons (IC condition).<sup>90</sup> Seals constitute the most important component of an Inuit diet,<sup>91</sup> and indigenous hunting practices represent a form of ICH deemed essential to preserve the indigenous way of life.

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<sup>86</sup> K William Watson, ‘Geographical Indications in TTIP: An Impossible Task’ (*Cato Institute Online Forum*, 21 October 2015) < <https://www.cato.org/publications/cato-online-forum/geographical-indications-ttip-impossible-task>>.

<sup>87</sup> Enrico Bonadio, ‘Why Europe and the US are Locked in a Food Fight over TTIP’ (*The Conversation*, 7 August 2015) <<http://theconversation.com/why-europe-and-the-us-are-locked-in-a-food-fight-over-ttip-45279>> accessed 13 October 2017.

<sup>88</sup> Andrea Borghini, ‘Geographical Indications, Food and Culture’, in Paul B Thompson and David M Kaplan (eds), *Encyclopedia of Food and Agricultural Ethics* (Springer 2014) 1118.

<sup>89</sup> European Communities—Measures Prohibiting the Importation and Marketing of Seal Products (EC—Seal Products), Reports of the Panel, 25 November 2013, WT/DS400/R, WT/DS401/R. European Communities—Measures Prohibiting the Importation and Marketing of Seal Products, Reports of the Appellate Body, 22 May 2014, WT/DS400/AB/R WT/DS401/AB/R.

<sup>90</sup> Regulation (EC) 1007/2009 of the European Parliament and of the Council of 16 September 2009 on Trade in Seal Products, 2009 OJ (L 286) 36.

<sup>91</sup> Edmund Searles, ‘Food and the Making of Modern Inuit Identities’ (2002) 10 *Food & Foodways: History & Culture of Human Nourishment* 55.

In response to the EU ban, Canada and Norway brought claims against the EU before the WTO Dispute Settlement Body (DSB), contending that the EU seal regime was inconsistent with the EU's obligations under the General Agreement on Tariffs and Trade 1994 (GATT 1994),<sup>92</sup> and under the Technical Barriers to Trade (TBT) Agreement.<sup>93</sup> Canada and Norway specifically argued, *inter alia*, that the indigenous communities (IC) condition violated the non-discrimination obligation under Article I:1 and III:4 of the GATT 1994. According to Canada and Norway, such conditions afford seal products from Canada and Norway less favourable treatment than that afforded to like seal products of domestic origin, as well as those of other foreign origin, in particular from Greenland.<sup>94</sup> In fact, the majority of seals hunted in Canada and Norway would not qualify under the IC exception, while most, if not all, of Greenlandic seal products would satisfy such requirements.<sup>95</sup> The panel and the Appellate Body held, *inter alia*, that the exception provided for indigenous communities under the EU seal regime afforded more favourable treatment to seal products produced by indigenous communities than that afforded to like domestic and foreign products,<sup>96</sup> in breach of Articles I:1 and III:4 of the GATT 1994. The panel referred to the various instruments which protect indigenous cultural practices at the international law level,<sup>97</sup> including the 2007 United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).<sup>98</sup> However, the panel concluded that the design and application of the IC measure were not even-handed, because the IC exception was available *de facto* to Greenland.<sup>99</sup> Both the Appellate Body and the panel were very careful in noting that the EU was pursuing a legitimate objective; they only censored the way in which the EU was pursuing the selected goal. This case is significant as it shows that states can adopt exceptions to favour the safeguarding of ICH. At the same time, they must ensure that the adopted measures do not discriminate across countries.

An additional sector in which the cultural clash between free trade and intangible heritage occurs is agriculture. The WTO's Agreement on Agriculture,<sup>100</sup> which governs domestic support, market access and export subsidies in the agricultural sector, is based on the market liberalisation model and efficiency criteria.<sup>101</sup> It requires WTO members to convert non-tariff barriers to tariffs, lower tariff barriers to trade and reduce export subsidies. By gradually reducing the protections available for domestic agricultural sectors, the agreement does 'not allow farmers to maintain their current methods of production solely on cultural or environmental grounds, if those methods prevent the farmers from efficiently adjusting their production in line with market

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<sup>92</sup> General Agreement on Tariffs and Trade 1994, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 UNTS 187.

<sup>93</sup> Agreement on Technical Barriers to Trade, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 UNTS 120.

<sup>94</sup> *EC—Seal Products*, Reports of the Panel, para 7.2.

<sup>95</sup> *Ibid.* paras 7.161 and 7.164.

<sup>96</sup> *Ibid.* para 8(2).

<sup>97</sup> *Ibid.* para 7.292.

<sup>98</sup> United Nations Declaration on the Rights of Indigenous Peoples, adopted by the General Assembly on 13 September 2007, A/RES/61/295 (2007).

<sup>99</sup> *EC—Seal Products*, Reports of the Panel, para 7.317

<sup>100</sup> Agreement on Agriculture, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 UNTS 410.

<sup>101</sup> Fiona Smith, 'Indigenous Farmers' Rights, International Agricultural Trade and the WTO' (2011) 2 *Journal of Human Rights and the Environment* 157, 159.

forces'.<sup>102</sup> Rather, the WTO regards agriculture 'as an economic sector like any other industrial sector'.<sup>103</sup> In some countries, the liberalisation of the market – opening certain markets to highly subsidised agriculture – has meant that local farmers have to compete with heavily subsidised imports.<sup>104</sup> Competition has driven prices down and forced these farmers out of business. This phenomenon has also touched products that are central to a country's culture.<sup>105</sup> For example, the influx of highly subsidised corn from the US has undermined the ability of Mexican farmers to grow corn, a crop that Mexicans have cultivated for centuries.<sup>106</sup> Corn is an essential component of traditional Mexican cuisine that is inscribed on the Representative List of the Intangible Cultural Heritage of Humanity.<sup>107</sup>

A further area of cultural resistance in which the clash between free trade and cultural attitudes is particularly evident is food safety. The WTO Sanitary and Phytosanitary Agreement<sup>108</sup> addresses the interest of member states in assuring that their citizens are supplied with safe food, encouraging member states to base sanitary and phytosanitary measures on internationally accepted scientific standards.<sup>109</sup> However, conflicts have arisen with regard to the interpretation of scientific evidence. While the precautionary approach to risk management is a general principle of EU law – ruling that given products are prohibited until they are proven safe – on the other side of the Atlantic, products must conversely be proven unsafe to be banned. These different approaches to risk and food safety – based on different cultural approaches to food production – have given rise to a number of disputes at the WTO concerning hormones, genetically modified organisms (GMOs) and other issues. Furthermore, trade experts tend to consider safety regulations and cultural concerns to be forms of protectionism and technical trade barriers, rather than legitimate concerns.

## CONCLUSION

Given its importance for human subsistence, resilience and flourishing, intangible heritage is at the heart of civilisations. It plays a role in shaping the specific identity of communities and individuals alike. The safeguarding of the processes and practices of intangible heritage has required the adoption of an ad hoc instrument: the 2003

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<sup>102</sup> Ibid. 168.

<sup>103</sup> Ibid. 159.

<sup>104</sup> Wenonah Hauter, 'The Limits of International Human Rights Law and the Role of Food Sovereignty in Protecting People from Further Trade Liberalization under the Doha Round Negotiations' (2007) 40 *Vanderbilt Journal of Transnational Law* 1071.

<sup>105</sup> See generally, Fiona Smith, *Agriculture and the WTO: Towards a New Theory of International Agricultural Trade Regulation* (Edward Elgar 2009).

<sup>106</sup> Smith (n 105), 161.

<sup>107</sup> UNESCO, Decision of the Intergovernmental Committee: 5.COM 6.30, <<https://ich.unesco.org/en/decisions/5.COM/6.30>> accessed 13 October 2017.

<sup>108</sup> Agreement on the Application of Sanitary and Phytosanitary Measures, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 UNTS 493.

<sup>109</sup> John C Beghin, 'The Protectionism of Food Safety Standards in International Agricultural Trade' (2014) 1 *Agricultural Policy Review* 7.

Convention.<sup>110</sup> Despite some achievements, the 2003 Convention is largely characterised by substantive overreach and procedural underachievement. Not only does it fail to ensure adequate safeguarding of intangible heritage, marking a ‘*de facto* soft law instrument in formal hard law clothing’,<sup>111</sup> but it also fails to provide a meaningful forum to address ICH-related disputes.

The approach endorsed by the 2003 Convention clashes with international economic governance, which is conversely characterised by substantive underachievement and procedural overreach. The WTO is a legally binding and highly effective regime that demands states to promote and facilitate free trade. The WTO system governs international trade based on a free-market paradigm.<sup>112</sup> It is therefore not interested in local communities and their intangible cultural heritage. Rather, the WTO system conceptualises such issues as non-economic concerns, relegated to the margins of the regime.<sup>113</sup> Nevertheless, although the WTO-covered agreements do not purposely regulate ICH, and instead assumedly touch upon it in a rather indirect fashion, economic activities regulated under the WTO agreements can (and have) affect(ed) the aims and objectives of the 2003 Convention.

Intangible heritage trade disputes are generally characterised by the need to balance the protection of intangible heritage and the promotion of free trade. Many such controversies arise during trade negotiations or are brought before the WTO Dispute Settlement Mechanism. The WTO panels do not have a specific mandate to assess the cultural implications of the disputes they are adjudicating. It is therefore no surprise that trade ‘courts’ have paid little attention to the cultural aspects of trade disputes. Nonetheless, intangible cultural heritage matters, and the existence of such disputes, can provoke a necessary and sustained reflection on whether international law is indeed a fragmented system by nature, or whether there are tools to promote better coordination among its various subfields.

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<sup>110</sup> Mounir Bouchenaki, ‘A Major Advance towards a Holistic Approach to Heritage Conservation: the 2003 Intangible Heritage Convention’ (2007) 2 *International Journal of Intangible Cultural Heritage* 106, 108.

<sup>111</sup> Broude (n 60) 3.

<sup>112</sup> Smith (n 105) 176.

<sup>113</sup> Ibid.