



Cultural Concern under Trade and Investment Agreements: Does it Really Work?

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Abstract: *There has been a concern over the adverse influence of globalisation on local culture. Trade and investment agreements have included cultural concern in their provisions. Employing these provisions, countries initiated trade and investment-related measures to secure what they have presumed as cultural traditions and values. This article seeks to examine if the incorporation of cultural concern under trade and investment agreement is effective to reconcile the need for securing culture and the spirit of free trade and free flows of investment. This article is normative research, examining the existing cultural concern under trade and investment agreements, cultural-related measures of particular countries, and how the judicial bodies have responded these measures in their decisions.*

This article argues that the incorporation of cultural concern has triggered a wide range of cultural-related measures. Nevertheless, the decision of judicial bodies, to some extent, has been effective to shield the purpose of cultural concern, especially to avoid disguise or inefficient protectionism, and to admit the right of countries to protect or promote their cultural traditions and values.

Keywords: *cultural concern, trade agreements, investment agreements*

I. INTRODUCTION

Some scholars have expressed their concerns owing to the adverse influence of globalisation over culture. For example, Huntington (1993) states that culture is the essential aspect that affects the globe in the future, showing this fact as ‘The Clash of

Civilizations’.¹ He explains that the primary basis of the clash in the earth would not be mainly economic and philosophical, but cultural.² It has to be admitted that the strongest actors in world’s matters are states, but the major disputes of world’s politics

¹ Samuel P Huntington, ‘The Clash of Civilizations’ (1993) 73(3) *Foreign Affairs* 22, 23.

² *Ibid.*

would take place between states and class of various culture.³

The presence of international trade and foreign direct investment ('FDI') has significantly improved the availability of foreign-made products and services into particular host countries. This process relates not only to tradable activities but also impacts local culture (such as values and traditions) of a particular class. Historically, the period after World War I commenced the discourse between globalisation and The United States' ('US') culture through Hollywood films took over the dominant control of European movies.⁴ Later, this control has extended through other cultural goods and services product, comprising not only movies but also televisions, books, as well as music, gearing up the moot from other countries, especially European countries in the global sphere.⁵

The power of Hollywood's lifestyles broadly spreads almost all over the earth.⁶ Through international trade and FDI, all popular culture of US along with its café's chains and user products have been boosted and distributed to many spectators and consumers world-wide. For instance, Kim Campbell, previous Canadian Prime Minister stated that US's image is so massive in the world.⁷ It does not seem that the globe is relocating to the US, but US has been

emigrating to other parts of the globe, letting people desire as Americans even in a remote country.⁸

The above-mentioned fact has raised anxieties about the existence of local cultures as opposed to US Culture. For some countries, this phenomenon led to restlessness whether their own cultures are being exposed.⁹ Specifically, the invasion of culture from overseas has enhanced the probability of societies to mingle with a new culture.¹⁰ For example, the enormous endorsement of money-oriented life, free sex, and violence that are linked to Hollywood's lives has opposed to local culture.¹¹ However, according to Voon, although conserving genuine culture is crucial, culture has to be endorsed to develop through interplay and interchange with other cultures.¹² Therefore, it is not like imported apples that could be useless if they carried disease from overseas, foreign culture could be beneficial owing to their cultural values and traditions.¹³

Having acknowledged this trend, trade and investment agreements have commenced placing cultural concern as a means of accommodating the need of particular countries to impose measures about cultural protection without contradictory with the spirit of globalisation and liberalisation. Ensuring this goal, the dispute settlement

³ *Ibid.*

⁴ Christopher M Bruner, 'Culture, Sovereignty, and Hollywood: UNESCO and the Future of Trade in Cultural Products' (2008) 40 *New York University Journal of International Law and Politics* 351,354.

⁵ Peter Van Den Bossche, 'Free Trade and Culture: A Study of Relevant WTO Rules and Constraints on National Cultural Policy Measures', (Maastricht Faculty of Law Working Paper Series, 2005) 6.

⁶ Christopher M Bruner, above n 4, 355.

⁷ Steve Barth, 'Cultural Protectionism' (1998) 11(3) *World Trade* 43.

⁸ *Ibid.*

⁹ See e.g., Brian M Yecies, 'Parleying Culture against Trade: Hollywood's Affairs with Korea's

Screen Quotas', (2007) 38 (1) *Korea Observer*, 1,2.

¹⁰ Christopher M Bruner, above n 3, 354.

¹¹ Oliver R. Goodenough, 'Defending the Imaginary to the Death?: Free Trade, National Identity, and Canada's Cultural Preoccupation', (1998) 15 *Arizona Journal of International Law and Comparative Law* 203, 226.

¹² Tania Voon, *Cultural Products and the World Trade Organization* (Cambridge University Press,2007) 12.

¹³ *Ibid.*

system under trade and investment agreements was established such as the dispute settlement body under the WTO ('DSB WTO') and investor-state dispute settlement ('ISDS').

Some countries then initiated trade and investment-related measures for securing what they have subjectively considered as local cultures. However, these measures, according to the decision of judicial body, have conflicted with the movement of globalization as they would likely fall within the scope of 'inefficient protectionism' and contradict with the value of human rights in relation free speech and ideas' access.¹⁴

This paper seeks to examine if the inclusion of cultural concern under trade and investment agreement is effective to reconcile the need of shielding culture and the spirit of free trade and free flows of investment. This paper starts by explaining how the existing trade and investment agreements have integrated cultural concern in their provisions. Next, it shows how particular countries have employed cultural-related measures and how the judicial bodies have countered these measures in their decisions.

II. LEGAL MATERIALS AND METHODS

This paper used normative methodology, which departed from existing laws concerning trade and investment agreements. It adopted the statute approach as it examines relevant legal framework in trade and investments. Comparison on state practice were also adopted to gain appropriate recommendation on how cultural

aspect may affect judicial bodies in delivering their decisions upon various cases.

Legal materials used in this paper include these following legal instruments:

1. United Nations Educational, Scientific and Cultural Organization Convention
2. Universal Declaration on Cultural Diversity
3. United Nations Declaration on the Rights of Indigenous Peoples
4. General Agreement on Tariffs and Trade
5. Trade Related Intellectual Property Rights
6. Trade-Related Investment Measures
7. North American Free Trade Agreement
8. Trans-Pacific Partnership

Various cultural norms are also discussed towards the above mentioned legal instruments and examined whether cultural aspects have been included within those legal instruments

III. RESULTS AND DISCUSSIONS CULTURAL CONCERN UNDER TRADE AND INVESTMENT AGREEMENTS

The Elusive Meaning of Culture

International law has recognised the importance of culture and its diversity within society. Specifically, the preamble of United Nations Educational, Scientific and Cultural Organization ('UNESCO') constitution defines that "*the wide diffusion of culture...are indispensable to the dignity of man and constitute a sacred duty which all the nations must fulfill in a spirit of mutual assistance and concern*".¹⁵ Besides, article 1 of Universal Declaration on Cultural

¹⁴ Krista Boryskavich and Aaron Bowler, 'Hollywood North: Tax Incentives and the Film Industry in Canada' (2002) 2 *Asper Review of International Business and Trade Law* 25, 26.

¹⁵ Constitution of the United Nations Educational, Scientific and Cultural Organization, 4 UNTS 275;

41 AJIL Supp. 1 (4 November 1946) the Preamble ('UNESCO Constitution').

Diversity ('UDCD') states that cultural diversity is "embodied in the uniqueness and plurality of the identities of the groups and societies making up humankind. As a source of exchange, innovation, and creativity, cultural diversity is as necessary for humankind as biodiversity is for nature".¹⁶ The acknowledgment is not only for culture and its diversity but also for a group of people that conserve its cultural identity. The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) states that "[i]ndigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions".¹⁷

Although its presence has broadly acknowledged, there is no varying meaning of culture. This is due to a hugely complex fact which has diverse senses. Raymond Williams (1976) even explains that culture can be categorised as one of the most complex words in the language of English.¹⁸ Low (1994) then revealed the challenges to find an intact culture's definition. Firstly, culture is a mobile concept as it adheres to a life's reality. Next, in some countries, there is a government's trend to unscrupulously influence culture for myriad reasons.¹⁹

UNESCO tried to define the term of culture in the Preamble of its UDCD by explaining that: "Culture should be regarded as the set of distinctive spiritual, material, intellectual and emotional features of society or a social group, and that it encompasses, in addition to art and literature, lifestyles, ways of living together, value systems, traditions, and beliefs."²⁰

Eide (1995) then proposed three potential definition of culture, namely: (1) material factors of culture consisting of cultural services and goods; (2) immaterial factors of culture through the process of scientific formation or creative; and (3) anthropological factors of culture (such as the way of life).²¹

Cultural Concern under Trade and Investment Agreements

Before explaining the cultural concern, this paper will explain the reason to combine the explanation of trade and investment agreements and not divide it. Trade and investment are highly connected and thus could be illustrated as two sides of the same coin.²² Companies conduct cross-border trade to supply their foreign investment,²³ and they invest abroad in bolstering their

¹⁶ Universal Declaration on Cultural Diversity, UNESCO Res. 25, 31st Gen. Conference, UNESCO Doc. 31 C/25 (2 November 2001) art 1 ('UDCD').

¹⁷ United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, UN Doc. A/RES/61/295, 13 September 2007, 46 ILM 1013 (2007), art 33 ('UNDRIP').

¹⁸ Raymond Williams, *Keywords: A Vocabulary of Culture and Society* (Oxford University Press, 1976) 76.

¹⁹ Seta M Low, 'Cultural Conservation of Place', in Mary Hufford (ed.), *Conserving Culture: A New Discourse on Heritage* (University of Illinois Press, 1994) 66,67.

²⁰ Universal Declaration on Cultural Diversity, UNESCO Res. 25, 31st Gen. Conference, UNESCO Doc. 31 C/25 (2 November 2001), the preamble ('UDCD').

²¹ Asbjørn Eide, 'Cultural Rights as Individual Human Rights', in Asbjørn Eide, Catarina Krause and Allan Rosas (eds.), *Economic, Social and Cultural Rights. A Textbook* (Martinus Nijhoff Publishers, 1995) 239, 230.

²² Debra P Steger, 'International Trade and Investment: towards a Common Regime?' in Roberto Echandi and Pierre Sauvé (eds.), *Prospects in International Investment Law and Policy* (Cambridge University Press, 2013) 156, 159.

²³ Nicholas DiMascio and Joost Pauwelyn, 'Nondiscrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin?' (2008) 102 *American Journal of International Law* 48,49.

trade.²⁴ While investors produce and consume both goods and services, an open international trade system will provide a bright investment climate.²⁵ The WTO has applied many rules covering not only trade but also investment as reflected in the General Agreement on Trade in Services ('GATS')²⁶ and Trade-Related Investment Measures ('TRIMS').²⁷ Besides, some preferential trade agreements, such as North American Free Trade Agreement ('NAFTA') and Trans-Pacific Partnership ('TPP') have also separately regulated investment and investment arbitration. Contrarily, trade became integrated into investment treaties.²⁸ Some existing Bilateral Investment Treaties (BITs) forbid trade-related performance requirements, especially provision to stipulate the use of local products and technology transfer.²⁹

The General Agreement on Tariffs and Trade ('GATT') has incorporated provisions, enabling states to enforce or maintain internal quantitative regulation in related to uncovered movies as regulated under Article IV.³⁰ However, this provision restricts the

measure, through screen quotas which some conditions, including the minimum broadcasting time of national/ local films, the maximum broadcasting time of foreign-films in a year and a particular theatre.³¹

The general exception under the GATT has also spanned cultural concern. Article XX (f) reflects how the exception also spanned measures for securing what has been classified as nationwide assets of creative, remarkable or archeologically value.³² Some conditions to be entitled for this exception are explained in the first paragraph (or chapeau) of Article XX by saying that measures are not employed in a way that can create a tool of 'arbitrary or unjustifiable discrimination' between states wherein the similar situations prevail, or a 'disguised restriction' on international trade.³³

Although general exceptions in Article XX GATT along with Article XIV GATS are not systematically aimed at enabling cultural measures, some cultural regulation might be encompassed. Specifically, the term 'public morals' has been linked to cultural value through DSB WTO decision. 'Public Morals'

²⁴ Jeswald W Salacuse, *The Three Laws of International Investment: National, Contractual, and International Frameworks for Foreign Capital* (Oxford University Press, 2013) 23.

²⁵ Erik Denters, 'Preferential Trade and Investment Treaties' in Tarcisio Gazzini and Eric De Brabandere (eds), *International Investment Law: The Sources of Rights and Obligations* (Martinus Nijhoff Publishers, 2012) 49, 51.

²⁶ *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1B ('General Agreement on Trade in Services') art I(2)(c)

²⁷ *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1A ('Agreement on Trade-Related Investment Measures') art 1.

²⁸ Joost Pauwelyn, 'The Re-Convergence of International Trade and Investment Law: Causes, Questions, and Reform' (2014) 108 *American Society of International Law Proceeding* 255.

²⁹ *Ibid.*

³⁰ The General Agreement on Tariffs and Trade, opened for signature 30 October 1947, 55 UNTS 187 (entered into force 1 January 1948) art IV ('GATT 1947').

³¹ GATT 1947 art IV stated that:

(a) Screen quotas may require the exhibition of cinematograph films of national origin during a specified minimum proportion of the total screen time actually utilized, over a specified period of not less than one year, in the commercial exhibition of all films of whatever origin, and shall be computed on the basis of screen time per theatre per year or the equivalent thereof;

(b) With the exception of screen time reserved for films of national origin under a screen quota, screen time including that released by administrative action from screen time reserved for films of national origin, shall not be allocated formally or in effect among sources of supply.

³² GATT 1947 art XX (f).

³³ GATT 1947 art XX.

has recently been construed as representing values of true and wrong manner maintained by or on behalf of a public or state³⁴ that was employed based on a supple and dynamic method.³⁵ It was because public morals could differ in space and time, relying upon a series of aspects, including religious, cultural, social, and ethical values.³⁶

Trade Related Intellectual Property Rights ('TRIPs') has also included cultural concern. Article 22(1) show, while explaining geographical indications, culture is closely linked to the quality, image and other typical of the good.³⁷ Next, the treaty of the European Community has included cultural concern. Under Article 87(1) of this treaty, it is a violation to provide assistance by member countries that ultimately misleads rivalry by supporting the manufacture of particular goods (such as subsidies).³⁸ Nonetheless, there has been an exemption for this ban as regulated under Article 87(3)(d) that explains if an assistance for promoting culture wherein such assistance does not impact trade's competition to an extent that is contradict to the public interest.³⁹ In addition, Article 151 shows that the Community shall give a contribution to the colouring of the cultures, while honouring their national and regional difference and

simultaneously delivering the prevailing cultural heritage to the front.⁴⁰

North America Free Trade Agreements ('NAFTA') also covers a restricted exemption for 'cultural industries'. This FTA then defines cultural industries means individuals or groups involved in sale, distribution and production, among other things, books, newspapers, films, video music recording and radio communications.⁴¹ The ASEAN–Australia–New Zealand Free Trade Agreement ('AANZFTA') in its general provisions and exceptions also covers cultural concern, especially related to the existence of indigenous group in New Zealand. Specifically, chapter 15 Article 5 allows the government of New Zealand to impose measure when it is necessary to give a more favourable treatment to Maori tribe, covering the compliance of its responsibility under the Treaty of Waitangi.⁴² This measure, nevertheless, must not be employed as a tool of 'arbitrary or unjustified discrimination' against individuals of the other member states of this treaty.⁴³

Some bilateral FTAs have also put cultural concern in their provisions. In Chile–USA FTA, The national television of Chile or '*Consejo Nacional de Televisión*' may stipulate that all programs relay through

³⁴ Panel Report, United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services, WT/DS285/R, adopted 20 April 2005 [6.465] ('*US-Gambling Panel Report*').

³⁵ US-Gambling Panel Report [6.479].

³⁶ US-Gambling Panel Report [6.461].

³⁷ *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1A, art 22(1) stated that: 'Geographical indications are, for the purposes of this Agreement, indications which identify a good as originating in the territory of a Member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin' ('*Agreement on Trade-Related Investment Measures*').

³⁸ Consolidated Version of the Treaty Establishing the European Community, 2002 O.J. (C325/33) 24 December 2002, art 87(1) ('*EC Treaty*').

³⁹ EC Treaty art. 87(3)(d)

⁴⁰ EC Treaty art.151.

⁴¹ North American Free Trade Agreement, signed 17 December 1992, [1994] CTS 2 (entered into force 1 January 1994), art 2107 ('*NAFTA*').

⁴² Agreement Establishing the ASEAN–Australia–New Zealand Free Trade Area, opened for signature 27 February 2009, [2010] ATS 1 (entered into force 1 January 2010) Chapter 15, art 5 ('*ASEAN–Australia–New Zealand FTA*').

⁴³ *Ibid.*

Chile's public television channels cover up to 40 percent of Chilean production.⁴⁴ Similarly in Australia-USA FTA, Australia has the right to require minimum local content quotas on television at a specific level.⁴⁵ It expressly states that Telstra (National Television) can be owned by foreigner with the maximum ownership is 35 per cent. The chair person and directors of this company must be Australian and the head office of Telstra must be in Australia.⁴⁶

Finally, the International Finance Corporation ('IFC') through its performance standard stipulates all firms that propose loans from the IFC should appreciate indigenous groups and cultural heritage.⁴⁷ It states that IFC will avoid project that may adversely affect cultural heritage and indigenous groups.⁴⁸ Similarly, the Multilateral Investment Guarantee Agency ('MIGA') through its performance standards number seven and eight also encouraged foreign investment that respected indigenous peoples and cultural heritage.⁴⁹

THE APPLICATION OF CULTURAL CONCERN

Countries' Measures in relation to Cultural Concern

The incorporation of cultural concern under trade and investment agreements has

released wider opportunities for the governments to unilaterally impose cultural-related measures to promote and protect their cultures, especially related to cultural goods and services. These measures can be applied in many diverse practices. This section will briefly discuss a number of such measures, showing how they have been employed by some particular countries.

The most popular common of cultural-related measures is the limitations of market access, especially to secure what countries have regarded as cultural goods and services. Mexico and Spain employed screen quotas for movies to limit the presence of foreign movies within their territories.⁵⁰ China through its state-owned companies employed screen publications, such as books and newspapers, audio and video products as a means of anticipating those products will not contradict with China's cultural traditions.⁵¹ Recently, China even conducted internet control through filtering and blocking mechanism, and initiating what has been called as self-censorship by internet customers through supervision and penal sanctions.⁵²

Some countries also employed preventive measures to protect what they have assumed as cultural value or tradition.

⁴⁴ *Free Trade Agreement between the Government of the Republic of Chile and the Government of the United States of America*, signed 6 June 2003 (entered into force 1 January 2004) annex I- 3 (Chile) ('*Chile-USA FTA*').

⁴⁵ *Free Trade Agreement between the Government of Australia and the Government of the United States of America*, signed 18 May 2004 (entered into force 1 January 2005) annex I ('*Australia-USA FTA*').

⁴⁶ Australia-USA FTA, annex 1-14.

⁴⁷ International Finance Corporation, 'Performance Standards on Environmental and Social Sustainability' (1 January 2012) standard 7.

⁴⁸ *Ibid.*

⁴⁹ Nyoman Indra Juarsa and Yanuarda Yudo Persian, 'Corporate Social Responsibility in International

Economic Law Perspective' (2015) 2(2) *Brawijaya Law Journal* 84,96.

⁵⁰ Christoph Beat Graber, 'Audiovisual Media and the Law of the WTO' in Christoph Beat Graber, Michael Girsberger and Mira Nenova (eds.) *Free Trade versus Cultural Diversity: WTO Negotiations in the Field of Audiovisual* (Schulthess, 2004) 15, 29.

⁵¹ See Panel Report, *China - Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/R (Aug. 12, 2009) [4.113-4.120] ('*China - Audiovisual*').

⁵² Quynh-Dan Nguyen, 'Error: Essay not Found: Comparing Censorship in China and South Korea (2016) 3(1) *Brawijaya Law Journal* 17, 20.

Benin⁵³ and Haiti⁵⁴ constrained the importation of alcohol; Israel banned importation of all non-Kosher meat products;⁵⁵ Brunei limited importation in certain meat products;⁵⁶ Qatar prohibited importation of pork products;⁵⁷ Taiwan banned importation of dog meat, and Tunisia prohibited the importation of swine products.⁵⁸ Canada explicitly announces its ban on child pornography and materials considered indecent, traitorous, or treasonable.⁵⁹

The limitation of foreign investment and ownership of cultural goods and services is the next cultural-related measures. Most of measures are associated with broadcasting and news corporations for radio and television. In the US, 45 per cent is the maximum ownership of single television operator in the broadcasting market.⁶⁰ In the same way, France delimited the shares in broadcasting corporations to a maximum of 49 per cent notwithstanding foreign and domestic ownership.⁶¹ Australia had the right for imposing minimum local content quotas to 35 per cent on foreign-owned TVs.⁶²

The subsidy, intellectual property rights, and tax are less common cultural related measures, but they are still employed by some countries or group of countries. The

EU has implemented subsidy program for protecting and promoting domestic cultural services and goods. Specifically, the Council of Europe initiated what has been called as ‘*Eurimages fund*’, providing grants and repayable credits for European co-productions of movies.⁶³ In the French Code of Intellectual Property, the Government of French has the right to give an extra 25 per cent of the payment from private copying charges for protecting and promoting local entertainers or artistic creations.⁶⁴ As regards to tax measures to encourage domestic cultural products, France obliged taxes on the income of broadcasting operators, the sale of movies tickets and video tapes for assisting domestic films’ production.⁶⁵

JUDICIAL BODY DECISION OVER CULTURAL-RELATED MEASURES

WTO Dispute Settlement Decision

WTO dispute settlement system has been existing more than twenty-two years, adjudicating at least 405 disputes from 1 January 1995 to 22 August 2016. In that period, it has been probably the most prolific of all international dispute settlement

⁵³ WTO Secretariat, *Report of the WTO Secretariat on the Trade Policy Review of Benin*, WT/TPR/S/131 (24 May 2004) [42].

⁵⁴ WTO Secretariat, *Report of the WTO Secretariat on the Trade Policy Review of Haiti*, WT/TPR/S/99 (7 October 2003) [41].

⁵⁵ WTO Secretariat, *Report of the WTO Secretariat on the Trade Policy Review of Israel*, WT/TPR/S/58 (13 August 1999) [24].

⁵⁶ WTO Secretariat, *Report of the WTO Secretariat on the Trade Policy Review of Brunei*, WT/TPR/S/84 (27 April 2001) [43].

⁵⁷ WTO Secretariat, *Report of the WTO Secretariat on the Trade Policy Review of Qatar*, WT/TPR/S/144 (24 January 2005) [26].

⁵⁸ WTO Secretariat, *Report of the WTO Secretariat on the Trade Policy Review of Tunisia*, WT/TPR/S/152 Rev.1 (Oct.31, 2005) [39].

⁵⁹ WTO Secretariat, *Report of the WTO Secretariat on the Trade Policy Review of Canada*, WT/TPR/S/53 (19 November 1998) [46].

⁶⁰ Federal Communications Commission, Code of Federal Regulations, Title 47 (47 C.F.R.), § 73.3555(d)(1).

⁶¹ Alison James and Adam Dawtrey, ‘Oui are the World’ *Variety* (19 June 2000) 85.

⁶² Australia-USA FTA, annex 1.

⁶³ See Council of Europe, Resolution (88)15 of 26 October 1988.

⁶⁴ See French Code de la Propriété Intellectuelle, Act No. 2000-719, Art. L. 321-9.

⁶⁵ Mary E Footer, and Christoph Beat Graber, ‘Trade Liberalization and Cultural Policy’ (2000) 3(1) *Journal of International Economic Law* 115, 125.

practices.⁶⁶ Some leading international scholars have positively assessed the existing of dispute settlement mechanism under the WTO.⁶⁷ Unlike the GATT, the DSB has successfully initiated the accurate time limits throughout the dispute settlement mechanism.⁶⁸ Lockhart and Voon (2005) presumed that appellate review in the WTO was well-operated, and scholars observed on the efficiency of appellate review that has led to the progression of international trade law.⁶⁹ In the same way, Guzman and Pauwelyn (2012) stated that the dispute settlement mechanism was one of the most exceptional aspects of the WTO.⁷⁰

Developing countries have often utilised the WTO dispute settlement system. Brazil (thirty complaints), India (twenty-three complaints), Argentina and Mexico (twenty-one complaints), and Indonesia (ten complaints) are among repeated parties of the system.⁷¹ Moreover, Developing countries successfully defeated economic superpowers countries in some WTO cases. In particular, *US – Underwear*, a complaint by Costa Rica, *US – Clove Cigarettes*, a complaint by Indonesia and even more so *US-Gambling*, a

complaint by Antigua which has a population only 67,000.

Under the WTO systems, a Member could impose a limitation or discriminatory measures in associated with cultural products for preserving and promoting what has been classified as local culture or to shield its producers.⁷² The scope of cultural value of a particular product may span not only the product's nature, or who make it, but also how it is made or consumed or how it affects local identity.⁷³ The panel and the Appellate Body WTO then scrutinised if those measures are consistent with what has been called as the law of the WTO. It is often claimed that WTO law typically limits the ability of WTO members to impose measures for protecting and promoting domestic cultural products,⁷⁴ as the following WTO jurisprudence show.

In *Japan – Leather II (US)*, a Japanese law stipulated leather importers to acquire import licenses and to comply with import quotas,⁷⁵ thereby securing the jobs of a certain minority and indigenous population, that is the Dowa People.⁷⁶ Japan argued that the Dowa people were in an inferior position

⁶⁶ Peter Van den Bossche, *The Law and Policy of the World Trade Organization* (Cambridge University Press, 2010) 169.

⁶⁷ Thomas A Zimmermann, 'WTO Dispute Settlement at Ten: Evolution, Experiences & Evaluation,' (2005) 60 *The Swiss Review of International Economic Relations* 27,53.

⁶⁸ *Ibid.*

⁶⁹ John Lockhart and Tania Voon, 'Review of the Appellate Review in the WTO Dispute Settlement System' (2005) 6 *Melbourne Journal of International Law* 474,476.

⁷⁰ Andrew T Guzman and Joost HB Pauwelyn, *International Trade Law* (Wolters Kluwer 2nd ed, 2012) 127, See also Nicolette Butler, 'In Search of a Model for the Reform of International Investment Dispute Resolution: An Analysis of Existing International and Regional Dispute Settlement Mechanisms' in Jean E Kalicki and Anna Joubin-Bret (eds), *Reshaping the Investor-State Dispute Settlement System: Journeys for the 21st Century* (Nijhoff, 2015) 353,355.

⁷¹ This can be traced through Map of Disputes Between WTO Members, <https://www.wto.org/english/tratop_e/dispu_e/di_spu_maps_e.htm>

⁷² Tomer Broude, 'Taking "Trade and Culture" Seriously: Geographical Indications and Cultural Protection in WTO Law' (2005) 26(4) *University of Pennsylvania Journal of International Economic Law* 623, 638.

⁷³ Tania Voon, *Cultural Products and the World Trade Organization* (Cambridge University Press, 2007) 11

⁷⁴ See Ivan Bernier, 'Trade and Culture' in Patrick FJ Macrory, Arthur E Appleton, and Michael G Plummer (eds.) *The World Trade Organization: Legal, Economic and Political Analysis* (Springer, 2005), 790.

⁷⁵ Panel Report, *Japanese Measures on Imports of Leather*, L/5623 - 31S/94 (15/16 May 1984) [8] ('*Japan-Leather II Panel Report*')

⁷⁶ *Japan-Leather II Panel Report* [15], [17]–[18].

economically, socially, and culturally due to discrimination based on a class system.⁷⁷ However, the panel invalidated Japan's measure because it had impaired or nullified benefits to other members, that is the US.⁷⁸ Furthermore, in *Japan – Alcoholic Beverages II*, Japan insisted its lower taxes on “shochu” compare to whiskey, cognac, and white spirits,⁷⁹ showing that Japanese consumers culturally assumed shochu as different from those alcohol drinks, and consumed it in different ways.⁸⁰ The Panel and Appellate Body then prohibited this measure because it fell within the scope of ‘internal taxation’ so that it is inconsistent with GATT Article III:2.⁸¹

In *China – Audiovisual*, China through its state-owned corporations, screen publications of newspapers, books, audio and video products, such as games, CDs, DVDs and music transferring services.⁸² China claimed that its system was vital as a preventive measure for reassuring that those products did not have any violence or pornography materials that contradicted with China's cultural value.⁸³ Both the Panel and the Appellate Body annulled this measure because it caused discriminatory manners wherein China required the trade of importing publications must be operated by wholly State-owned firms and negated

foreign firms from being permitted as publication importers so that this measure did not fall within the scope of general exception under GATT Article XX.⁸⁴

In *EC – Seal Products*, the EU prohibited the importation and advertising of seal products (*EU Seal Regime*) to nurture the EU's moral concerns about the prosperity of seals.⁸⁵ This measure was harshly contested by Canada where sealing was a vital cultural practice for its indigenous Inuit communities, as well as by Norway.⁸⁶ The result of this measure discriminatory benefited seal products reaped by Greenland's Inuit communities over Canadian Inuit communities (that still employed cultural practice) from the way this measure was undertaken.⁸⁷ In its final report, the Appellate Body confirmed that the EU Seal Regime was illegal as it had been employed in discriminatory means according to GATT Article XX.⁸⁸

In the first three cases, both the Panel and the Appellate Body significantly limited the ability of WTO members to impose measures about the cultural concern. All cultural-related measures were eventually considered inconsistent with the law of the WTO. In *EC – Seal Products*, however, the Panel and the Appellate Body acknowledged the right of WTO member states to preserve

⁷⁷ Japan-Leather II Panel Report [21]–[22].

⁷⁸ Japan-Leather II Panel Report [44].

⁷⁹ Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, (1 November 1996) 17 (*‘Japan – Taxes on Alcoholic Beverages AB Report’*).

⁸⁰ Panel Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/R, WT/DS10/R, WT/DS11/R (1 November 1996) [4.54] (*‘Japan – Taxes on Alcoholic Beverages Panel Report’*),

⁸¹ Japan – Taxes on Alcoholic Beverages AB Report 32.

⁸² Panel Report, *China - Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/R (12 August 2009) (*‘China-Audiovisual Panel Report’*).

⁸³ China-Audiovisual Panel Report [4.113-4.120].

⁸⁴ China-Audiovisual Panel Report [4.113-4.120].

⁸⁵ Appellate Body Report, *European Communities - Measures Prohibiting the Importation and Marketing of Seal Products* WT/DS400/AB/R, WT/DS401/AB/R (22 May 2014) 24 (*EC - Seal Products AB Report*).

⁸⁶ Panel Report, *European Communities - Measures Prohibiting the Importation and Marketing of Seal Products*, WTO Docs WT/DS400/R, WT/DS401R (25 November 2013) [7.303-315] (*EC - Seal Products Panel Report*).

⁸⁷ EC - Seal Products Panel Report [7.460].

⁸⁸ EC - Seal Products Panel Report [5.320, 5.337-5.338].

the cultural practice (that is sealing activities) of indigenous groups. From this decision, it can be inferred that this cultural practice should be conserved, and if any measure will harm or discriminate such practice, the measure should be invalidated.

Investor-State Arbitration Decision

The existence of an autonomous investor-state dispute settlement ('ISDS') mechanism will be crucial to reassure the responsibility of government for any violations of commitments they have done.⁸⁹ Moreover, if a host country provides impartial and independent dispute settlement mechanism, the country will be more appealing for foreign investment.⁹⁰ Based on those reasons, the use of ISDS has been buoyant since twenty years ago, following the rapid growth of FDI.⁹¹ In practice, there are two types of international arbitration. Firstly, *ad hoc* arbitration, consisting of an arbitral panel and procedure that is agreed between the investor and the host country.⁹² Next, the application institutional system of international arbitration, such as ICSID to settle the investor-state dispute.⁹³

Under ISDS, there has been a debate over cultural-related measures of the host country and foreign investors' interest. Foreign investors brought a lawsuit before

ISDS, arguing host countries' measure adversely affected their investment, thereby qualifying to 'indirect expropriation' or other relevant breaches of investment treaties such as lack of fair and equitable treatment and discriminatory conducts.⁹⁴ However, a host country claims that its measure is crucial for protecting cultural heritage site and the life of indigenous groups.⁹⁵

Some cases have discussed the issue as to whether cultural-related measures intended at guarding cultural heritage may be considered to be an indirect expropriation or a measure equal to expropriation. In *Glamis v. the US*, a mining company from Canada intended to mine gold in the area that considered being a holy place for indigenous groups (the Quechan Indian tribe).⁹⁶ Even though this place is not listed on the World Heritage list, its cultural heritage and tradition are equal to Mecca or Jerusalem.⁹⁷ The Federal Government then denied approving this project, taking into account the potential environmental and cultural damage caused by mining activities.⁹⁸ The tribunal eventually buttressed the decision from the US Federal Government. It reasoned that mining actions might lead to the burial of more items, leading to greater environmental damage.⁹⁹ Interestingly, the Tribunal also particularly referred to Article

⁸⁹ Stephan W. Schill, 'Private Enforcement of International Investment Law: Why We Need Investor Standing in BIT Dispute Settlement' in Michael Waibel, et al (eds), *The Backlash Against Investment Arbitration* (Kluwer, 2010) 29,31.

⁹⁰ Peter Muchlinski, 'Policy Issues' in Peter Muchlinski, Federico Ortino, and Christoph Schreuer (eds), *The Oxford Handbook of International Investment Law* (Oxford University Press, 2008) 3, 41.

⁹¹ Jeff Waincymer, 'Settlement of Disputes Under Free Trade Agreements' in Sisira Jayasuria, Donald MacLaren and Gary Magee (eds), *Negotiating a Preferential Trading Agreement: Issues, Constraints and Practical Options*, (Edward Elgar, 2009) 196,197.

⁹² Peter Muchlinski, above n 88, 42.

⁹³ *Ibid.*

⁹⁴ Valentina Vadi, *Cultural Heritage in International Investment Law and Arbitration* (Cambridge University Press, 2014) 93.

⁹⁵ Martina Guidi, 'The Protection of Indigenous Peoples' Concerns in World Bank-Funded Projects' in Giorgio Sacerdoti et al (eds), *General Interests of Host States in International Investment Law* (Cambridge University Press, 2014) 237, 238

⁹⁶ *Glamis Gold Ltd v. United States of America (award)* (ICSID Arbitral Tribunal, 8 June 2009)[103-8] ('*Glamis v. US*')

⁹⁷ *Glamis v. US* [107].

⁹⁸ *Glamis v. US* [107].

⁹⁹ *Glamis v. US* [687].

12 of the World Heritage Convention that requires countries to guard their cultural heritage even if it is not listed on the World Heritage List.¹⁰⁰

Some ongoing cases also discussed the tautness between cultural related measures and the investors' interest. In 2011, Peru confronted ISDS claim over the planned development of property in a protected historical site. In 1995, investors obtained a permit to build a property in the area that was classified as a protected historical site.¹⁰¹ In 2007, however, the National Institute of Culture enacted a regulation, banning any form of construction on that site.¹⁰² In 2016, a Canadian miner brought a lawsuit under ICSID against the government of Romania.¹⁰³ The Romanian government refused to issue a permit over notorious mining project (the Roșia Montană project) because the location of this project was on the list of 'tentative-list of world cultural heritage site.'¹⁰⁴

The more interesting case involved the government of Mauritius and British Investor in 2016.¹⁰⁵ Investor intended to build an integrated tourism projects, including hotels and villas at *Le Morne* in Mauritius' west coast.¹⁰⁶ This location was on the list of World Heritage sites in 2008.¹⁰⁷ Investor then claimed that the government of Mauritius deceived the actual situation of the land at *Le Morne*.¹⁰⁸ The land was mostly private-

owned instead of state-owned so that UNESCO could deny Mauritius' request to put *Le Morne* as World Heritage sites.¹⁰⁹ In 2017, Dutch Investor brought a lawsuit against the Government of Croatia over the development of resort on Dubrovnik.¹¹⁰ Because this area is on the list of World Heritage site, UNESCO has suggested some changes and limitations on this project for protecting this site, and investors has complied with all of this stipulation.¹¹¹ The Croatian government, however, still refused this project following the local court ruling on the environmental permit.¹¹²

IV. CONCLUSIONS AND SUGGESTIONS

There has been an apprehension over the hostile impact of globalisation on local culture. Trade and investment agreements have included cultural concern in their provisions. Employing these provisions, countries initiated trade and investment-related measures for protecting what they have regarded as cultural traditions and values. The integration of cultural fear has led to a wide diversity of cultural-related measures such as market access' restrictions, subsidy, tax, intellectual property rights, and the restriction of foreign-owned corporations. The judicial body then replied some of countries' cultural related measures. Under the WTO, both the Panel and the Appellate Body considerably restricted the

¹⁰⁰ Valentina Vadi, *Cultural Heritage in International Investment Law and Arbitration* (Cambridge University Press, 2014) 118.

¹⁰¹ Luke E Peterson, 'New Government in Peru Confronts Recent Arbitration Loss and New Claims by Foreign Investors in Electricity Transmission, Construction, and Port Sectors', (Investment Arbitration Reporter, 4 August 2011).

¹⁰² *Ibid.*

¹⁰³ IA Reporter, 'Gabriel Resources Hails Romania's Willingness to Re-run a Contested Tax Audit, But Complains of Other Unhelpful Measures Including Bid to Designate Mining Area as World Heritage

Site' (Investment Arbitration Reporter, 27 September 2016)

¹⁰⁴ *Ibid.*

¹⁰⁵ *Ibid.*

¹⁰⁶ *Ibid.*

¹⁰⁷ *Ibid.*

¹⁰⁸ *Ibid.*

¹⁰⁹ *Ibid.*

¹¹⁰ Jarrod Hepburn, 'Croatia Faces New Claim at ICSID by Elitech BV and Razvoj Golf Doo Over Golf Resort Development' (Investment Arbitration Reporter, 7 September 2017).

¹¹¹ *Ibid.*

¹¹² *Ibid.*

ability of WTO members to impose measures in relation to cultural concern. In *EC – Seal Products*, however, the Panel and the Appellate Body admitted the right of WTO members to preserve the cultural tradition (that is sealing actions) of indigenous groups. Under ISDS, the tribunal has explicitly acknowledged the right of host country to impose cultural-related measures for protecting what has been classified as cultural heritage sites. As a result, the decision of judicial body, to some extent, has been effective to secure the objective of cultural concern under trade and investment agreements, especially to prevent disguise or inefficient protectionism, and to acknowledge the right of countries to protect or promote their cultural values and heritage.

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