

Mapping the Potential Interactions between UNESCO’s Intangible Cultural Heritage Regime and World Trade Law

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Abstract: The 2003 Convention for the Safeguarding of Intangible Cultural Heritage (CSICH) was not intended to have legal repercussions in international trade. Nevertheless, intangible cultural heritage (ICH) may interact with trade regulation under various scenarios. The CSICH “Representative List” inscribes numerous ICH elements with real and potential international commercial aspects and consequent trade law implications. These emergent trade law–ICH regime dynamics require not only some critical reflection (for example, is safeguarding of ICH ultimately dependent on commodification or, at least in some cases, significantly prone to commercial capture?) but also doctrinal legal analysis. This article undertakes a survey of many plausible ICH–trade interactions (generally excluding intellectual property issues), providing an analytical framework with reference to a series of case sketches of selected CSICH inscriptions such as kimjang, beer culture in Belgium, and yoga. These and other cases may indeed raise issues under world trade law, including the General Agreement on Tariffs and Trade, the General Agreement on Trade in Services, the Agreement on Technical Barriers to Trade, the Agreement on Sanitary and Phytosanitary Measures, and subsidies regulation. Trade law may have underestimated the significance of ICH as a growing field. At the same time, ICH law may be developing without thinking through how it is impacted by commercial interests and international trade law.

Keywords: UNESCO, WTO, International Trade Regulation, Intangible Cultural Heritage, Commodification, Culture, Subsidies, Kimchi, Beer, Yoga, Collectives

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THE CONTEXT OF INTERNATIONAL TRADE AND CULTURAL COMMODIFICATION

The complex relationship between international cultural heritage law, on the one hand, and world trade law, on the other, has been discussed and debated in a variety of contexts over the last two decades. The debate has focused on two areas of interaction: (1) the interplay between international cultural law and intellectual property (IP) law, which since 1995 has been part of the international trade law edifice,¹ and (2) the interface between the 2005 United Nations Educational, Scientific and Cultural Organization's (UNESCO) Convention on Cultural Diversity (CCD)² and the World Trade Organization (WTO) Agreements.³ While the difficulties involved in harnessing standard IP to the goals of safeguarding intangible cultural heritage (ICH) have been examined,⁴ the potential interactions between the 2003 UNESCO convention aimed at safeguarding ICH – the Convention for Safeguarding of the Intangible Cultural Heritage (CSICH),⁵ and world trade law (excluding IP)⁶ have not been properly acknowledged, let alone analyzed.⁷

This gap in the available literature is not so surprising because the CSICH was neither intended nor designed to have legal repercussions in international trade or direct interactions with world trade law.⁸ This is in contrast with the CCD, whose negotiation process was launched with the unconcealed purpose of its *demandeurs*, led by France, to create a “cultural exception” outside the realm of trade law.⁹ This effort was ultimately unsuccessful, its opponents having ensured that “[n]othing

¹Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994) (TRIPS).

²Convention on the Protection and Promotion of the Diversity of Cultural Expressions, 20 October 2005, 2440 UNTS 311 (CCD).

³Marrakesh Agreement Establishing the World Trade Organization, 15 April 1994, 1867 UNTS 154.

⁴Broude 2005; Hahn 2006; Pulkowski 2014; Blake 2015, ch. 7.

⁵Convention for Safeguarding of the Intangible Cultural Heritage, 17 October 2003, 2368 UNTS 1 (CSICH).

⁶Lixinski 2013, ch. 6.

⁷Lixinski (2013, 62) in his book on intangible cultural heritage (ICH) devotes some attention to the World Trade Organization (WTO) beyond intellectual property (IP), but only with respect to the CCD. The issue of ICH/WTO interaction is conspicuous by its absence in other sources (such as Nafziger and Kirkwood Paterson 2014; Stefano and Davis 2017). But see Vadi (2014, ch. 5) on international investment law and intangible cultural heritage and Vadi (2017), dealing with cultural heritage-related disputes in the WTO.

⁸This reflects a deeper difficulty: “International heritage law’s relationship to the market is fraught to say the least. It oscillates between potentially outlawing the market outright ... to simply not mentioning the possibility of cultural heritage being in the market”; the CSICH is clearly in the latter group. Lucas Lixinski, “International Heritage Law and the Market: Outlawing, Ignoring, Alienating” (manuscript, on file with author, cited with permission) to be included in Lixinski 2019.

⁹According to Musitelli 2006, 11: “*Ce texte ... donne force de loi internationale au principe de diversité culturelle en l’inscrivant comme tel dans le droit positif et non plus en tant qu’appendice du droit commercial*” (emphasis added).

in this Convention shall be interpreted as modifying rights and obligations of the Parties under any other treaties to which they are parties.”¹⁰ Not so with the CSICH, which was not part of an alternative trade agenda and remains well off the radar of trade lawyers to this day.¹¹ Moreover, the very soft nature of the obligations established by the CSICH—and, no less importantly, of the rights it grants—makes it appear quite innocuous from a trade law perspective and, in substance, seems to reduce the risk of conflicting with other treaties, such as the WTO agreements. Given the loose nature of rights and obligations in the CSICH, the scope for inter-regime normative conflict would appear to be very limited.

However, this presents a significant gap in our understanding of the interaction between cultural heritage and economic law. Trade law may have underestimated the significance of ICH as a growing field, and, at the same time, ICH law and practice may be developing without thinking through how it is impacted by commercial interests and international trade law. In any case, the CSICH contains a much more limited conflicts clause than the CCD,¹² which first regulates its relation to the 1972 World Heritage Convention (WHC)¹³ and then removes from its reach “rights and obligations deriving from any international instrument relating to intellectual property rights or to the use of biological and ecological resources.”¹⁴ The former category clearly leaves the rules of the WTO’s TRIPS Agreement intact, although, as we shall later see, this may not be a watertight exclusion. Only a very broad interpretation, which would require compelling justification, could view the entirety of the WTO Agreement as an “instrument relating to” IP because it constitutes a “single undertaking” that includes the TRIPS Agreement (Annex 1C to the WTO Agreement). The latter, second category—“relating to the use of biological and ecological resources”—which also has a distinct IP dimension, could also be more broadly understood as engaging environmental agreements that impact the CSICH’s relevance to issues arising in these areas under the WTO’s TBT¹⁵ or SPS¹⁶ Agreements, for example, but it is difficult to see this clause establishing a sweeping carve-out.

Notwithstanding the absence of an effective separation between the CSICH and (non-IP) WTO law, there is one juncture through which the CSICH—or, rather, its operation—may interact significantly with WTO law: the listing of ICH items mandated by the CSICH, either at the national level (“inventories of the intangible cultural

¹⁰CCD, Art. 20(2).

¹¹Two of the most important monographs on cultural diversity and international trade published in the years following the signing of the CSICH do not even mention the concept of ICH. Voon 2007; Shi 2013.

¹²CSICH, Art. 3, on the relationship to other instruments.

¹³Convention Concerning the Protection of the World Cultural and Natural Heritage, 16 November 1972, 1037 UNTS 151 (WHC).

¹⁴CSICH, Art. 3(b).

¹⁵Agreement on Technical Barriers to Trade, Annexes 1.1 and 1.2, 15 April 1994, 1868 UNTS 120 (TBT Agreement).

¹⁶TBT Agreement; Agreement on Sanitary and Phytosanitary Measures, 15 April 1994, 1867 UNTS 493 (SPS Agreement).

heritage present in [a state party's] territory" under Article 12 of the CSICH) or at the international level (the "Representative List of the Intangible Cultural Heritage of Humanity" under Article 16 of the CSICH (Representative List) and the "List of Intangible Cultural Heritage in Need of Urgent Safeguarding" under Article 17 of the CSICH (Urgent Safeguarding List). While several scholars have criticized the "authorized heritage discourse" expressed in the very concept of listing,¹⁷ and the listing process itself has determined some controversies at the international level, this article will focus on the doctrinal ways in which the items inscribed in the national inventories and CSICH lists may play a role in WTO law, in a variety of hypothetical yet plausible scenarios.

Our starting point for discussion is that notwithstanding the cultural goals of the CSICH, items inscribed under it may carry commercial and financial value. Such economic value may pre-exist the listing of the given cultural items or may arise after listing because of the commodification that comes with legal protection.¹⁸ Whether pre-existing and/or forthcoming, this economic value creates potential interactions between CSICH-inscribed items and international trade law.¹⁹ For example, traditional performing arts (such as the Capoeira circle [Brazil],²⁰ or Marimba music [Colombia and Ecuador])²¹ may raise issues relating to education and entertainment services as well as labeling and marketing. Methods of producing particular goods (for example, Copper craftsmanship of Lahij [Azerbaijan]²² or traditional skills of carpet weaving in Fars [Iran]²³ and four other inscribed carpet-making items) carry implications for all disciplines in trade in goods. Local festivals (for example, Summer Solstice fire festivals in the Pyrenees [Andorra, Spain, and France]²⁴ may interact with tourism and travel services. Medical practices (for example, acupuncture and moxibustion of traditional Chinese medicine [China])²⁵ also have medical or health services dimensions, as do other practices and knowledge relating to pharmaceutical goods, human health, and agriculture (for example, argan, practices, and know-how concerning the argan tree [Morocco]).²⁶ All of these also necessarily have potential international trade-related IP implications.

Indeed, in some cases, inclusion in the Representative List has raised hopes not only of cultural safeguarding as such but also of (increased) international commercial success and has been promoted by economically interested parties, including corporations that have lobbied for ICH recognition of practices

¹⁷Smith 2006.

¹⁸Lixinski 2013, 14: "[B]y offering legal protection to heritage, one necessarily exposes it to the market."

¹⁹With few exceptions, this article will not deal with interactions between ICH and IP. This has been dealt with very capably elsewhere (Lixinski 2013, ch. 6) and would go beyond the scope of the article, which concentrates on the uncharted territory of ICH and the bulk of WTO law.

²⁰CSICH Nomination File no. 00892, Doc. 9.COM, 2014.

²¹CSICH Nomination File no. 01099, Doc. 10.COM, 2015.

²²CSICH Nomination File no. 00675, Doc. 10.COM, 2015.

²³CSICH Nomination File no. 00382, Doc. 5.COM, 2010.

²⁴CSICH Nomination File no. 01073, Doc. 10.COM, 2015.

²⁵CSICH Nomination File no. 00425, Doc. 5.COM, 2010.

²⁶CSICH Nomination File no. 00955, Doc. 9.COM, 2014.

associated with certain products. For example, the 2014 inscription of the ICH item, the traditional agricultural practice of cultivating the “*vite ad alberello*” (head-trained bush vines) of the community of Pantelleria (Italy),²⁷ which relates to the production of a sweet wine already protected by a geographical indication,²⁸ was greeted with industry comments such as that “[t]he UNESCO recognition might foster a renaissance of the outstanding quality wine Pantelleria Passito, brought *worldwide* by major *brands* as Donnafugata,”²⁹ on the admission of the Donnafugata winery owner that “[w]e have been working towards this result for many years.”³⁰ Donnafugata is a local Sicilian family-owned winery that pioneered the conversion of the traditional sweet wine of Marsala into an internationally competitive quality dry wine, under the initiative and energy of the late Giacomo Rallo,³¹ with the support of global American wine enterprises such as Mondavi.³² It also pioneered the revival of Pantelleria, which would otherwise have died out entirely.

This example reflects the ambivalence of ICH safeguarding, broadly understood well beyond static preservation and ultimately dependent on commodification or at least significantly prone to commercial capture. The CSICH’s 2016 “operational directives” (OD) take cognizance of this dialectic,³³ requiring that inscriptions should not be “misused to the detriment of [ICH] and communities, groups or individuals concerned, in particular for short-term economic gain.”³⁴ This should be recalled as we examine the ICH trade law nexus.

After these preliminary considerations on the interplay between the CSICH and the WTO agreements, which may prove important to the application of ICH and its inscribed items in the international trade law environment and provide a very helpful contextual background to the doctrinal focus of this article, the argument shall proceed as follows. The second section will present selected actual

²⁷CSICH Nomination File no. 00720, Doc. 9.COM, 2014.

²⁸Pantelleria is a Denominazione di Origine Controllata under a decree from September 2000, published in Italy’s *Gazzetta Ufficiale* no. 234, 6 October 2000.

²⁹See Italy Heritage “Zibibbo of Pantelleria,” <http://www.italyheritage.com/traditions/food/zibibbo.htm> (accessed 9 May 2017).

³⁰Chris Mercer, “Vine Growing on Remote Italian Island Gets UNESCO Heritage Status,” *Decanter*, 1 December 2014, <http://www.decanter.com/wine-news/vine-growing-on-remote-italian-island-gets-unesco-heritage-status-4275/#omAIzPHVudMJIPtW.99> (accessed 18 May 2017) (emphasis added).

³¹Chris Mercer, “Italian Wine Veteran Giacomo Rallo Dies,” *Decanter*, 12 May 2016, <http://www.decanter.com/wine-news/italian-wine-veteran-giacomo-rallo-dies-300786/> (accessed 21 May 2017).

³²“The Leap of Donnafugata,” *Meininger’s Wine Business International*, 10 March 2016, <https://www.meininger.de/en/wine-business-international/leap-of-donnafugata> (accessed 21 May 2017).

³³Operational Directives for the Implementation of the Convention for the Safeguarding of the Intangible Cultural Heritage Adopted by the General Assembly of the States Parties to the Convention at its Second Session (UNESCO Headquarters, Paris, 16–19 June 2008), amended at its third session (UNESCO Headquarters, Paris, 22–24 June 2010), its fourth session (UNESCO Headquarters, Paris, 4–8 June 2012), its fifth session (UNESCO Headquarters, Paris, 2–4 June 2014), and its sixth session (UNESCO Headquarters, Paris, 30 May to 1 June 2016), http://www.unesco.org/culture/ich/doc/src/ICH-Operational_Directives-6.GA-PDF-EN.pdf (accessed 21 May 2017) (OD).

³⁴OD, para. 176, see also paras. 116–17.

ICH-inscribed items as case sketches that demonstrate the real and potential effects of ICH inscription in international trade and law. The third section more generally considers the status of CSICH items in international law in general and in WTO law in particular. The fourth section will walk through a series of doctrinal interactions between ICH inscriptions and WTO law, generally *in abstracto* and to the exclusion of IP law, which, as noted, has been dealt with elsewhere. The fifth section concludes with forward-looking reflections.

SELECTED CASE SKETCHES: ICH ITEMS AND INTERNATIONAL TRADE

In this section, a selection of ICH inscriptions is presented with an emphasis on their concurrent commercial and international trade law dimensions; this does not necessarily imply a conflict but, rather, describes the duality of human actions that can be considered simultaneously as either cultural heritage or commercial activity, with commensurately different international legal framings.

Kimjang: Making and Sharing Kimchi in the Republic of Korea

Kimjang—the traditional process of preparation of kimchi, a spicy Korean vegetable dish—was inscribed in 2013, nominated by the Republic of Korea (South Korea).³⁵ Kimchi, a food that is the tangible product of *Kimjang*, is defined as “Korean-style³⁶ preserved vegetables seasoned with local spices and fermented seafood.”³⁷ Kimchi serves as a ubiquitous sidedish in Korea, and the nomination file expounds on the tradition. The *kimjang* narrative refers to the geographical seclusion of the Korean peninsula, its long winters, harsh terrain, twentieth-century poverty, reliance on the fruit of the sea, and its people’s resilience.³⁸ Moreover, kimchi is associated with positive health effects including the relative absence of obesity among Koreans.³⁹ From a commercial perspective, however, Korean kimchi is now in crisis, with significantly reduced domestic consumption,⁴⁰ and a marked rise in the importation

³⁵This subsection draws from Broude 2015, 2017. Note that a similar but separate inscription was later made at the nomination of North Korea, Tradition of Kimchi-Making in the Democratic People’s Republic of Korea, CSICH Nomination File no. 01063, Doc. 10.COM, 2015. Discussion in this section refers solely to South Korea.

³⁶The qualification Korean style is important from an international perspective. While it excludes foods that are not produced in a Korean fashion, the qualification recognizes the practice of *kimjang* outside of South Korea, such as by Korean diasporas. See Gin-Young 2012.

³⁷CSICH Nomination File no. 00881, Doc. 8.COM, 2013, 3.

³⁸See Oh et al. 2014.

³⁹See Oh et al. 2014; Park et al. 2014; Cui et al. 2015.

⁴⁰“Domestic consumption has dropped dramatically. Why? People are eating out more, are eating less salty foods, and have developed a taste for western foods,” Gwynn Guilford, “The Kimchi War between South Korea and China is Getting Extra Spicy,” *Quartz*, 5 February 2014, <https://qz.com/173722/the-kimchi-war-between-south-korea-and-china-is-getting-extra-spicy/>, quoting Dr. Park Chae-lin of the World Kimchi Institute, interviewed by the BBC at https://www.bbc.com/news/world-asia-25840493?ocid=socialflow_twitter (accessed 21 May 2017).

of commercial-grade kimchi,⁴¹ much of it from China, eaten in restaurants. The nomination file cites a 2011 study, according to which only 6.8 percent of kimchi consumed in Korea is commercially produced, but recent data shows that Chinese kimchi alone makes up 13 percent of consumption,⁴² and 17 percent in 2016.⁴³

Kimjang is therefore not only ICH, but it also has a commercial interest, with a market worth close to US \$1 billion in Korea. Consequentially, Korea has employed international law to influence Korean kimchi's international commercial position. In the 1990s, troubled by the popularity of a Japanese version of kimchi (called "*kimuchi*"), which does not involve fermentation processes,⁴⁴ Korea campaigned for the adoption of an international Codex Alimentarius standard for kimchi that emphasizes fermentation, which was ultimately approved in 2001.⁴⁵ The standard, however, has another far less traditional qualification, whereby kimchi must use Chinese cabbage (*paechu*).⁴⁶ This is by far the most popular type of kimchi, though rivaled by Daikon radish kimchi (*Kkakdugi*), but kimchi is highly diverse, with hundreds of types utilizing many different basic ingredients in different regional (Korean) styles.⁴⁷ Yet the standard promoted by Korea—which may have WTO implications⁴⁸—exclusively requires Chinese cabbage, and this may derive from trade interests; Chinese cabbage is the predominant basis for industrial kimchi, and Korea is among its top five producers globally, with the highest per capita production among the major producers.⁴⁹

⁴¹Alexandra Stevenson, "Uncertain Trade Path for South Korea's Kimchi," *New York Times*, 29 July 2015, https://www.nytimes.com/2015/07/30/business/international/chinese-trade-rules-put-south-koreas-kimchi-industry-in-a-pickle.html?_r=0 (accessed 21 May 2017).

⁴²See Gwynn Guilford, "The Kimchi War between South Korea and China Is Getting Extra Spicy," *Quartz*, 5 February 2014, <https://qz.com/173722/the-kimchi-war-between-south-korea-and-china-is-getting-extra-spicy/> (accessed 21 May 2017).

⁴³See Kwak Young-sup, "(News Focus) Chinese Goods Flex More Muscle in S. Korea," *Yonhap News Agency*, 6 March 2017, <http://english.yonhapnews.co.kr/focus/2017/03/06/1/1700000000AEN20170306007700320F.html> (accessed 21 May 2017).

⁴⁴See Calvin Sims, "Cabbage Is Cabbage? Not to Kimchi Lovers; Koreans Take Issue with a Rendition of Their National Dish Made in Japan," *New York Times*, 5 February 2000, <http://www.nytimes.com/2000/02/05/business/cabbage-cabbage-not-kimchi-lovers-koreans-take-issue-with-rendition-their.html> (accessed 21 May 2017). The Korea/Japan kimchi/kimuchi tension apparently arose from a Japanese proposal to designate kimuchi an official food of the 1996 Atlanta Olympics; see "S. Korea, Japan in Struggle for Sovereignty over Pickled Cabbage," *Agence France-Presse*, 16 March 2000.

⁴⁵See Codex Standard for Kimchi, Doc. Codex Stan 223-2001, 2001.

⁴⁶See Codex Standard for Kimchi, defining kimchi as the product "prepared from varieties of Chinese cabbage, *Brassica pekinensis* Rupr."

⁴⁷See Mei Chin, "The Art of Kimchi," *Saveur*, 14 October 2009, <http://www.saveur.com/article/Kitchen/The-Art-of-Kimchi> (accessed 21 May 2017); this is confirmed by the kimjang nomination file itself.

⁴⁸See discussion later in this article.

⁴⁹See Food and Agricultural Organization Statistical Database, <http://faostat3.fao.org/home/E> (accessed 21 May 2017).

Korea has also turned on several occasions to international law to protect its international kimchi trade interests *vis-à-vis* China,⁵⁰ predominantly related to industrial, wholesale kimchi.⁵¹ In recent years, China reclassified Korean kimchi as a pickled product that does not meet its health standards, effectively barring Korean imports to China—a topic that has strained trade relations.⁵² Korea has attempted to promote legal protection through a very broad geographical listing in at least one bilateral trade agreement (Chile),⁵³ with no notable effect. “Changnyeong onions”—onions used in some localized kimchi making, coming from a particular locale in Korea—have reportedly been listed as a geographical indication (GI) in Korea and recognized as a GI under the South Korea–European Union (EU) Free Trade Agreement.⁵⁴

Beer Culture in Belgium

The application for inscription of Belgian beer culture was submitted by the country’s German-speaking community, also on behalf of the French and Flemish communities of Belgium, with support from brewers’ organizations, beer-tasting organizations, beer promoters, specialized non-governmental organizations, and educational institutions.⁵⁵ The nomination file emphasizes the diversity of brewing practices throughout Belgium, the transmission of brewing knowledge, the social role of beer in communities and social settings, and its contribution to sustainable development.⁵⁶

The application itself was prepared by a trade association, Belgian Brewers, which is a federation of almost all of the breweries in Belgium.⁵⁷ This is noteworthy as far as international trade is concerned. Members of the federation are not limited to “the craft and/or speciality beers in Cistercian Trappist breweries, family breweries, ‘abbey’ breweries” that the nomination file focuses on.⁵⁸ Rather, the federation

⁵⁰Both China and South Korea imposed restrictions on imports of kimchi, having found parasite eggs in each other’s kimchi products. See Snyder and Byun 2010.

⁵¹See “The Kimchi Wars: South Korea and China Duel over Pickled Cabbage,” *The Economist*, 17 November 2005, <http://www.economist.com/node/5176043> (accessed 21 May 2017).

⁵²See Stevenson, “Uncertain Trade Path.”

⁵³See Italian Intellectual Property Rights Desk, *Protection of Geographical Indications in the Republic of Korea*, 2010; Korea–Chile Free Trade Agreement, 15 February 2003, Annex 16.4.3.

⁵⁴See European Union–South Korea Free Trade Agreement, 1 July 2011, Annex 10-A, part B.

⁵⁵Joint Press Release by the Ministers for Culture for the German-speaking Community in Belgium, Ms Isabelle Weykmans, the Flemish Community, Mr Sven Gatz, the French-speaking Community of Belgium, Ms Alda Greoli, and the Minister-President of the Brussels-Capital Region, in Charge of Intangible Cultural Heritage, Mr Rudi Vervoort, 30 November 2016, http://www.ostbelgienkulturerbe.be/PortalData/31/Resources/dokumente/immaterielles_ke/Beer_culture_in_Belgium_Press_Release_EN_KIW.pdf (accessed 21 May 2017).

⁵⁶CSICH Nomination File no. 01062, Doc. 11.COM, 2016.

⁵⁷Marilyn Haigh, “Sante! Belgium Wants Its Beer on Global Culture List,” *Reuters*, 25 November 2016, <http://www.reuters.com/article/us-belgium-beer-idUSKBN13K17E> (accessed 21 May 2017).

⁵⁸CSICH Nomination File no. 01062, 4.

includes, among others, Duvel Moortgat, a corporation with a diverse portfolio of internationally marketed Belgian beers (for example, Duvel, Maredsous, d'Achouffe, and De Koninck), and 2015 a consolidated turnover of €315.6 million.⁵⁹ More importantly, it includes the Leuven-based multinational Anheuser-Busch (AB) InBev, the world's largest brewer, with US \$55 billion in global annual sales and an estimated global market share of 28 percent.⁶⁰ AB InBev's Belgian brands include Jupiler, Belgium's leading lager beer, as well as a series of recognized international brands brewed in Belgium, such as Stella Artois, Leffe, and Hoegaarden. In recent years, as beer consumption in Belgium has dropped, large-scale Belgian brewers have turned to an expanding global market.⁶¹

Thus, the nomination of Belgian beer culture in UNESCO paralleled a corporate international marketing drive, in which the Belgian government has economic interests, as does the EU. Beer production is said to be 1 percent of Belgium's gross domestic product,⁶² generating 50,000 jobs in retail, hospitality, supply, and brewing.⁶³ These commercial dynamics can certainly lead to international legal frictions, even with cultural dimensions. Famously, within the EU, the European Commission brought action against Germany in the Court of Justice of the European Union in 1987, at the behest of French brewers who could not sell their products under the label "beer" due to the German purity laws (*Reinheitsgebot*) of 1516. The Court determined that this constituted a restriction on the freedom of movement of goods that could not be justified on public health grounds.⁶⁴ In the WTO, the EU filed a complaint against Canada in 2006, regarding its tax exemptions and reductions for wine and beer, arguing, *inter alia*, that these measures discriminated against European beer in favor of Canadian beverages.⁶⁵ As we shall see below, cultural descriptions of production methods and styles inscribed in ICH items may potentially impact such questions.

In Belgium itself, there are hopes that the inscription will be a boon for international tourism and hospitality services, with Prime Minister Charles Michel calling

⁵⁹Duvel Moortgat, <http://www.duvelmoortgat.be/en/info/financial> (accessed 21 May 2017).

⁶⁰See Lisa Brown, "A-B InBev Finalizes \$100B billion Acquisition of SABMiller, Creating World's Largest Beer Company," *Chicago Tribune*, 11 October 2016, <http://www.chicagotribune.com/business/ct-megabrew-ab-inbev-sabmiller-merger-20161010-story.html> (accessed 21 May 2017).

⁶¹See Alan Hope, "AB InBev Announces Worst Annual Results in 15 Years," *Flanders Today*, 16 June 2014, <http://www.flanderstoday.eu/business/ab-inbev-announces-worst-annual-results-15-years> (accessed 21 May 2017).

⁶²"Annual Report 2015," *Belgian Brewers*, 3, <http://www.belgianbrewers.be/en/economy/article/employment-104> (accessed 21 May 2017).

⁶³See Brewers of Europe, "The Contribution Made by Beer to the European Economy," January 2016, 3, <http://www.brewersofeurope.org/uploads/mycms-files/images/2016/publications/economic-report-countries/belgium.pdf> (accessed 21 May 2017).

⁶⁴Case C-178/84, *Commission v. Germany*, [1987] ECR 01227.

⁶⁵Canada – Tax Exemptions and Reductions for Wine and Beer, WT/DS354/2, Mutually Agreed Solution, 23 December 2008. The dispute was resolved with Canada extending tariff reductions to foreign competing products.

for tourists to visit in order to taste the beers.⁶⁶ Further, as part of the nomination of the beer culture of Belgium to the ICH list, tourist-friendly safeguarding efforts of regions were detailed, ranging from a “beer routes” project in the Flemish community to the planned opening of an “interactive center for discovering beer” in Brussels, which will position itself as the “Beer Capital.”⁶⁷

Yoga

Yoga, which was inscribed in 2016 at the nomination of India,⁶⁸ is worth briefly considering within the ICH/trade nexus for several reasons. First, while originating in India, it is a practice of global reach, which has raised explicit concerns of commodification and even cultural (and neoliberal) misappropriation.⁶⁹ Second, beyond its Western accessorization—the trend toward the consumption of products associated with yoga, such as yoga pants and mats—yoga has distinct elements of health, leisure, education, and tourism that may relate directly to international service trade and IP. Third, yoga has become an incredibly profitable international industry, for lack of a better word; in the United States, for example, there are an estimated 36 million practitioners, and the industry is worth US \$16 billion.⁷⁰

The Indian government has criticized this commodification, though it may also be a beneficiary. On the first United Nations (UN) International Day of Yoga in 2015, Indian Prime Minister Narendra Modi declared that “[y]oga is not a commodity ... if we make yoga into a commodity, we will cause maximum damage to it,” and he stated further that “yoga is not India’s property, and should not be seen as an Indian brand.”⁷¹ At the same time, the Union (federal) minister in charge of Ayurveda, yoga, Unani, siddha, and homoeopathy (AYUSH) called for the regulation of yoga: “Regulations are necessary to standardise yoga practices and bring authenticity to yoga teachers.”⁷² Such regulation may have international legal implications. Also in the legal realm, the Indian government is attempting to prevent the appropriation of yoga as IP. In the ICH nomination file for yoga, it was indicated that the existing literature on yoga and other traditional systems—including, so far, some 1,680 ‘asanas’ (roughly, yoga positions or

⁶⁶Cynthia Kroet, “Belgian Beer Culture Added to UNESCO World Heritage,” *Politico*, 30 November 2016, <http://www.politico.eu/article/belgian-beer-culture-added-to-unesco-world-heritage/> (accessed 21 May 2017).

⁶⁷CSICH Nomination File no. 01062, s. 3.b.(ii).

⁶⁸CSICH Nomination File no. 01163, Doc. 11.COM, 2016.

⁶⁹For one take on this, see Godrej 2016.

⁷⁰“2016 Yoga in America Study,” *Yoga Journal and Yoga Alliance*, <http://media.yogajournal.com/wp-content/uploads/2016-Yoga-in-America-Study-Comprehensive-RESULTS.pdf> (accessed 21 May 2017).

⁷¹“PM Warns against Commodification of Yoga,” *Deccan Herald* (22 June 2015), <http://www.deccanherald.com/content/484969/pm-warns-against-commodification-yoga.html> (accessed 21 May 2017).

⁷²“PM Warns against Commodification of Yoga.”

exercises)—are being digitally transcribed in order to prevent misappropriation and to provide defense against IP claims.⁷³ This comes after an American court found that Bikram Choudhri, the founder of Bikram yoga, could not copyright a series of yogic asanas.⁷⁴ Yoga and the “AYUSH” sector also hold economic potential for transnational service provision. India’s wellness industry was estimated in 2016 to be worth 490 billion rupees, and the AYUSH sector has an annual turnover of some 120 billion rupees.⁷⁵ The global “wellness” economy was worth US \$3.7 trillion in 2015, of which wellness tourism made up US \$536 billion,⁷⁶ which is a fact not lost on Indian officials, who see yoga tours and medical tourism as a way to draw travelers and foreign currency.⁷⁷

Idea and Practice of Organizing Shared Interests in Cooperatives

This is an interesting, even peculiar, ICH item inscribed at the nomination of Germany in 2016.⁷⁸ It is unusual because it essentially refers to a “form of self-organization” with distinct economic goals, including the provision of services and other involvement in the market, that are extremely common in Germany and elsewhere.⁷⁹ In other words, in contrast to most of the ICH items discussed in this article, in which a cultural activity gains an economic dimension, one could say that cooperatives could be defined first as a socioeconomic activity that Germany and the inscription process considered to have gained the character of ICH. In this respect, one need not go far to see how cooperatives may interact with international trade law. As service providers—say, in the financial sector—should they be granted regulatory preferences on the basis of their acknowledged cultural uniqueness in comparison with regular commercial banks? Should they be treated as private or public entities? And what about subsidies regulation, which may apply under the WTO? These are not theoretical questions.

⁷³CSICH Nomination File no. 01163, 7.

⁷⁴Bikram’s Yoga College v. Evolution Yoga, No. 13–55763 (9th Cir. 2015).

⁷⁵“Ayurveda and Yoga Boosting Medical Tourism in the Country,” *Times of India*, 12 April 2016, <http://health.economictimes.indiatimes.com/news/industry/ayurveda-and-yoga-boosting-medical-tourism-in-the-country/51862027> (accessed 21 May 2017).

⁷⁶Global Wellness Institute, “Statistics and Facts,” <https://www.globalwellnessinstitute.org/press-room/statistics-and-facts/> (accessed 12 May 2017).

⁷⁷“Ayurveda and Yoga”; Vanita Srivastava, “Yoga Tours to Help Boost Tourism in Country,” *Hindustan Times*, 20 June 2015, <http://www.hindustantimes.com/india/yoga-tours-to-help-boost-tourism-in-country/story-iljZtjFtW8kiwDwNg2F7oN.html> (accessed 21 May 2017).

⁷⁸CSICH Nomination File no. 01200, Doc. 11.COM, 2016.

⁷⁹CSICH Nomination File no. 01200, 4: “Cooperatives are widespread in Germany, there are ca. 5,800. Just about every farmer is a member of one or more cooperatives, as well as ca. 90 % of all bakers and butchers, ca. 75 % of all retailers, more than 65 % of all self-employed tax consultants and ca. 60 % of all craftsmen. In total, over 20 million people—a quarter of all German citizens—are members of cooperatives ... cooperative banks provide more than 30 million customers in Germany with financial services.”

In the EU context of state aid regulation, the EU Commission issued a notice in the same year as the inscription, whereby “[g]enerally, cooperative societies are not in a comparable factual and legal situation to that of commercial companies and consequently do not entail State aid, provided that: (i) they operate in the economic interest of their members; (ii) the relations with their members are personal and individual; (iii) the members are actively engaged in the work of the cooperatives and (iv) they are entitled to equitable distribution of their economic results.”⁸⁰ Whether such a position would withstand scrutiny under global subsidies regulation (discussed later in this article), perhaps invoking public morals or public order exceptions⁸¹ and taking into account the CSICH, is of course, at this time, a hypothetical question. We take a step back now to examine the status of ICH items from the perspective of general international law and international trade law more specifically.

THE STATUS OF CSICH INSCRIPTIONS IN INTERNATIONAL LAW AND IN THE WTO

The (Meagre) International Legal Implications of CSICH Inscriptions

The CSICH entered into force on 20 April 2006 and currently has 172 state parties. While the Convention is undoubtedly legally binding under international law, the scope of legal obligation (and right) that can be derived from it is questionable. Its main requirements are at the national level and highly deferential at that—namely, state parties are merely instructed to create inventories of intangible cultural heritage within their respective territories, “in a manner geared to [each party’s] own situation,”⁸² and to take “necessary measures” to ensure ICH safeguarding.⁸³ State parties are also instructed to “endeavor, by all appropriate means,” to ensure education, awareness raising, and capacity building⁸⁴ with respect to ICH in their territory (regardless of inventory inclusion or listing) and to include “communities, groups and individuals” in the framework of their respective safeguarding activities.⁸⁵

At the international level, the CSICH mandates the establishment of two lists: the first, a “Representative List of the Intangible Cultural Heritage of Humanity” (Representative List),⁸⁶ and the second, a “List of Intangible Cultural Heritage in

⁸⁰“European Commission Publishes Guidelines Regarding State Aid,” *EY Tax Insights for Business Leaders*, 19 May 2016, <http://taxinsights.ey.com/archive/archive-news/european-commission-publishes-guidelines-regarding-state-aid.aspx> (accessed 21 May 2017); see also Azcoaga Ibarra 2014.

⁸¹The question of whether general exceptions can apply to subsidies is controversial; see Rubini 2012.

⁸²CSICH, Art. 12(1).

⁸³CSICH, Arts. 11(1), 13.

⁸⁴CSICH, Art. 14.

⁸⁵CSICH, Art. 15.

⁸⁶CSICH, Art. 16(1).

Need of Urgent Safeguarding” (“Urgent Safeguarding List”).⁸⁷ Inclusion in either of these lists is determined by the Intergovernmental Committee for the Safeguarding of the Intangible Cultural Heritage (CSICH Committee) at the proposal of the state parties concerned; the purpose of the Representative List is to “ensure better visibility ... and awareness of [the ICH’s] significance,” while inscription in the Urgent Safeguarding List makes the relevant heritage eligible for international assistance.⁸⁸ Thus, it might be said that inscription simply reflects the strong preference of a state party to the Convention—and the political approval of the CSICH Committee (composed of 18 state parties)—that the ICH in question is worthy of recognition and safeguarding. The “safeguarding” aspect does not mandate any specific action but, rather, suggests a range of policies that should apply to all ICH, whether listed or not.⁸⁹ Indeed, simply put, there do not seem to be any explicit “hard” legal consequences to inscription stemming from the CSICH.⁹⁰

ICH inscription nominations must include a detailed list of measures that the submitting state intends to take in order to safeguard the inscribed ICH item.⁹¹ However, while Article 29 of the CSICH subjects contracting parties to periodical review, there is nothing in the CSICH indicating a penalty or sanction in case of non-compliance, such as formally “de-listing” the inscription. The possibility of de-listing is quite fleetingly noted in the OD,⁹² according to which “[a]n element shall be removed from the Representative List ... by the Committee when it determines that [the element] no longer satisfies one or more criteria for inscription on that list.” It remains unclear to what extent this OD provision can be employed as a compliance measure, if a state party does not pursue the safeguarding measures as committed in the nomination file. To date, there have been no such occurrences.

By contrast, looking at tangible world heritage law, while the UNESCO WHC itself similarly does not include any provisions for the removal of a listing, the WHC Operational Guidelines include much more concrete and specific criteria for de-listing, in cases where “the property has deteriorated to the extent that it has lost those characteristics which determined its inclusion in the World Heritage List” and “where the intrinsic qualities of a World Heritage site were already threatened at the time of its nomination by human action and where the necessary corrective measures as outlined by the State Party at the time, have not been taken within the time proposed.”⁹³ To date, there have been only two instances of WHC de-listing:

⁸⁷CSICH, Art. 17(1).

⁸⁸CSICH, Art. 20(a).

⁸⁹CSICH, Art. 2(3).

⁹⁰Broude 2017.

⁹¹Smeets and Deacon 2017.

⁹²OD, ch. I.11, para. 40.

⁹³United Nations Educational, Scientific and Cultural Organization (UNESCO), Intergovernmental Committee for the Protection of the World Cultural and Natural Heritage, “Operational Guidelines for the Implementation of the World Heritage Convention,” Doc. WHC.16/10, 26 October 2016, para. 192, <http://whc.unesco.org/document/156250> (accessed 21 May 2017) (WHC Operational Guidelines).

Oman's Arabian Oryx Sanctuary in 2007, due to reductions in the size of the sanctuary and plans for hydrocarbon prospection (with the de-listing taking place at Oman's own suggestion),⁹⁴ and Germany's Dresden Elbe Valley in 2009, due to the construction of a four-lane bridge across the river.⁹⁵ Both of these came after years of efforts by the WHC Committee to convince the states in question to comply with the regime, including site visits and meetings with local officials, and this under the WHC's system of "reactive monitoring."⁹⁶ It is at least hypothetically possible that a similar situation could emerge under the CSICH regime, but, *stricto sensu*, that is not the current reading of the law and OD.

In sum, the general international legal implications of CSICH inscription would appear to be quite limited, entailing a good faith obligation to pursue safeguarding measures in the broadest sense of the term, with the worst case scenario of de-listing, in circumstances that have not yet been fleshed out in practice. Let us turn now to examine the legal status and implications of CSICH-based inventories and inscriptions in the WTO's legal system.

The (Potential) Status of National Inventories and CSICH Items in the WTO

In the WTO, national lists and domestic ICH-related measures would normally be considered as municipal legislation. In the WTO system—and, indeed, under international law as a whole—a country's domestic legislation cannot excuse it from fulfilling its international obligations.⁹⁷ Within the WTO, municipal law can serve as evidence of facts (*in casu*, whether a particular product or service is considered as ICH under domestic law and which of its characteristics justify this status) or as compliance or non-compliance with international obligations.⁹⁸ Moreover, the manner in which a measure is characterized under municipal law, or the "label" that is given to it, is not dispositive and may be characterized differently in the WTO system.⁹⁹

⁹⁴World Heritage Committee, "Provisional Agenda: State of Conservation of World Heritage Properties Inscribed on the World Heritage List," Doc. WHC-07/31.COM/7B, 10 May 2007, Item 7B, 33–35.

⁹⁵World Heritage Committee, "Provisional Agenda: The Full Reports of Reactive Monitoring Missions Requested by the Committee: State of Conservation of the Properties Inscribed on the List of World Heritage in Danger," Doc. WHC-09/33.COM/7A, 11 May 2009, Item 7A, 89–92.

⁹⁶WHC Operational Guidelines, para. 169.

⁹⁷Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331, Art. 27 (VCLT); Brazil – Export Financing Program for Aircraft, Recourse by Canada to Article 21.5 of the DSU, Appellate Body Report, WT/DS46/AB/RW, 2 August 1999, para. 46.

⁹⁸United States – Section 211 Omnibus Appropriations Act of 1998, Appellate Body Report, WT/DS176/AB/R, 2 January 2002, para. 105; China – Measures Affecting Imports of Automobile Parts, Appellate Body Report, WT/DS339/AB/R, 15 December 2008, para. 225.

⁹⁹Canada – Certain Measures Affecting the Renewable Energy Generation Sector / Canada – Measures Relating to the Feed-In Tariff Program, Appellate Body Report, WT/DS412/AB/R, WT/DS426/AB/R, 6 May 2013, para. 5.127; United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint), Appellate Body Report, WT/DS353/AB/R, 12 March 2012, para. 593.

Domestic lists could therefore become relevant as evidence of the protected status of ICH in domestic law, as mandated by the CSICH, for various trade law purposes; however, the fact that a state has itself declared an element of its heritage as “safeguarded ICH” would not, in and of itself, grant that element privileged status in the WTO. Indeed, domestic safeguarding measures (such as subsidies or preferred taxation and regulatory treatment) are precisely the type of measures whose WTO consistency may come into question, requiring review, whether in WTO dispute settlement or in other settings.

At the international law level, regarding CSICH inscriptions, as adopted by the CSICH Committee, it should first be noted that the jurisdiction of the WTO Dispute Settlement Body (DSB) is limited to claims under the ‘covered agreements’ of WTO law,¹⁰⁰ of which the CSICH is of course not one. In other words, an ICH item could not of itself be the basis for a WTO claim (such as if a trade measure taken by one WTO member is detrimental to the safeguarding of an ICH item, in which another member has a trade interest; the basis of such a claim would be WTO law itself, not the CSICH). Nonetheless, applicable law in the WTO is not necessarily limited to WTO-covered agreements.¹⁰¹ An internationally recognized UNESCO ICH inscription could be introduced into the WTO system in several ways, which are discussed in more detail in the next section, depending on the specific legal context.

Non-WTO norms such as ICH items, including “soft law” and non-binding agreements, generally play an interpretive role in the WTO or serve as factual evidence and support. This has been demonstrated in several disputes. In the *United States – Shrimp* dispute, the Panel and Appellate Body took into account several non-WTO agreements in interpreting the term “exhaustible natural resources” under Article XX(g) of the General Agreement on Tariffs and Trade (GATT).¹⁰² In particular, they found sea turtles to be factually in danger of extinction, with reference to a list of such species appended to an international agreement (the appendices to the Convention on International Trade in Endangered Species of Wild Fauna and Flora),¹⁰³ which may be considered similar to CSICH inscription.¹⁰⁴ In *United States – Clove Cigarettes*, both parties referred to the World Health Organization’s (WHO) Framework Convention on Tobacco Control (FCTC)

¹⁰⁰Understanding on Rules and Procedures Governing the Settlement of Disputes, 15 April 1994, 1869 UNTS 401, Art. 1 (DSU).

¹⁰¹On gaps between jurisdiction and applicable law, see Bartels 2011.

¹⁰²General Agreement on Tariffs and Trade, 15 April 1994, 55 UNTS 194 (GATT). *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, Appellate Body Report, WT/DS58/AB/R, 12 October 1998 (US – Shrimp).

¹⁰³Convention on International Trade in Endangered Species of Wild Fauna and Flora, 3 March 1993, 993 UNTS 243.

¹⁰⁴Other agreements taken into account included the United Nations Convention on the Law of the Sea, and the Convention on International Trade in Endangered Species of Wild Fauna and Flora. US – Shrimp, paras. 130–34.

(neither of which had ratified it) and the non-binding Partial Guidelines for Implementation of Articles 9 and 10 of the WHO Framework Convention on Tobacco Control, 20 Nov 2010, FCTC/COP3(7).¹⁰⁵ The Panel used the inclusion of sales prohibitions as recommended measures under the Partial Guidelines to support its finding that Indonesia had failed to demonstrate that the US ban on clove cigarettes was not “more trade restrictive than necessary” to fulfill its legitimate objective.¹⁰⁶ This may be analogized to the CSICH’s recommended safeguarding measures.

However, this approach may be significantly qualified. In *European Communities – Measures Affecting the Approval and Marketing of Biotech Products (EC – GMOs)*, for example, the Panel accepted that reference to other relevant rules of international law may be informative for interpretative purposes but, in practice, declined to take into account provisions of certain non-WTO international agreements, finding that it was not “necessary or appropriate” to do so.¹⁰⁷ Nevertheless, the Panel actively sought (and received information) from a variety of international organizations¹⁰⁸ and, indeed, took terminologies adopted by them (essentially as “soft law”) as informing the “ordinary meaning” of treaty terms relevant to the dispute (for example, the UN Food and Agriculture Organization’s *Glossary of Biotechnology for Food and Agriculture*).¹⁰⁹

Regarding treaty interpretation, Article 3.2 of the WTO’s Dispute Settlement Understanding (DSU) asserts the WTO dispute settlement system’s role in “[clarifying] the existing provisions of those agreements in accordance with customary rules of interpretation of public international law,”¹¹⁰ which has been taken to mean primarily Articles 31 and 32 of the Vienna Convention on the Law of Treaties (VCLT).¹¹¹ This should in principle include taking into account “any relevant rules of international law applicable in the relations between the parties,” pursuant to Article 31(3)(c) of the VCLT. “Relevance,” in such situations, is determined on a case-by-case basis¹¹² and, in any event, requires that the rule must deal with the same subject matter as the term being interpreted.¹¹³ However, it may be that the use of Article 31(3)(c) of the VCLT

¹⁰⁵United States – Measures Affecting the Production and Sale of Clove Cigarettes, Panel Report, WT/DS406/R, 2 September 2011, paras. 2.29–2.30 (US – Clove Cigarettes).

¹⁰⁶US – Clove Cigarettes, paras. 7.427–7.428.

¹⁰⁷European Communities – Measures Affecting the Approval and Marketing of Biotech Products, Panel Report, WT/DS291/R, 29 September 2006, paras 7.93–7.95 (EC – GMOs).

¹⁰⁸EC – GMOs, para. 7.31.

¹⁰⁹EC – GMOs, para. 7.334; citing Food and Agriculture Organization, *Glossary of Biotechnology for Food and Agriculture*, <http://www.fao.org/docrep/004/y2775e/y2775e07.htm> (accessed 17 May 2017).

¹¹⁰DSU, Art. 3.2. For critique, see Young 2007.

¹¹¹VCLT, Arts. 31–32.

¹¹²Marceau 2001, 1087.

¹¹³Peru – Additional Duty on Imports of Certain Agricultural Products, Appellate Body Report, WT/DS457/AB/R, 20 July 2015, para. 5.95 (Peru – Agricultural Products); European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft, Appellate Body Report, WT/DS316/AB/R, 18 May 2011, para. 846.

is appropriate only if all WTO parties, and not just the parties to the dispute, are members of the Convention,¹¹⁴ as the *EC – GMOs* Panel indeed held.¹¹⁵ This issue has been the subject of much debate¹¹⁶ and has essentially been side-stepped by the Appellate Body through the exercise of judicial economy.¹¹⁷

For present purposes, without establishing the precise manner of the introduction of ICH items into WTO law, suffice it to say that, depending on the legal and factual circumstances, an ICH inscription may serve for the purposes of factual determination and interpretation under WTO law. This article now turns to discuss norm-specific situations in which this may have impacts in WTO law contexts (but with a broad brush, without in any way proffering an exhaustive or overly detailed legal analysis).

NORM-SPECIFIC INTERACTIONS POTENTIALLY INTRODUCING ICH TO THE WTO

Non-Discrimination - ICH Items as Product or Service Distinctions

The most elementary situation in which a CSICH inscription might be taken into account under WTO law is a scenario in which the status of an inscribed ICH item, as well as its substantive content, would inform a determination of WTO-inconsistent trade discrimination, whether under Article I or III of GATT,¹¹⁸ Article II or XVII of the General Agreement on Trade in Services (GATS),¹¹⁹ or other relevant WTO disciplines.¹²⁰ All WTO members are bound by GATT's very first provision to grant "any advantage, favour, privilege or immunity" on a non-discriminatory basis to any "like product," "originating in or destined for any other country" (general most-favored nation treatment [MFN])¹²¹ and to apply internal taxes to foreign products not "in excess" of the taxation of "like" domestic products and not "less favourable" to foreign "directly competitive and substitutable" products (Article III:2 of GATT). Regulatory measures applied to foreign products shall provide "treatment no less favourable" than accorded "like domestic products" (Article III:4 of GATT) (national treatment [NT]). Similarly, WTO members are bound to "accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favourable" than that accorded to "like services and service suppliers" of any other country (MFN on services trade) and, in specified

¹¹⁴Lennard 2002, 38.

¹¹⁵*EC – GMOs*, paras. 7.68–7.75.

¹¹⁶McGrady 2008.

¹¹⁷*Peru – Agricultural Products*, para. 5.105.

¹¹⁸GATT, Arts. 1, 3.

¹¹⁹General Agreement on Trade in Services, 15 April 1994, 1869 UNTS 183 (GATS).

¹²⁰E.g., TBT Agreement, Art. 2.1.

¹²¹GATT, Art. I:1.

sectors, must also provide foreign services and service suppliers the same treatment granted to “like” domestic equivalents (NT in services).¹²²

The “likeness” of products, services, and service suppliers is therefore a key question in findings of discrimination, and the role of cultural content of goods and services has arisen to some extent in WTO jurisprudence and scholarship, albeit not with respect to the CSICH.¹²³ Regarding goods, the following four criteria have traditionally been examined in determining the competitive relationship between products: (1) the product’s end uses; (2) consumers’ tastes and habits; (3) the product’s nature, properties, and quality (physical characteristics); and supplementarily, (4) the customs classification of the products.¹²⁴ This has been extended *mutatis mutandis*—but not without difficulty—to the question of “like services.”¹²⁵

One could consider several ways in which the inscription of an ICH item could be evaluated within this framework.¹²⁶ For example, a “widget” produced in circumstances and conditions that have merited ICH inscription—say, traditionally produced kimchi—may be functionally substitutable for another widget, though for particular cultural end uses of ceremonial or otherwise anthropological nature, only the actually inscribed item will do. Moreover, it cannot be presumed that relevant consumers would be indifferent to the cultural values that come with the circumstances and conditions that underwrite the ICH inscription, just as it cannot be presumed that they would be indifferent to the health implications of a widget.¹²⁷ In some cases, the authenticity of the ICH embedded within a product may be considered as a distinctive physical characteristic of the product, certainly if identifiable as a production and processing method¹²⁸ that distinguishes the ICH product from its functional substitutes. Much the same could be said, in principle, about services that have an ICH dimension to them, while competing on the

¹²²GATS, Arts. II, XVII.

¹²³Particularly in two disputes: Canada – Certain Measures Concerning Periodicals, Appellate Body Report, WT/DS31/AB/R, 30 June 1997 (Canada – Periodicals); China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products, Appellate Body Report, WT/DS363/AB/R, 21 December 2009 (China – Audiovisual Products). For discussion, see Shi 2013, 193–211.

¹²⁴As derived from GATT, *Border Tax Adjustments*, Working Party Report, Doc. BISD 18S/97, 2 December 1970.

¹²⁵For discussion, see Cossy 2006; Diebold 2010.

¹²⁶As the WTO Appellate Body has noted, “there can be *no one precise and absolute definition of what is ‘like.’* The concept of ‘likeness’ is a relative one that evokes the image of an accordion. The accordion of ‘likeness’ stretches and squeezes in different places as different provisions of the *WTO Agreement* are applied.” Japan – Alcoholic Beverages, Appellate Body Report, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, 1 November 1996, 114.

¹²⁷European Communities – Measures Affecting Asbestos and Products Containing Asbestos, Appellate Body Report, WT/DS135/AB/R, 12 March 2001, para. 122 (EC – Asbestos).

¹²⁸See “WTO Rules and Environmental Policy: Key GATT Disciplines,” https://www.wto.org/english/tratop_e/envir_e/envt_rules_gatt_e.htm (accessed 17 May 2017).

marketplace with non-ICH services (for example, health services, entertainment services, or educational services).

An alternative approach to identifying discrimination has focused less on competitive market comparators and more on the “regulatory purpose” of the measure in question.¹²⁹ Along this line of thinking, which is still controversial in trade law, a trade restriction whose *bona fide* regulatory purpose is clearly aimed at safeguarding an ICH item, rather than protecting economic interests as such, may perhaps not be considered discriminatory. Of course, to the extent that some ICH inscriptions have strong origin-related criteria, the burden of demonstrating that the measure is based on a regulatory distinction that goes beyond the origin of the product (or service, as the case may be) could be high. In short, ICH inscriptions may have the incidental (at least) effect of providing evidentiary and interpretative information that influences product and service likeness that can be determinative of findings of WTO inconsistency in terms of GATT and GATS MFN and NT discrimination.

General Exceptions - Public Morals and Others

A second potential interaction between ICH inscribed items and WTO law would be within the realm of general exceptions, under Article XX of GATT or Article XIV of GATS, that could in principle justify any violation of GATT or GATS rules respectively (although the actual success rate of exceptions in this regard is very modest). There are in essence three relevant possibilities: a public morals defense (Article XX(a) of GATT or Article XIV(a) of GATS [in the latter case encompassing public order as well]); the necessity of securing compliance with otherwise not WTO-inconsistent domestic rules (Article XX(d) of GATT and Article XIV(c) of GATS); and the currently untested defense of Article XX(f) of GATT “imposed for the protection of national treasures of artistic, historic or archaeological value.”

The GATT/GATS public morals exception has been interpreted as relying upon “standards of right and wrong conduct maintained by or on behalf of community or nation.”¹³⁰ The reference to a community or nation defies universality, and, broadly read, standards of right or wrong could encompass some cultural practices—including those inscribed as ICH items—that define the intangible characteristics of tradeable goods and services. Insofar as descriptions of cultural production practices in goods and services (such as national inventories of ICH)¹³¹ are not

¹²⁹For most current analysis and discussion, see Mitchell, Heaton, and Henckels 2016.

¹³⁰United States – Measures Affecting the Cross-Border Supply of Gambling Services, Panel Report, WT/DS285/R, 10 November 2004, para. 6.465 (US – Gambling).

¹³¹The Appellate Body has held that the provisions of an international agreement are not a “measure” for the purposes of Art. XX(d) of GATT. Mexico – Tax Measures on Soft Drinks and Other Beverages, Appellate Body Report, WT/DS308/AB/R, 6 March 2006, para. 69 (Mexico – Soft Drinks). A national inventory listing, however, may be considered as a measure. All CSICH-inscribed items must also be reflected in national inventories. See CSICH OD, ch. I.2, s R.5.

in themselves violative of GATT/WTO law—and there is no reason *a priori* to see them in this light—domestic measures taken to enforce their safeguarding may be protected under Article XX(d) of GATT and its corollary in Article XIV(c) of GATS. Inscription at the CSICH level, with the election to the Representative List by the CSICH Committee, can provide evidence of non-discriminatory purposes. Furthermore, the Article XX(f) GATT exception, which has never been applied in practice so far, may also be relevant, if the meaning of the phrase “national treasures” were interpreted to include ICH elements, even if in principle they should be considered of a universal character. A similar approach has also been suggested in the context of the CCD.¹³² To be sure, the application of the public morals and “securing compliance” exceptions would have to satisfy the conditions of necessity.¹³³

All three exceptions would have to pass the hurdles of the respective chapeaux of Article XX of GATT and/or Article XIV of GATS that require that the excepted measure is not “applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade.” This is not a simple feat in practice.¹³⁴ In the *European Communities – Seals* dispute, another GATT Article XX scenario arose: cultural heritage as a factor in the chapeau rather than in the substantive exception. The measure in question, a European Community (EC) ban on seal products, which the EC justified on the Article XX(a) public morals exception for reasons of animal cruelty, included an exception applying to “subsistence” seal hunts of Indigenous communities leading to the “partial use” of the products “within the communities according to their traditions.” While open to the possibility that traditional hunts could receive such special treatment, the Appellate Body found that the Indigenous exception (which, in practice, only benefited Inuit communities in Greenland but not in Canada or Norway) did not pass the chapeau test, *inter alia* because the criteria for benefiting from it were too ambiguous to ensure that seal products from commercial hunts by Indigenous peoples would not enter the EC market under the exception.¹³⁵ Not only does this present a real example of the theoretical duality of heritage and commerce, but it also raises the question how might the scrutiny of the Indigenous exception have been informed had there existed an ICH item for the traditional Inuit seal hunt (not an entirely theoretical possibility, given that the CSICH does not expressly preclude inscription of practices

¹³²CDC; Voon 2006, 646.

¹³³On GATT, Art. XX(a) necessity requirement, see *China – Audiovisual Products*, paras. 237–49; on GATT Art. XX(d) necessity requirement, see *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, Appellate Body Report, WT/DS161/AB/R, WT/DS169/AB/R, 11 December 2000, para. 161; *Mexico – Soft Drinks*, para. 74; on GATS Art. XIV(a), see *US – Gambling*, paras. 309–11.

¹³⁴See, e.g., *United States – Standards for Reformulated and Conventional Gasoline*, Appellate Body Report, WT/DS2/AB/R, 20 May 1996, 22; *US – Shrimp*, paras. 118–20.

¹³⁵*European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, Appellate Body Report, WT/DS400-401/AB/R, 22 May 2014, paras. 5.326, 5.338. For discussion, see Vadi 2015.

that may be detrimental to animal welfare). These scenarios suggest that the inscription of an ICH element under the CSICH, with the commensurate national inventory listing, may have an impact on the legal recognition of an exception in the WTO, potentially sustaining a domestic measure, subject to the conditions of WTO law.

ICH Items as Technical Regulations, Standards, or SPS Measures

A third way in which ICH items inscribed under the CSICH or national inventories could become relevant in WTO law, at least insofar as trade in goods is concerned,¹³⁶ is under the TBT Agreement and/or the SPS Agreement. There are two sides of the coin to consider in this respect, which are to be dealt with differently under each agreement. First, whether ICH items listed in the national inventories, and the measures taken to safeguard them, could be considered technical regulations or standards, as defined in Annex 1 of the TBT or SPS measures as defined in Annex A of the TBT or SPS Agreements, thus requiring conformity with the substantive provisions of each agreement, respectively. Second, if the answer to the first question were positive, CSICH inscriptions could be considered “relevant international standards” under the TBT Agreement, or “international standards, guidelines or recommendations” under the SPS Agreement, providing national measures based on them with a default defense of WTO consistency.

A national ICH inventory item, whether based upon a CSICH inscription or not, or measures taken to safeguard ICH, may qualify as technical regulations under the TBT Agreement. Technical regulations are to be implemented in order to meet ‘legitimate objectives’, which under the TBT Agreement, include “*inter alia*, national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment.”¹³⁷ Some of these, especially the prevention of deceptive practices, may be objectives of ICH measures, consonant with safeguarding, respect, and awareness building regarding ICH (Article 1 of the CSICH on purposes of the Convention), but the list is non-exhaustive, and there is no reason not to view the safeguarding of cultural heritage as a ‘legitimate objective’ in itself. Whether that is indeed the objective of a measure would require case-specific factual analysis.

In the interpretation of Article 1, Annex 1, of the TBT Agreement, a “technical regulation” has been found to involve three cumulative criteria: “*First*, the document must apply to an identifiable product or group of products. ... *Second*, the document must lay down one or more characteristics of the product. ... *Third*,

¹³⁶The TBT and SPS Agreements do not, as such, apply to trade in services, and corollary agreements on technical regulations in services supply do not exist as straightforwardly in the multilateral trading system; for some discussion of the problems of application and progressive development in this field, see Gabriel Gari, “What Can International Standards on Services Do for GATS?,” *The E15 Initiative*, September 2015, <http://e15initiative.org/blogs/what-can-international-standards-on-services-do-for-gats/> (accessed 21 May 2017).

¹³⁷TBT Agreement, Art. 2.2.

compliance with the product characteristics must be mandatory.”¹³⁸ The technical regulation may also define “related process and production methods” and can include “symbols, packaging, marking or labelling requirements.”¹³⁹ All of these may be relevant either to the listing itself or to product-related safeguarding measures taken with respect to it.

The third criterion—that compliance be ‘mandatory’—is important especially for the distinction between “technical regulations,” on the one hand, and “standards,” “with which compliance is not mandatory” (Article 2, Annex 1, of the TBT Agreement), on the other hand. Compliance is mandatory if the document containing the criteria “[regulates] in a legally binding or compulsory fashion the characteristics at issue, and if it thus *prescribes or imposes* in a *binding or compulsory* fashion that certain product *must or must not* possess certain characteristics ... or that it *must or must not* be produced by using certain processes.”¹⁴⁰ The panel in the *United States – Tuna II (Mexico)* dispute was divided on the meaning of “mandatory.”¹⁴¹ The majority ruled that the fact that tuna products marketed in the United States could not carry a “dolphin-safe” label unless certain criteria were met—in essence, that they regulated the conditions under which a product may be labeled dolphin safe—made the regulation “mandatory.”¹⁴² That said, one panel member opined that the fact that tuna could be marketed with or without meeting the “labelling requirements” meant that the labeling scheme was, in fact, voluntary.¹⁴³ The Appellate Body ultimately sided with the Panel majority on this issue.¹⁴⁴

In any case, this opens the door to recognition of ICH safeguarding measures as technical regulations, which would be subjected to the rigorous requirements of Article 2 of the TBT Agreement, including not only non-discrimination (both MFN and NT) similar to those discussed above with respect to GATT but also to the Article 2.2 of the TBT Agreement requirement that technical regulations “shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create.” In principle, “[m]embers shall use [international standards], or the relevant parts of them, as a basis for their technical regulations” (Article 2.4 of the TBT Agreement). This would raise the question of whether CSICH inscriptions constitute international standards for this purpose, which would require further analysis, in particular, given the TBT’s reference to the terminology of the second International Organization

¹³⁸European Communities – Trade Description of Sardines, Appellate Body Report, WT/DS231/AB/R, 23 October 2002, para. 176 (emphasis in original), citing EC – Asbestos, paras. 66–70. Further quoted in US – Clove Cigarettes, para. 7.24.

¹³⁹TBT Agreement, Art. 1, Annex 1, second sentence.

¹⁴⁰United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products, Panel Report, WT/DS381/R, 15 September 2011, para. 7.111 (US – Tuna) (emphasis in original).

¹⁴¹US – Tuna.

¹⁴²US – Tuna, paras. 7.144–7.145.

¹⁴³US – Tuna, paras. 7.150–7.151.

¹⁴⁴US – Tuna, Appellate Body Report, WT/DS381/AB/R, 16 May 2012, para. 196.

of Standardization / International Electrotechnical Commission Guide,¹⁴⁵ and some discussion of a related issue by the Panel in *United States – Tuna II (Mexico)*.¹⁴⁶ However, if CSICH inscriptions were not considered to be international standards, this would not detract from the potential characterization of such inscriptions as technical regulations for the purposes of the TBT Agreement. If they were considered to be international standards, national measures (such as listing on inventories and safeguarding measures) might benefit from this international acknowledgment to the extent that the international standard could be shown to be “an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued” (Article 2.4 of the TBT Agreement). Moreover, if recognized as an international standard “prepared, adopted or applied for one of the legitimate objectives explicitly mentioned” in Article 2.2 (such as prevention of deceptive practices), the technical regulation would be “rebuttably presumed not to create an unnecessary obstacle to international trade” (Article 2.5, second sentence, of the TBT Agreement). In short, there is room to consider in greater depth the implications of international and national ICH listings, as they may constitute measures reviewable under the TBT Agreement.

The scope for envisioning ICH-related measures—inscriptions and safeguarding measures—as SPS measures is narrower than the TBT context. The definition of SPS measures in Article 1, Annex A, of the SPS Agreement clearly emphasizes that SPS measures are measures applied to protect human, animal, or plant life or health from a variety of risks arising from pests, diseases, additives, contaminants, and so on. SPS measures must also be “based on scientific principles and ... not [be] maintained without sufficient scientific evidence” (Article 2.2 of the SPS Agreement). While, at first glance, both of these requirements would seem to cut across the grain of measures adopted for cultural reasons on the basis of cultural beliefs and preferences, it is worth recalling that many inscribed ICH items do in fact relate to human food consumption and/or to agricultural practices that address animal and plant health concerns. Some are explicitly justified in terms of human, animal, and plant life or health, and refer to the inclusion or exclusion of ingredients that may be considered additives and contaminants, in the nomination files.¹⁴⁷ The complex relationship between culture and health is on UNESCO’s working agenda.¹⁴⁸

¹⁴⁵ISO/IEC Guide 2, Standardization and Related Activities: General Vocabulary,” <http://ec.europa.eu/eurostat/cros/system/files/ISO%20reference%20definitions%20-%20%20guide%20%20-%202004%20-%20rev.doc> (accessed 18 May 2017).

¹⁴⁶WTO, “TBT Agreement, Interpretation and Application of the Preamble, ‘international standard’,” https://www.wto.org/english/res_e/booksp_e/analytic_index_e/tbt_01_e.htm#article2B4di (accessed 18 May 2017).

¹⁴⁷E.g., *Kimjang* (previously discussed) refers to kimchi’s “nutritional value”; Mediterranean Diet, CSICH Nomination File no. 00884, Doc. 8.COM, 2013, makes several references to health benefits.

¹⁴⁸UNESCO, Third Expert Group Meeting on Cultural Contexts of Health and Well-Being: Scope and Purpose, 25 January 2017, https://ich.unesco.org/doc/src/Third_expert_group_meeting_on_cultural_contexts_of_health_and_well-being-Scope_and_purpose.pdf (accessed 17 May 2017).

Thus, an ICH national inventory listing or a related safeguarding measure should not *ab initio* be excluded from the scope of SPS measures, depending, *inter alia*, on the importance of the health dimension embedded in the ICH. However, absent a scientific basis for the measure itself, the cultural dimension of the measure would certainly face challenges under SPS scrutiny.

National SPS measures “based on” international standards, guidelines, or recommendations are presumed to be WTO consistent (Article 3.2 of the SPS Agreement), providing an example of the “hardening” of soft law.¹⁴⁹ It would thus be of cardinal importance to examine whether CSICH inscriptions might qualify as international standards under the SPS Agreement, which generally specifies a closed list of standard-setting bodies.¹⁵⁰ Such standard setting, however, would not be unheard of; kimchi, which is the end product of CSICH-inscribed kimjang, has been accorded a Codex Alimentarius Committee standard. It is therefore conceivable that an ICH measure may at the same time be accepted as an international SPS standard.

Market Access in Services Trade

Some ICH inscriptions, such as yoga, cooperatives, and beer discussed previously, may be commodified in strong relation to various services, including tourism, travel, education, health, finance, and more. As another example, acupuncture, which is on the UNESCO Representative List, is also classified under the UN Services Central Product Classification (CPC) as a sub-class (93191) of “human health services.”¹⁵¹ We have also already discussed possible ICH-based distinctions between “like services,” in the context of MFN and NT. To complete the picture, such services may also raise issues relating to market access (Article XVI of GATS). It bears noting that, depending on their specific attributes, such ICH-based services may be traded internationally under all four “modes of supply” under GATS. Thus, to continue with the example of acupuncture, it may be provided under Mode 2 (a consumer travelling to the acupuncturist’s country), Mode 3 (commercial establishment of a business providing acupuncture treatment in a foreign jurisdiction), or Mode 4 (an acupuncturist travelling to a foreign country to provide acupuncture treatment). Thus, specific commitments undertaken by WTO members in medical services may apply to acupuncture services, potentially raising problems of gaps between formal accreditation in a host country, as a restriction on market access, on the one

¹⁴⁹Geboye Desta 2012.

¹⁵⁰SPS Agreement, Annex A(3); the standard-setting bodies indicated include the Codex Alimentarius Commission, the International Office of Epizootics, and the Secretariat of the International Plant Protection Convention.

¹⁵¹UN Services Central Product Classification, Code 93191, <https://unstats.un.org/unsd/cr/registry/regcs.asp?Cl=16&Co=93191&Lg=1> (accessed 18 May 2017).

hand, and traditional definitions of acupuncture as noted in the relevant ICH item, on the other hand.

In some of these sectors, WTO members have already taken cognizance of the potential economic and regulatory role of ICH items in domestic tourism, health, and so on. For example, Vietnam's Law on Tourism (2001), as notified to the WTO, explicitly refers to ICH as a set of "humanity tourism resources" to be protected.¹⁵² Yet Vietnam's GATS schedule of specific commitments lists, in the sector of "travel agencies and tour operator services" (CPC 7471) lists only one restriction on foreign market access under Mode 3 (commercial establishment)—a requirement that foreign service providers enter into joint ventures with Vietnamese partners. Foreign tourism services operating in Vietnam may encounter restrictions relating to the protection of cultural heritage, which may in turn be covered by the public morals/public order exception in Article XIV(a) of GATS—ultimately requiring a determination of which interests qualify as protected ICH—in which case, the UNESCO lists and national inventory may be resorted to for interpretative and definitional purposes, as previously described.¹⁵³

Cultural Heritage and International Subsidies Disciplines

As Jingxia Shi notes, subsidization is a "highly sensitive matter in international trade relations."¹⁵⁴ It is also a legally and economically nebulous issue.¹⁵⁵ The design of a subsidy can have critical implications for WTO consistency. For example, in a case relating to a cultural claim, in the *Canada – Periodicals* dispute, Canada supported its domestic print magazines, *inter alia*, through subsidized postal distribution rates that were not offered to US magazines, raising a claim of discrimination under Article III of GATT.¹⁵⁶ Canada invoked Article III(8)(b) of GATT as a defense, a provision that excludes from the NT discipline "payment of subsidies exclusively to domestic producers." The Appellate Body did not accept this argument under the circumstances because the subsidies were not paid directly to the publishers.¹⁵⁷ Subsequently, direct subsidies were put in place.

WTO rules on subsidies can be quite complex, and the following is just a taste of some terminology that could be relevant to ICH. Much simplified, Article 1 of the WTO's SCM Agreement defines subsidies (in trade in goods) as a government/public "financial contribution" (including, but not limited to, direct transfers of funds, loans, and loan guarantees, foregone government revenue, and provision

¹⁵²Law on Tourism, Law no. 44/2005/QH11 (Vietnam), https://www.wto.org/english/thewto_e/acc_e/vnm_e/WTACCVNM43_LEG_12.pdf (accessed 18 May 2017).

¹⁵³Vietnam has been particularly active in UNESCO within the CSICH regime, with no fewer than nine inscriptions on the Representative List, and two on the Urgent Safeguarding List.

¹⁵⁴Shi 2013, 150.

¹⁵⁵Sykes 2010.

¹⁵⁶Canada – Periodicals.

¹⁵⁷Canada – Periodicals, 32–35.

of goods or services) that confers a “benefit.”¹⁵⁸ In addition, and perhaps most importantly to the present discussion, it must be “specific,” as defined in Article 2 of the SCM Agreement: specific to an enterprise or industry or group of enterprises or industries. Subsidies contingent on export performance, or on the use of domestic goods in production, are generally prohibited.¹⁵⁹ Subsidies that cause adverse effects to the interests of other members as defined in Article 5 of the SCM Agreement may be “Actionable,” giving rise to WTO disputes or (subject to an additional set conditions applying Article VI of GATT as detailed in the SCM Agreement) countervailing measures taken by an injured member.

As far as subsidization of services is concerned, it is clearly outside the scope of the GATT and the SCM Agreement, and, because Article XV of GATS mandates detailed negotiation on rules in that area (which have not yet culminated in concrete results),¹⁶⁰ it is often considered to be unregulated by GATS.¹⁶¹ However, that is not entirely correct; MFN and NT non-discrimination rules may apply since GATS does not have a corollary to Article III(8)(b) of GATT, the provision that excludes subsidies from these disciplines.¹⁶² Subsidies are a significant issue in cultural policy, having provoked many debates on effectiveness and efficiency, particularly with respect to governmental support of performing arts and audiovisual industries.¹⁶³ In the area of ICH, the CSICH OD include many references to financial measures in a variety of contexts, which can be understood as encouragement of subsidization. Indeed, one study by a cultural heritage expert has noted that “[e]conomic incentives to safeguard intangible cultural heritage will probably play the largest role of all in encouraging transmission and re-enactment of intangible heritage.”¹⁶⁴ In some jurisdictions, such as the EU, ICH subsidization is clearly permissible, but this would not necessarily imply WTO consistency.¹⁶⁵ Some national subsidization programs, especially those that provide financial support for the training of “successors”—younger individuals who are incentivized to learn traditional crafts and practices from their elders, such as Japan’s Living National Treasures program¹⁶⁶ and France’s *Les Maîtres d’Art*¹⁶⁷—may formally be considered as specific subsidies

¹⁵⁸Canada – Measures Affecting the Export of Civilian Aircraft, Panel Report, WT/DS70/R, 14 April 1999, paras. 9.112-9.20; upheld in Canada – Measures Affecting the Export of Civilian Aircraft, Appellate Body Report, WT/DS70/AB/R, paras. 153–61.

¹⁵⁹SCM Agreement, Art. 3.1.

¹⁶⁰Sauvé and Soprana 2015.

¹⁶¹Shi 2013, 151.

¹⁶²Poretti 2008.

¹⁶³See numerous references in Towse 2003.

¹⁶⁴Deacon et al. 2004, 6.

¹⁶⁵Commission Regulation 651/2014 Declaring Certain Categories of Aid Compatible with the Internal Market in Application of Articles 107 and 108 of the Treaty, [2014] OJ L 187, 3.

¹⁶⁶See Aikawa-Faure 2014.

¹⁶⁷See Ministère de la Culture et de la Communication, “Les Maîtres d’art,” <http://www.culturecommunication.gouv.fr/Thematiques/Metiers-d-art/Les-Maitres-d-art> (accessed 22 May 2017); Institut National Métiers d’Art, “Titre de Maître d’Art,” <http://www.institut-metiersdart.org/action-ministere-culture/maitres-d-art/titre-maitre-d-art> (accessed 22 May 2017).

that could in theory be prohibited (for example, if contingent on the use of domestic goods) or actionable, although given the small scale of these operations, international “adverse effects” required for action against subsidies are unlikely.

All this is said merely to raise the possibility that some subsidies for ICH may cross the lines of specificity and discrimination, especially if they feed into international economic competition in resultant goods or services and, in particular circumstances (such as when more than one WTO member produces a product or supplies a service based on ICH or when cultural arguments are abused in the context of commodification), may also create grounds for consideration and action under WTO law.

IP, Notwithstanding

As noted above, Article 3(b) of the CSICH precludes any effect of the Convention on “rights and obligations deriving from any international instrument relating to intellectual property rights.” This would seem to draw a bright line between ICH law and TRIPS obligations as a significant component of world trade law. Nonetheless, some interactions may occur and will be only briefly mentioned here in the sole context of the above analysis’s focus on the potential role of ICH items, as a potential issue that has not been dealt with so far in the literature. An international or domestic authority, acting with respect to Article 22 of the TRIPS Agreement or national law implementing it with respect to geographical indications, may be required to determine if a geographical indication can be ascribed to “a given quality, reputation or other characteristic ... essentially attributable to its geographical origin.” ICH inscriptions are not themselves “the Convention” and often have both explicit and implicit geographical dimensions that could be useful in factual determinations regarding geographical indications and perhaps in informing conflicts between trademarks and geographical indications, such as in the ongoing Budweiser issue.¹⁶⁸

CONCLUSION

The goal of this article has been to fill a gap in the literature: can the safeguarding of ICH reverberate beyond the boundaries of the CSICH regime? If so, what are the effects of ICH safeguarding on international trade law and policy? Given the characteristic “softness” of the ICH regime, there would seem to be very limited scope for interaction between the CSICH and the WTO. However, focusing on the main operative dimension of the CSICH—namely, the mandating of national inventories of ICH and the international inscription of items on the Representative and Urgent Safeguarding Lists, the potential interactions may be significantly greater than originally envisaged. The initial working hypothesis in this analysis

¹⁶⁸Goebel and Groeschl 2014.

is that many ICH items hold both cultural and economic relevance. In addition to their cultural character, they are deeply implicated with economic transactions, both domestic and international. The examples in the second section bear this out; the same human activity can be framed, simultaneously, as either heritage or commerce, with interactions ranging beyond trade in goods to trade in services, sometimes in multi-million dollar sectors. The article then examined this from a cross-legal perspective: what is the status of ICH items in general international law and international trade law. Having established that an ICH inscription may serve for the purposes of factual determination and interpretation under WTO law, this was then applied across a comprehensive range of WTO law disciplines, demonstrating that the CSICH may indeed translate into concrete effects in international trade law.

These conclusions may be jarring for practitioners and scholars active in both fields. It would seem to be incumbent upon trade negotiators, for example, to keep tabs on developments in ICH that may have unintended (or intended) consequences for international trade law. At the same time, those involvement in the development of ICH law should be aware of its potential trade law effects and its potential capture by commercial interest groups. From both perspectives, it would be beneficial if sustained recognition and dialogue were promoted between the fields.

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