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World Trade Law, Culture, Heritage and Tourism. Towards a Holistic Conceptual Approach?

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This article argues that law is an important factor in the consideration of the evolution of tourism discourse. Thus it is important for academics to consider the law-tourism connection. But law is a dynamic phenomenon that is experiencing change. Within law, the domain of world trade is increasingly significant. In addition, the conceptualisation of culture and heritage is ongoing and as the law has implications for the development of those concepts, then correspondingly the law-culture and heritage connection should be considered. World trade law in turn has culture and heritage implications. Tourism will be affected by both the evolution of world trade and evolving conceptions of culture and heritage, not least legal ones. Accordingly, as a result of the increasing interpenetration and interconnections of issues, it is submitted that consideration of the four conceptual domains of world trade, law, tourism and culture and heritage, suggests the desirability of a holistic approach to (or awareness of) the consideration of certain issues that may fall into the intellectual space advanced by the potential intersection of these issues. This is especially justifiable in view of the multiplicity of academic viewpoints that studies of tourism embrace. It may be necessary in order to provide options for the solution of legal issues that involve these factors. Thus it is argued that it is important to consider the domain delineated above in a holistic way, recognising that the forces of development act reflexively on each other as a start in order to overcome inevitable epistemological difficulties.

Keywords: world trade law, culture, heritage, tourism, holistic conceptualisation

The Dynamism of Law and the Link with Tourism: Law-tourism

Discussion of issues associated with tourism is necessarily an interdisciplinary endeavour, which must consider law as an important component. While law, lawyers and legal systems are facing much well-deserved criticism (Crier, 2002), it would be a mistake to underestimate their pervasive influence. It should be pointed out that some jurists argue that a lot of legal theory (as opposed to legal reasoning, say, in courts) is vacuous (Posner, 2001). That having been said, domains such as 'travel and tourism law' are especially relevant to tourism studies. Travel law, travel and tourism law, tourism law and sub-groups such as 'holiday law' and 'hotel and catering law' all deal with tourism. Laws in relation to ownership and safeguarding of cultural property may impact on the tourism industries. Issues of liability, such as personal injury, will be foremost in the minds of most managers. Competition law may also dictate the evolution of the structure of the industry. Unsurprisingly, academic tourism literature reveals an increased consciousness of specific legal issues, such as the implications of the *Disability Discrimination Act* (e.g. Miller &

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Kirk, 2002). New directions, such as what might be termed genetic heritage tourism, give rise to legal issues that are likewise evolving on a parallel trajectory. There have been many other significant cases at national level where travel and tourism issues have been centre stage, as for example over issues of civil rights. In the case of *Heart of Atlanta Motel* (1964), it was held by the US Supreme Court that Congress had power to ban racial discrimination in places of public accommodation, including hotels and motels. The Heart of Atlanta in the 'Heart of Dixie' lost the argument that people are not commerce under the constitution. Within national systems, the context of the clash between travel and tourism and the environment has already given rise to much debate, as shown in another US case of *Sierra Club v. Morton* (1972). This involved a dispute between a tourism facility of Walt Disney Enterprises and the Sierra Club and led to interesting judicial debate, language and reasoning. The conservation group wanted to block the conversion of 80 acres of wilderness into a recreation complex and ski resort. In order to have legal standing to bring the case anyone who was bringing the suit would have to have been directly affected by the action in question. Environmentalists outside the court context sought to bolster their position by seeking to reinterpret the idea of legal standing when taking action on environmental issues (Stone, 1972). This also shows how concepts may move from discourse to discourse. It is worth noting that national legal issues may be decided in the context of state membership of regional legal communities such as the EU. A series of controversial Irish cases that were decided on the basis of principles of EU law have shown the link between rights associated with travel and abortion (*SPUC v. Grogan*, 1991). That link may not have been an obvious one. Legal circumstance often conspires to concoct them. Thus these cases demonstrate how law and travel and tourism may intersect at a national and regional level and are directly relevant to travel and tourism discourse in the widest sense. Law may have direct, immediate and actual implications and sometimes make deeper, theoretical and philosophical contributions. In general, however, the impact of law is sometimes solely conceived to be related to the impact of legal rules. Knowledge of law is generally equated with knowledge of rules. On this level there is obviously a need to understand some of the principal impacts of law on tourism.

But law is also dynamic. Within law, it could be argued that the evolution and impact of 'world trade law' may represent one of the greatest sources of potential conceptual challenge to the landscapes of tourism and tourism studies in the long-run. Critical analysis must test the assumptions underpinning any intellectual construct. As the law-tourism nexus is becoming clear, so is that of law-world trade in parallel. But when one also considers the law-culture and heritage connection, it is clear that a dynamic field of academic debate is being framed. It is argued by certain academics that law is not only about the knowledge of rules (Samuel, 2003). This suggests deeper epistemological and ontological engagements if disciplines are to communicate. This process of communication is also complicated by the contingent and contestable nature of the boundaries that make the delineation quite difficult.

A Contestable Description of the Emergent Conception of 'World Trade Law': Law-world Trade

It is always important to emphasise that law and legal systems may be characterised by conservatism but still manifest dynamism at particular times. At the present time of 'global legal pluralism' it is necessary to elaborate on the meaning of world trade law although the use of the description 'world trade law' would be contested by some legal academics. Nomenclature of subjects within law is not fixed, especially in turbulent times. More well-established terms include 'international economic law' and the legal aspects of international economic relations (see Jackson *et al.*, 2002). International trade law is sometimes contrasted with international economic law in that the former is fairly confined to the narrow context of commercial transactions in many works (e.g. Chuah, 2001). International business law may also be an appropriate term. Wider notions of international trade law are emerging (see e.g. Fletcher *et al.*, 2001). But the emergence of the World Trade Organisation (WTO) as the central economic institution of the world economy is critically significant. The solidity of the Dispute Settling Mechanism (DSM) is a chief distinguishing feature from the previous *General Agreement on Tariffs and Trade* (GATT) system, with greater leverage for the continuing liberalisation of trade. It requires some re-adjustment for lawyers (Ehlermann, 2002) and others. Combined with a new organisational focus and other procedural reforms, the WTO might be said to be at the centre of world trade. The greater shift towards rule-orientation is consistent with a process often described as 'juridification', a term which suggests an ongoing legal crystallisation of trade rules at a world level. Consensus-based systems that prevailed before are ultimately being displaced. However, there has sometimes been a reluctance to admit that trade rules constitute law, especially where there are genuine constitutional restrictions on the exercise of external power, such as in the USA.

If the WTO and its emergent jurisprudence are taken to be at the centre, then the penumbra of world trade law is quite wide. The exact trajectory in the sphere of international law is unclear. International lawyers are reluctant to admit that the exact scope, meaning and import of 'international law' are in a state of flux, not least as a result of events in Iraq. Jurists (e.g. Kahn, 1999) suggest that most international law scholars see their role not as the study of a social practice and belief but, rather, as contributing to the progressive realisation of an international order. The Appellate Body of the WTO itself has sought to clarify the relationship between its rules and the rest of international law. Discussion on issues in relation to international treaties is common. Thus for example in a recent dispute, in relation to United State-Softwood Lumber (2004), discussion on the impact of the *Vienna Convention on the Law of the Treaties* crops up in argument, as is fairly usual. Ultimately there will be a period of reconciliation of both sets of rules. But in some cases, the emerging world trade rules may displace or be perceived to displace other less crystallised international rules.

At the same time, the network of regional legal communities governing the context of operation of industries (such as tourism) could be considered part of the world trade law regime. The core conceptual base of the EC/EU revolves around the attainment of single or common markets based on an evolving treaty construct, which guarantees freedom of movement of the factors of production.

The deeper logic of course relates to the attempt to eliminate tensions that derive from purely national constructs of law and associated political dogma through novel legal constructions. The European Court of Justice (ECJ) was given the task of interpreting and applying the law under the treaties. It boldly articulated the nature of the evolving legal community. When given the opportunity, it stressed that the community was a new order in international law, based on a transfer of sovereignty, for which member states had limited their rights (see Weatherill & Beaumont, 1999). The limitation of rights had particular consequences that were quietly revolutionary when viewed *ex ante.* Some might see parallels with the trajectory of development of the GATT agenda, primarily driven by an ingrained institutional commitment sometimes described as involving 'embedded liberalism'. In the tourism context, there is a range of potentially diverse sources of regulation within regional legal communities (such as that of Package Travel in the EU).

The individual natural or legal person may find that such treaties have direct relevance to a situation they find themselves involved in and that no national law is of assistance, or indeed there is a conflicting national law. While the GATT, WTO and EU constructs focus on inter-state relationship, the principles of 'direct effects' may allow individuals to rely on certain provisions of these agreements. This notion was crucial in the context of development of EU law and is also relevant to other international treaties. The *Finance Ministry* case (1973) for example, reveals this in relation to GATT, in so far as the Court of Cassation demonstrated that individuals may be able to argue that the provisions of such international agreements may take precedence over conflicting national provisions in certain circumstances.

But to complicate things further, protection of international business transactions could also be considered as part of world trade law. This requires an awareness or comprehension and consideration of the formation, enforcement of international sales transactions and securities. Similarly, ideas of a new *lex mercatoria* (law merchant) might suggest the advisability of considering the regulation of the trader or merchant as part of any world system. This refers to the idea of a set of customary principle and rules that are widely recognised in international transactions. These are seen to be among the earliest forms of globalisation in the legal field. Communications technology and intellectual property issues are also increasingly regulated at an international level, and have been for over a century. The Council of Europe *Convention on Cybercrime* of 2001 and the *World Intellectual Property Organisation Conventions* (WIPO) of 1996 could be cited (as well as the Trade Related Aspects of Intellectual Property Agreement (TRIPS) that forms part of the WTO framework).

It is interesting to contrast US support of TRIPS and openness to the *Cybercrime Convention*, and its ultimate respect for the recent WTO Steel Subsidies decision on the one hand, with its ambivalence towards the *World Heritage Convention*, hostility to the *Kyoto Protocol* and *International Criminal Court*, and opposition to other UN initiatives. Commercial interests are dictating the construction of international obligations at present, according to some (McGrath, 1996). However, on a longer trajectory and with the possibility of a re-awakening of the US Supreme Court with the 'terrorism' prisoner cases, the exercise of executive power might become a little more contained. In the longer term, the possibility of greater

global regulation of competition, which is one of the 'Singapore Issues' in the world trade discussions, may form a critical dimension of world trade. But even if the suggested description of such a field is too wide, or the centrality of trade is contested as a useful and unifying description thereof, it is clear that the emergent system of regulation of trade and international business is an important factor in the evolution of the environment in which other global forces such as tourism must operate.

The impact and consequences of such a *corpus* of law, thus conceived in a general way, is formidable. Key decisions may come from national courts, reflecting and contributing to the evolution of international principles, which contribute to the context of world trade. World trade law thus conceived is obviously of importance in a general way in relation to tourism and tourist industries. While the emphasis of world trade has been on goods, the incorporation of services and IP widens the net. There is a need to consider the triangular network of national, regional and international or world regulation, as decisions may come from a number of places therein. Likewise there is a need to consider the evolution of legal concepts (as well as the impact of existing regulation). Either way, the law-world trade connection parallels the clarification of the law-tourism connection.

The Legal Development of Concepts of Culture and Heritage: Law-culture and Heritage

Culture is a notoriously elusive concept that needs to be defined before it can be discussed in meaningful ways (Tunney, 2001). Does the particular definition used cover old houses, new architecture, dance, music, folk or rap, or perhaps the complexities of notions such as Japanese *kazari* (see Rousmaniere, 2002)? Does it include phenomena that are pro-establishment or anti-establishment, static or dynamic, transient or permanent, commercial or non-commercial, contemporary or antique? What does not constitute culture? Clearly, it should be defined with caution, and if meaningful discourse is to emerge, definitions must be clear and specific. Ultimately, they may depend on the overall context rather than on any absolute sense of meaning.

Notions of 'heritage' may seem more straightforward, but again it is necessary to exercise caution, and the politics of heritage and culture must also be considered (Bianchi & Boniface, 2002). Does it cover genetic heritage, for example? And when both culture and heritage are approached in the context of legal (and especially judicial reasoning) the fluidity tolerated in some disciplines quickly evaporates in vagueness to reveal dangerous shards of competing interests. In general terms, courts must be able to draw on clear, well-defined, operable concepts from the most appropriate literature. Such concepts must be capable of articulation in ways that make them available to judges, with all the nuances and distinct meanings that only become clear in the arena of contest. Binding legal principles and doctrines are more often hammered out in particular court disputes. Where parties have something to fight for, and the resources and will to do so, dispute resolution gives rise to useful legal trajectories for others who follow. Legal principles may represent both a shield and a sword. In many emergent, legal domains, creative lawyers will seek to exploit existing legal doctrines, invent

new ones, or catch the wind of a new judicial disposition to resolve disputes. However, access to such legal creativity is nevertheless costly and presupposes a pre-existing constituency of consciousness. In fact, many 'legal positivists' are incredibly hostile to 'judicial activism' and 'judicial legislation', sometimes for good reason. There is also scepticism within law about seeking too much through law and seeking 'cosmic justice' (Sowell, 1999). Indeed, within the law itself, there is a deep dynamic of culture and heritage in its institutions, conduct and practice, which has both positive and negative elements (e.g. Monateri, 2000). Nevertheless, for better or worse, legal process cannot afford the luxury of indecision. Endless philosophical speculation is not available to judges, and the dialectical method can only be preliminary to a conclusion of some type. However, the simple determinacy of rules and propositions are an essential aspect of their democratic legitimacy. Rules are conceived, made and chosen by legislators and judges. At a certain point therefore, there needs to be a degree of pragmatism about the values that advocates of various views seek to promote and about how they might be implemented or preserved in rule-based systems or at least packaged in a way that they can be brought into the debate. It is worth pointing out the different levels from which such legal issues may emerge and be elucidated, from the national, regional and world level.

From National to Regional to World Legal Regulation of Culture and Heritage

At national levels, there is a diverse range of legal instruments that reflect political, economic, religious and cultural concerns to a greater or lesser degree. Relevant constitutions, statutes or judicial pronouncements deal with the ownership of natural or physical resources and cultural heritage as well as more specifically with management, commercial exploitation, access and dispute settlement. However, there is arguably no clear and standard legal definition or conception of the meaning of heritage or associated notions of culture. This makes dialogue across nations very difficult and creates ambiguities in any quest to distil useful, transposable legal concepts. Within the mosaic of national discourses, both political and legal, there will be deeper debates about the nature of culture and heritage.

Within the USA, for example, hostility to the *World Heritage Convention* has been pronounced. This reflects the previous reluctance of President Reagan and others to accept outside interference and has led to continued arguments that membership is unconstitutional. In contrast to mature legal systems such as the USA, in other countries where legal systems and institutions are immature, little can be gained by examining associated national approaches, as little jurisprudence may exist. By the same token, their perspective may be neglected. In the developed world, for instance, adherence to principles of 'restitution' and reparations in the context of disputes is arguably one of the most notable trends in national jurisprudence. The successful pursuit of Holocaust claims, along with Native American and Australian Aboriginal efforts at repatriation of cultural objects, may have contributed to the emergence of a viable principle of restitution and reparation in relation to heritage. Similarly, the greater organisation and sophistication of land claim cases and heritage pursued by indigenous people is

significant. The celebrated *Mabo* case (Tunney, 2000a), for example, should be seen as part of the evolution of national jurisprudence in relation to issues of culture and heritage. It was, however, inspired by international law principles. Interestingly, this case, and later cases based upon it, demonstrate how academically diverse any investigation of native title or its destruction would have to be, even though it would ultimately be a legal issue. Since *Mabo*, Australian courts have increasingly settled more abstract claims about heritage. In the *John Bulun Bulun* cases, for example, they were invited to expand the use of copyright to protect traditional values (Blakeney, 1998), and it is possible that elsewhere, too, the evolution of national jurisprudence will settle such major and contested claims as those relating to the Elgin/Parthenon Marbles.

Culture and heritage may be significantly regulated at an intra-regional level, as (for example) in the 1976 *Convention on the Protection of the Archaeological, Historical and Artistic Heritage of the American Nations*, an instrument deriving from the Organisation of American States. Heritage and cultural issues are also regulated by the Council of Europe (Pickard, 2002), and they figure prominently in the separate legal system of the EU. However, focus is often on specific policy to the detriment of judicial evolution. While there are knowledgeable practitioners on every minute aspect of Commission policy in relation to culture, there are far fewer on the role of the judiciary, and it is certainly arguable that most advances in EC/EU law came through the activity of judges (as critics of judicial activism would readily acknowledge). One example is the development of the principle of equal pay, judicially blossoming in the face of executive inertia. Furthermore, culture and heritage interest groups often overlook the relevance of other facets of law, like that of competition, as they may not initially appear to be relevant. In the EU, the protection of culture was inserted in the treaty. But certain academics think that this has been neglected in legal argument (Cunningham, 2001). This may have been because lawyers find it a vague concept and may wait for the context of contest to seek to define it.

Direct Regulation of World Heritage and Culture

Return of cultural treasure involves a plurality of legal considerations and often international trade issues also (Greenfield, 1996). More generally, there is a body of law regulating cultural issues that might be termed world heritage law, revolving around the *World Heritage Convention* and a host of other international and national legislative enactments. From the protection of cultural property during armed conflict, to submarine heritage, and through to the protection of monuments, there is a wide range of international instruments, including *United Nations General Assembly* resolutions. They are more firmly set within the boundaries and formulated rules of international law. Recommendations, declarations and charters on archaeological heritage, excavations and management, protection of cultural heritage, the built environment, historic monuments and towns, and natural heritage, form a web of regulation. As this web of regulation evolves, there is a need for those who wish to shape the evolution of concepts, to actively engage and participate in a widening field.

At the end of 2002, UNESCO celebrated the 30th anniversary of the *World Heritage Convention*. The Convention has been rightly lauded for dealing with both

cultural and natural properties. While there are shortcomings in its operations, it has considerable achievements to its credit. However, it is only on the battlefields of competing interest that the robustness of the system will be tested. Opponents of the Convention do not share the same values inspiring those who drove it forward, and may exploit weaknesses in systems not yet tempered through trial. Indeed, it could be argued that people who work to protect culture and heritage may too readily assume others share their values. Sometimes, international rules and regulations are not enough.

The destruction of Buddhist statues in Afghanistan in 2001 and antiquities in Iraq in 2003 sent shock waves through the international heritage community. Indeed, the destruction of heritage in Afghanistan and Iraq, along with the more extreme 'neo-liberal' free market arguments, demonstrates considerable opposition. One question that arose from the Afghanistan statues context was whether heritage could give rise to an international right to intervene in national sovereignty to protect it. Others might also cite mining and oil extraction, transport developments, energy requirements, the motor industry, logging and agriculture, as activities potentially hostile to the preservation of heritage. Such industries can often marshal potent economic arguments, and carry much political leverage, to obtain their own ends. Their power may defeat arguments that are based on longer-term concerns based on universal principles and, more particularly, on notions of the inherent value of culture or heritage.

Indeed, when the *World Heritage Convention* is examined, it is hard to find a coherent rationale that explains to a judge the basis on which the system operates and which can be employed to settle contests. The preamble to the *World Heritage Convention* talks of 'outstanding universal value' and the need for the international community as a whole to participate in a complementary way to the state's role. The philosophical basis of protection seems clear to its advocates. The list system and the *List of World Heritage in Danger* are very specific regimes and easily comprehensible. Such systems can evolve happily through the well-established principles of international law as they apply to international organisations such as UNESCO. The *Operational Guidelines for the Implementation of the World Heritage Convention* are very specific and relatively easily capable of application. Nevertheless judges in certain cases, in Australia for example, have commented on the difficulty of applying more vague general principles, and critics in the United States express indignation when World Heritage notices appear on national monuments. While non-lawyers are fond of the noble phrase and sentiment in international documents, duller, more careful legal articulations may ultimately be more use in specific historical contexts. What happens when there is a dispute between the existing or future designation of a site and some other pressing need? The unfolding regulation of world heritage requires a continual involvement that is alert to the necessary fragility of legal protection.

The experience of indigenous people with the use of legal means to secure the protection of their interests, for example, led to inevitable frustration. Many of their advocates suggested that the legal efforts have been unsuccessful, due to intrinsic difficulties of enforcement (Posey & Dutfield, 1996). As a result of legitimate frustration, such authors sometimes suggested solutions ostensibly based on the idea that the evolution of legal norms at an international level could not be successful. However, unless revolution is taking place, the nature of evolution of

law and legal systems requires a long-term commitment of engagement and participation, for those who want to advocate a cause or proposition.

To complicate matters further, it is clear that legal rules are now coming from a wide range of tribunals and courts. Indeed there is such a diverse proliferation of potentially relevant sources that some legitimately would caution against seeing anything like universal principles. Thus for example rulings that might come from tribunals such as the *International Tribunal for the Law of the Sea* are likely to become increasingly important (see ITLOS, 2003). It could be argued that those who want to advocate views about culture and heritage protection, for example, should seek to input and influence such diverse legal evolution. However, it is worth noting that there is evidence in the USA of hostility to the citation of non-US legal authority, particularly before the Supreme Court. Thus there is an emerging debate about the mobility of legal authority. If such a hostile view prevails, then the argument in favour of a more cosmopolitan building of international legal principles will lose out to a nationalist type of legal positivism.

The Subtle Challenge of Culture and Heritage in Particular WTO Contexts: World Trade Law-culture and Heritage

Some contexts bring culture and trade together explicitly in a contemporary sense. For example, the growth in tomb-raiding is related to technology and trade (Beech, 2003), and the link between the environment and trade has also received much attention (Sturm & Ulph, 2002). Regions and nations may compete for heritage 'prizes', as do regional authorities, and nations for ownership of the 'Iceman of the Alps' (Hitchcock, 1999). However, the links between culture and heritage may be subtler. In Europe, numerous cases have been brought by the Commission against member states that are arguably about culture, although they have not been explicitly decided on that basis. Examples include the case about the beer purity laws – the *Reinheitsgebot* (*Commission v. Germany*, 1987), when the European Court of Justice found that restrictions on the use of the word *Bier* in Germany to beverages produced using only barley, hops, yeast and water and the prohibition on the sale of beer with additives were not justifiable under the Treaty of Rome 1957.

Similarly, some decisions by the World Trade Organisation have prompted discussion on the relationship between trade and culture. The *Canadian Periodicals* case gave rise to discussion about the protection of cultural issues in the WTO dispute settlement system (see e.g. Carmody, 2002). Some critics argue that the construct of the WTO rules is not sufficiently sensitive to issues of 'culture'. This is often linked to related perceptions that the issue of protection of health of the consumer is jeopardised by the freedom of trade rules that is guaranteed under the WTO system. The *Beef Hormones* case (EC-Hormones, 1998) is often cited on this point. Similarly, it is argued that national environmental concerns may be difficult to pursue because of multilateral trade rules. One such dispute is the *Shrimp-Turtle* case (United States-Shrimp, 1998), which dealt with regulations pursuant to the US 1973 Endangered Species Act. This Act, that was designed to protect turtles from the negative consequences of shrimp trawling, generated a conflict between national laws and world trade obligations. In like manner, the recurrent issue of dolphins caught in tuna nets has given rise to much heated

discussion. The *Banana* cases have not only generated much legal literature, but have impacted on culture and popular discourse (see e.g. Ryle, 2002). In this instance, the argument has been that the freedom to support historic trading links that support small banana producers in the Caribbean is impossible under current trade rules. The consequence of the trading rules therefore is related to other socio-economic issues that are argued to be more subtle than current rules allow for.

Decisions in some of these key cases make it clear that the WTO does not seek to interfere with justifiable national rules. Members can respond and react to the decisions that do not go in their favour in ways that still accomplish the original objectives they sought. This demonstrates the ample ground left for WTO member regulation. However, if decisions about hormones are difficult to make and are also controversial, it can be expected that multi-faceted disputes that arise in relation to tourism, where culture and tourism collide, may be very complex indeed.

World Trade Law-tourism

The policy nexus between culture and heritage and tourism has already been made in certain international instruments, as with the *International Committee of Monuments and Sites (ICOMOS) Charter on Cultural Tourism* 1999. Clearly, the development of tourism is closely associated with the development of world trade and globalisation discourse (Teo, 2002). But then more specific questions arise as to the potential link between the WTO rules and especially the DSM and the evolution of tourism issues. It can be expected that national rules in relation to the ownership of heritage sites and of cultural property, the provision of electronic services and the protection of Intellectual Property will arise, in ways that impact directly on tourism industries.

Two issues are crucial in the debate over the legal ramifications of tourism's role in world trade. The first relates to the direct impact of the WTO on tourism in particular contexts (Wang & Qu, 2002). Writers such as Paton (2003) have argued that it is necessary to clarify and define travel and tourism under the *General Agreement on Trade in Services* (GATS). Since the inception of the WTO, there has been doubt about the relationship between world trade rules and other international legal instruments on the protection of the environment. A similar uncertainty should exist about the exact relationships of international instruments on culture, heritage and cultural tourism. There is an emerging focus on the implications of GATS on telecommunications, financial services and education. This is happening in relation to travel and tourism also.

Secondly, there is a greater challenge, which relates to the need to construct a hierarchy of principles to explain and translate insights from the academic literature on tourism and values emerging from tourist experience into principles that can at least inform judicial debate. Judges and legislators need to make choices in deciding cases and in making law respectively. In the making of those choices they need to draw upon options from the academic community, that may achieve the goals they think are necessary to settle disputes or to achieve legislative goals. In the world trade context, it is necessary that the academic literature and the policy choices be spelt out in some coherent way so that the genuine

factors in particular disputes can be teased out in relation to tourism. The complexity of issues appertaining to culture and heritage require much examination and explanation even to be expressed in legal terms. Tourism discourse that deals explicitly with culture and heritage contexts can help provide some clarity so that legal decisions that can be expected to occur in the next few decades, particularly as they arise in world trade law contexts, can at least take the full range of considerations into account.

Tourism-culture and Heritage

Much tourism discussion is implicitly about issues of culture and heritage. If the definitions of culture and heritage are as potentially wide as they may be when used in anthropology, for example, then it is arguably the case that tourism issues may become inextricably linked to conceptions of culture and heritage. Particular issues that could be readily in the realm of tourism studies create issues that are increasingly being recognised as having some connection with cultural and heritage discourse. Competition over scarce natural resources and recreational amenities may lead to disputes, as when the increased popularity of surfing results in 'surf rage', efforts at self-regulation, and discussion as to whether or not legal regulation is needed (Fickling, 2003). Badgers that could be 'natural heritage', can threaten cultural heritage, as embodied in megalithic sites or Roman remains (Jowitt, 2004). Confrontation may invoke contrasting opinions from different perspectives by museum curators, scientists and indigenous people (Harris, 2003). Increased tourism may threaten cultural heritage through infrastructural changes (Douglas, 2003). If tourism fails to deliver the anticipated benefits, there may be a reaction against conservation efforts (Itano, 2003). The main point is that tourism, visitor attractions and sites will probably give rise to a number of issues that come within the domain of culture and heritage, depending on how those concepts are defined.

Tentatively Towards Holistic Conceptualisation: The Whole Field of Studies

Thus we may imagine a square whose internal space is bounded by law, world trade, culture and heritage and tourism. Within that space there is a great arena that will witness debates in future decades. It is argued here that it would be useful if academics were able to provide a panoramic view of the relevant forces, the strategic interests, the potential outcomes and the possible options. Lawyers and business advisers need to have a panoramic perspective of legal regulation as it becomes more complex (Tunney, 2002). In like manner, the different platforms in tourism scholarship (Jafari, 1990) need to reflect changing contexts. Clarity of choice is important, since the field of tourism studies is interdisciplinary, albeit with its own unique specialists. As a consequence, for instance, issues such as the inter-relationships of image, identity and culture (Cronin & O'Connor, 2003) engender reasonably diverse exploration.

Pragmatism as advocated by such philosophers as William James (James, 1955) might be sometimes a more useful strategic approach to the evolution of cultural discourse within law, than mere pious aspirationalism, however intellectually piquant that may be. Some may believe that lawyers will not confront

the attempt to define culture. That would be mistaken. It is not merely a theoretical issue. Rightly or wrongly, and irrespective of how courts approach the issue, 'culture' has been quite explicitly inserted into the EC Treaty and is now a legal concept. Studies of tourism and studies of the role of law within tourism may equally benefit from the overlap. Academic focus on cultural tourism (McKercher *et al*., 2002) may give precise definitions of cultural context that may ultimately prove relevant in legal debates.

Indeed, law itself is changing, as Nader emphasises (2002: 230):

> Schools of thought are blurred, and multiple mirrors combine to enlarge both the strategies of research and the recognition of common objectives, one of which is an understanding of the relationship of global to local as well as of locals to locals. Microlevel fragments and dislocations are now integrated with macrolevel questions that involve law but go beyond law.

Primarily as a result of global forces, law is undergoing re-conceptualisation. International law itself now comes from many sites and locations (Higgins, 2003). Such a context requires awareness of interconnecting forces, particularly at international level, as can be seen, for example, in theories of international relations or in migration studies. However, lawyers have been able to avoid much discussion about epistemology in their domain. Thus they are often weak in the explanation of the construct of knowledge in law. There has been greater interest recently. In that context, Samuel examines what he terms as the schemes of intelligibility in the social sciences and argues that the greatest dichotomy therein is between the 'holistic' and 'atomistic' view of society (Samuel, 2003).

At the same time, re-conceptualisation is also an emergent theme in tourism discourse, which sometimes requires wider forms of analysis, as in the need for an enhanced focus on community involvement (Hardy *et al*., 2000). In tourism studies there is evidence of theoretical convergence (Apostolakis, 2003), which partly reflects technological and regulatory convergence, as in studies of ecotourism (Herath, 2002). Similarly, the harmonisation of legal systems leads to conceptual integration, which needs unifying perspectives to assist interpretation (Tunney, 1999).

Given the challenges ahead, one academic approach to where tourism, culture and heritage issues may meet in legal contexts may be to look at them in a way that recognises that they are reflexive and thus interdependent in certain conditions. Equally, it is appropriate to aim simply at more accurate predictions on complex issues by a greater awareness of contributory factors. A lawyer, for example, might ask whether a US court would allow the consequences of designation of World Heritage Site of the Old City of Havana to stand, particularly if faced with a returning pre-revolutionary property owner – an issue that might arise even without 'regime change'.

The pervasive nature of tourism will increasingly figure in world trade law disputes. At the same time, there is discontent with forces of globalisation. Already there is discontent with international institutions (Danaher, 2001), and the association of globalisation with world trade has led to an exponential increase in criticism. There are many diverse bases for criticism and much discontent (Stiglitz, 2002). The anti-globalisation critique is itself subject to critique (Legrain, 2002). Within that spectrum of arguments there are debates

about the nature and role of free trade and questions about the implications of such debates for the work of disciplines such as economics. For example, some commentators such as Carmody fear that free trade and its associated efficiency promotes homogeneity and jeopardise deep human values (2002). To deal with the tensions, economists such as Throsby (2001) call for a greater 'human-centred' notion of economics. He argues that the battle to obtain or retain economic power conflicts with the assertion of cultural identity, and that a deeper understanding of the relationship between economics and culture is needed to improve matters. Whatever the outcome of these debates, there may be an increased academic challenge to engage with more domains than they may have wanted to.

Faced with such conflicting claims over the nature and impacts of globalisation and disciplinary flux in law and elsewhere there may at least be an argument to corroborate that it might be preferable to adopt a holistic approach to the study of some issues associated with tourism. Basically, such an analytical approach treats the whole as greater than the sum of its own parts, and can be profitably applied to world trade, culture, law and tourism. Such an approach may help to facilitate dialogue across disciplines in order to merely define what the issues and options are when approached both in a macro and a micro way.

Tourism may become a major focus for opposition for example by local communities or groups, or other forces of anti-globalisation. Such a danger may suggest the benefit of seeking holistic solutions, which may need sometimes to re-conceptualise doctrine and discourse. A narrow, formalist legal reading of complex disputes may lead to unbalanced decision-making. Interdisciplinary contacts need to be more sophisticated and deeper. As well as welcome specific studies on law (such as Callander & Page, 2003) deeper opportunities exist. The very re-shaping of existing paradigms must recognise the phenomenon of law in a wider sense than it often has hitherto. One of the simple ways to do this as an academic is to engage with contemporary legal discourse (as manifest in legal and interdisciplinary legal literature). There is little evidence of that, if one examines the references used in much academic tourism discourse or the subject matter of contemporary PhDs. Likewise, there is little evidence of non-law study of particular disputes that might prove hugely important to those involved in culture and heritage domains. Lawyers may have little need, incentive or desire to venture far beyond their own discipline and indeed may have a strong incentive to maintain disciplinary exclusivity. What use would a wider philosophical base provide? To take one example, although the literature on local communities in tourism has grown significantly, they are still relatively invisible in regimes of legal protection, because insights are not fed into legal contexts. If one examines what might be termed 'travel law' and looks at a range of contexts such as Article 81 and 82 of the EC Treaty, the rules on Package Travel, consumer credit and consumer regulation, the dominant conception is that of a vulnerable traveller *qua* consumer, directly and indirectly. But non-law literature demonstrates that the host community is probably the more vulnerable now. If the argument in favour of recognition of the local community is to work, then they have to be made visible and it needs to be articulated in ways that can be legislated and made justiciable. Otherwise, the persistence of what this author has called 'the ghost-host community syndrome' will not change. This predominantly

pro-traveller law is subject to the striking exception of the DVT case (2003) in the UK and other similar ones around the world, which arguably generated relatively little academic attention. Likewise, the incorporation of debate on genetic contexts into the work of UNESCO demonstrates the conceptual proximity hitherto separate contexts. Where might a holistic approach be applicable? A particular doctrinal development that heritage could link up with more is the development of 'global public goods' discourse (Kaul *et al.*, 2003). This chimes with the direction of the World Bank (2002). The World Tourism Organisation's '*Global Code of Ethics for Tourism*' may have some influence on the emergence of legal principles and practices in the travel and tourism context. Particularly neglected domains of tourism such as 'social tourism' may become popular again. If the argument in favour of a holistic approach seems light and abstract, then practical reasons such as the increased involvement of museums in the business of foreign tourism may make it seem more relevant. There may be greater disciplinary mobility. This requires some simple approaches in order to build bridges. Such approaches may yield unanticipated benefits. Otherwise adequate analyses of, say, space tourism or Antarctic tourism will not be forthcoming. The notion of parallax could be used to describe the idea that different standpoints of a phenomenon will give different perspectives at least.

Conclusion: Looking Across the Whole Field

A space that is bounded by rough intellectual fences of concepts of culture and heritage, world trade, tourism and law needs to be explored to help identify the shifting, dynamic interactions. Tourism and heritage are complex human phenomena reflexively bound up with legal systems. The inherent proximity of issues of culture and heritage to tourism and the reflexive relationship between them (as well as with law) means that there is in reality a complex multi-layered dialogue. In world trade regulation, one danger is that the dialectical process of evolution will shift in favour of potentially dominant trade paradigms in the absence of more sophisticated counter-weight doctrines. A holistic disciplinary approach that includes sophisticated legal inputs could be part of a pragmatic solution that offers options. Failure to do so may create a momentum of opposition that will not only threaten a negative impact on world trade, but also the tourism industries.

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