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Cultural Heritage in International Investment Law

Forthcoming in A.F. Vrdoljak and F. Francioni (eds.), Oxford Handbook on Cultural Heritage Law (Oxford: OUP forthcoming 2019)

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Abstract

The protection of cultural heritage is a fundamental public interest that is closely connected to fundamental human rights and is deemed to be among the best guarantees of international peace and security. Economic globalization and international economic governance have spurred a more intense dialogue and interaction among nations—potentially promoting cultural diversity and providing the funds to recover and preserve cultural heritage. However, these phenomena can also jeopardise cultural heritage. Foreign direct investments in the extraction of natural resources have the potential to change cultural landscapes and erase memory, and foreign investments in the cultural industries can induce cultural homogenization. In parallel, international investment law constitutes a legally binding and highly effective regime that demands that states promote and facilitate foreign direct investment. Does the existing legal framework adequately protect cultural heritage vis-à-vis the economic interests of foreign investors? This chapter aims to address this question by examining recent arbitrations and proposing two legal tools to foster a better balance between economic and cultural interests in international investment law and arbitration.

1. Introduction

Cultural heritage is a multifaceted concept that includes both tangible (e.g., monuments, sites, cultural landscapes) and intangible cultural resources (e.g., music, cultural practices, food preparation). While culture represents inherited values, ideas, and traditions that characterise social groups and their behaviour, heritage indicates something to be cherished and handed down from one generation to another. There is no single definition of cultural heritage at the international law level; rather, different legal instruments provide *ad hoc*

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definitions often focusing on distinct categories of cultural heritage—i.e., intangible cultural heritage and underwater cultural heritage— rather than approaching it holistically.[1]

The protection and sustainable use of cultural heritage may foster resilience and economic development, enabling individuals and communities to respond to major social and economic changes.[2] In parallel, the expansion of foreign direct investments facilitates the interaction between different societies and cultural freedom.[3] As a result, there can be positive synergies between the promotion of foreign direct investment (FDI) and the protection of cultural heritage.

However, this is not always the case. Although economic globalization and international economic governance have spurred a more intense dialogue and interaction among nations—potentially promoting cultural diversity and providing the funds to recover and preserve cultural heritage—these phenomena can also jeopardise cultural heritage. Foreign direct investments in the extractive industries have the ultimate capacity to change cultural landscapes. At the same time, a highly effective legal framework demands that states promote foreign direct investment.

Under most international investment agreements (IIAs), states have agreed to grant arbitrators wide jurisdiction over what are essentially regulatory disputes. Modern IIAs do not require the intervention of the home state in the furtherance of a dispute. In practice, this means that foreign investors have access to arbitration against the host state if there is an IIA between the home state and the host state. Given that there are more than 3,000 IIAs worldwide, investment treaty arbitrations have become increasingly frequent.

Foreign investors have increasingly claimed that cultural policies violate international investment law before investment treaty arbitral tribunals. Arbitral tribunals are given the power to review the exercise of public authority and to settle disputes determining the appropriate boundary between two conflicting values: the legitimate sphere for state regulation for protecting cultural heritage on the one hand, and the protection of private interests from state interference on the other.

Both cultural heritage protection and the promotion of economic activities are important public interests that can contribute to economic growth and the common good. Cultural heritage can epitomise society's most cherished values that define a nation's identity. The protection of cultural heritage constitutes a public interest of the state, but it can also encapsulate a public interest of the international community as a whole.[4] In parallel, economic

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[1] F. Francioni, 'Culture, Heritage and Human Rights: An Introduction' in F. Francioni and M. Scheinin (eds.), *Cultural Human Rights* (Brill 2008) 1–16.

[2] A. Sen, 'How Does Culture Matter?' in V. Rao and M. Walton (eds) *Culture and Public Action* (Stanford University Press 2004) 37–58.

[3] A. Sen, *Development as Freedom* (Oxford: OUP 1999).

[4] F. Francioni, 'Public and Private in the International Protection of Global Cultural Goods', 23 *European Journal of International Law* (2012) 719–730 (conceptualizing the protection of cultural heritage as a global public good.)

freedoms can also promote the free flow of ideas, cultural diversity, and equality of opportunities as well as social and economic welfare.[5]

The variance between the legal protection of cultural heritage and the regulation of economic globalization is by no means new. However, most scholars and practitioners have examined this linkage from an international trade law perspective.[6] A recent seminal study investigated the parallel clash between the regulation of foreign direct investment and the protection of cultural resources and illuminated the tension between investors' rights and the regulatory autonomy of the host state in the cultural field.[7]

This chapter contributes to the existing literature by discussing the key features of the interplay between the protection of cultural heritage and the promotion of foreign direct investment in international investment law and arbitration and examining several arbitrations that have emerged in the past few years. This recent jurisprudence highlights that arbitral tribunals are increasingly providing consideration to cultural concerns; yet, the interplay between the protection of cultural heritage and the promotion of foreign direct investment in international investment law and arbitration continues to pose two main problems: 1) an ontological problem concerning the essence of international investment law and international law more generally; and 2) an epistemological problem concerning the mandate of arbitral tribunals.

With regard to the ontological problem, two main questions arise: Is international investment law a self-contained regime, or is it part and parcel of general international law? Is general international law a fragmented system, or are there tools to enhance its unity? With regard to the epistemological problem, arbitral tribunals have limited jurisdiction; they have a limited mandate to assess state compliance with international investment law. They do not have a specific mandate to ascertain the adequate protection of cultural heritage. Therefore, the key question is whether they can take non-investment concerns into account in the adjudication of investment disputes, and if so, to what extent.

This chapter addresses these questions and proceeds as follows. First, it highlights the main features of international investment law and arbitration. Second, it discusses several recent arbitrations. Third, the chapter examines whether investment treaty tribunals are taking cultural interests into account when adjudicating investment disputes. Fourth, the chapter proposes two main tools to better address the interplay between economic and cultural interests in international investment law and arbitration. Finally, some conclusions are drawn.

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[5] B. Choudhuri, 'International Investment Law as a Global Public Good', 17 *Lewis & Clark Law Review* (2013) (conceptualizing the promotion of foreign direct investments as a public good worth of being protected.)

[6] For a comprehensive study, see T. Voon, *Cultural Products and the World Trade Organization* (New York: CUP 2007).

[7] See V. Vadi, *Cultural Heritage in International Investment Law and Arbitration* (Cambridge: CUP 2014).

2. International Investment Governance

Once deemed to be an 'exotic and highly specialised' domain,[8] international investment law is now becoming mainstream.[9] Due to economic globalization and the rise of foreign direct investments, the regulation of the field has become a key area of international law and a well-developed field of study. As there is no single comprehensive global investment treaty, investors' rights are defined by an array of IIAs, customary international law, and general principles of law.

At the substantive level, international investment law provides extensive protection to investors' rights in order to encourage foreign direct investment and to foster economic development. Under IIAs, states parties agree to provide a certain degree of protection to investors who are nationals of contracting states, or their investments. Such protection generally includes compensation in case of expropriation, fair and equitable treatment, non-discrimination, and full protection and security, among others.

At the procedural level, international investment law is characterised by sophisticated dispute settlement mechanisms. While state-to-state arbitration has been rare,[10] investor–state arbitration has become the most successful mechanism for settling investment-related disputes.[11] Nowadays, most IIAs allow investors to directly access international arbitral tribunals. Arbitral tribunals are typically composed of three members: one arbitrator selected by the claimant, another selected by the respondent, and a third appointed by a method that attempts to ensure neutrality. All arbitrators are required to be independent and impartial. Under this mechanism, investors are not required to exhaust local remedies and no longer depend on diplomatic protection to defend their interests against the host state.

The internationalization of investment disputes has been conceived as an important valve for guaranteeing a neutral forum and depoliticizing investment disputes.[12] Investor–state arbitration shields investment disputes from power politics and insulates them from the diplomatic relations between states.[13] The depoliticisation of investment disputes benefits: 1) foreign investors, 2) the host state, and 3) the home state.[14]

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[8] ILC, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group (Martti Koskenniemi) UN Doc. A/CN.4/L.682 (13 April 2006) para. 8.

[9] Stephan W. Schill, 'W(h)ither Fragmentation? On the Literature and Sociology of International Investment Law' 22 *European Journal of International Law* (2011) 875.

[10] On state-to-state investment treaty arbitration, *see generally* A. Roberts, 'State-to-State Investment Treaty Arbitration: A Hybrid Theory of Interdependent Rights and Shared Interpretive Authority', 55 *Harvard International Law Journal* (2014) 1–70.

[11] S. Franck, 'Development and Outcomes of Investor–State Arbitration', 9 *Harvard International Law Journal* (2009) 435–489.

[12] I.F.I. Shihata, 'Toward a Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA' 1 *ICSID Review—FILJ* (1986) 1, 5.

[13] S. Puig, 'No Right without a Remedy: Foundations of Investor–State Arbitration' 35 *University of Pennsylvania JIL* (2013–2014) 829–861, 848–53.

[14] A. Roberts, 'Triangular Treaties: The Extent and Limits of Investment Treaty Rights', 56 *Harvard International Law Journal* (2015) 353–417, 390.

First, foreign investors no longer have to rely on the vagaries of diplomatic protection;[15] rather, they can bring direct claims and make strategic choices in the conduct of the arbitral proceedings. In this regard, investor–state arbitration can facilitate access to justice for foreign investors[16] and provide a neutral forum for the settlement of investment disputes.[17] Such access is perceived to be necessary to render meaningful the more substantive investment treaty provisions.

Second, the depoliticisation of investment disputes protects the host state[18] by reducing the home country's interference in its domestic affairs. It prevents or 'limit[s] unwelcome diplomatic, economic and perhaps military pressure from strong states whose nationals believe they have been injured.'[19] Third, the depoliticisation of investment disputes also protects the home state in that it no longer has to become involved in investor–state disputes.[20]

Arbitral tribunals have reviewed host state conduct in key sectors, including cultural heritage. Consequently, many of the recent arbitral awards have determined the boundary between two conflicting values: the legitimate need for state regulation in the pursuit of the public interest on the one hand, and the protection of private interests from state interference on the other.

3. The Diaspora of Cultural Heritage-Related Disputes before International Investment Treaty Tribunals

Cultural governance is a battlefield, i.e., a place where the interests of multiple players clash. Given that 'it is the duty of governments to ensure the protection and the preservation of the cultural heritage …, as much as to promote social and economic development',[21] it may be difficult to identify the most appropriate management of cultural heritage and to strike a balance between conservation goals and economic interests.[22]

Given the structural imbalance between the vague and non-binding dispute settlement mechanisms provided by the international instruments adopted by the United Nations Educational, Scientific, and Cultural Organization (UNESCO) and the highly effective and sophisticated dispute settlement mechanisms available under international investment law, a number of

[15] Puig, 'No Right without a Remedy', 844.

[16] F. Francioni, 'Access to Justice, Denial of Justice and International Investment Law' 20 *European Journal of International Law* (2009) 729–747.

[17] Puig, 'No Right without a Remedy', 846.

[18] Roberts, 'Triangular Treaties', 389–390.

[19] J. Pauwelyn, 'At the Edge of Chaos? Foreign Investment Law as a Complex Adaptive System' 29 *ICSID Review* (2014) 372–418, 404.

[20] Roberts, 'Triangular Treaties', 390.

[21] Convention concerning the Protection of the World Cultural and Natural Heritage (WHC), 16 November 1972, in force 17 December 1975, 1037 UNTS 151, 11 ILM 1358, Article 4.

[22] See *e.g.* Tad Heuer, 'Living History: How Homeowners in a New Local Historic District Negotiate Their Legal Obligations' *Yale Law Journal* (2008) 768, 819 (referring to the need of balancing 'the preservation of the past, the needs of the present, and the inheritance of the future').

investment disputes related to cultural heritage have been brought before investment treaty arbitral tribunals.[23]

This section examines and critically assesses several recent arbitrations. Given the impact that arbitral awards can have on cultural governance and the growing number of investment arbitrations, scrutiny and critical assessment of this jurisprudence is particularly timely and important. Such scrutiny illuminates the way that international investment law responds to cultural concerns in its operation, thus contributing to the ongoing investigation of the role of international investment law within its broader matrix of international law. Although this jurisprudence is not homogenous, it can be scrutinised according to the taxonomy of the claims brought by foreign investors, including, *inter alia*, fair and equitable treatment and expropriation.

3.1 Fair and Equitable Treatment

In an atypical case, indigenous peoples acting as foreign investors have complained about measures adopted by the host states, alleging that the state failed to take their cultural practices into account. For instance, in *Grand River v. United States*,[24] a Canadian tobacco company owned and operated by indigenous peoples contended that the Master Settlement Agreement—an agreement between tobacco companies and major tobacco producers in the United States—was being applied to their business without their input. Allegedly, such measures violated the fair and equitable treatment standard by violating customary law requiring the consultation, if not consent, of indigenous peoples on regulatory matters potentially affecting them.[25] As the individual claimants were members of the Six Nations of the Iroquois Confederacy, they argued that the tobacco business was their traditional activity, and thus the case involved their intangible cultural heritage. The Arbitral Tribunal, however, did not find any violation of fair and equitable treatment,[26] albeit recognising, in passing, that indigenous peoples should be consulted on matters potentially affecting them.[27]

In assessing the reasoning of the Tribunal, one finds two significant holdings and one important gap in legal reasoning. First, according to the Tribunal, the fair and equitable treatment standard 'does not incorporate other legal protections that may be provided to investors or classes of investors under other

[23] Obviously, this does not mean that these are the only available fora for this kind of dispute. Other tribunals are available such as national courts, human rights courts, regional economic courts and traditional state-to-state courts and tribunals such as the International Court of Justice or even inter-state arbitration. Some of these dispute settlement mechanisms may be more suitable than investor–state arbitration to address cultural concerns. However, given its scope, this study focuses on the jurisprudence of arbitral tribunals.

[24] *Grand River Enterprises Six Nations, Ltd. et al. v. United States of America*, Award, 12 January 2011.

[25] Id. para. 182(3).

[26] *Grand River v. United States*, Award, para. 187 (holding that 'whatever unfair treatment was rendered [to the claimant] or his business enterprise, it did not rise to the level of an infraction of the fair and equitable treatment standard of 1105, which is limited to the customary international law standard of treatment of aliens.')

[27] Id. para. 210.

sources of law'.[28] 'To hold otherwise', argues the Tribunal, 'would make Article 1105 a vehicle for generally litigating claims based on alleged infractions of domestic and international law and thereby unduly circumvent the limited reach of Article 1105 as determined by the Free Trade Commission in its binding directive'.[29] In reaching this outcome, the Tribunal was guided by the NAFTA Free Trade Commission statement that 'determination that there has been a breach … of a separate international agreement does not establish that there has been a breach of Article 1105.'[30]

Second, the Tribunal held that NAFTA Article 1105 required a uniform standard of treatment for all foreign investments, rather than allowing specialised procedural rights based on certain categories of investors (e.g., indigenous persons).[31]

Third, the arbitrators did not touch upon the role of Article 31(3)(c) of the Vienna Convention on the Law of Treaties (VCLT),[32] which requires adjudicators to take into account 'any relevant rules of international law applicable in the relations between the parties.'[33] Although Article 31(3)(c) cannot trigger the importation of external norms into a given treaty system or allow claimants to claim the breach of such external obligations, it enables such external rules to shape an arbitral tribunal's interpretation of a given investment treaty provision.

In *Crystallex v. Venezuela*,[34] a Canadian company that had invested in one of the largest gold deposits in the world, the Las Cristinas deposit in Venezuela, claimed that the conduct of the host state in relation to the mine amounted to, *inter alia*, a violation of fair and equitable treatment.[35] State authorities denied an environmental permit that prevented the exploitation of the mine because of concerns about the project's environmental impact. Venezuela pointed out that '*Las Cristinas* lies in the Imataca Reserve, which is a fragile rainforest with an extremely varied biodiversity and a significant indigenous population.'[36] For Venezuela, 'the Ministry of Environment was obliged to review the project carefully, only approving it once Crystallex had adequately demonstrated that it would not cause unacceptable environmental or social impacts.'[37] Venezuela contended that because 'the environmental and socio-cultural impact of the project proposed by Crystallex could not be mitigated', 'its authorization would have been a violation of the Venezuelan government's obligation to "ensure

[28] Id. para. 219.
[29] Id.
[30] NAFTA Free Trade Commission, Notes of Interpretation of Certain Chapter 11 Provisions, 31 July 2011.
[31] Id. para. 213 (arguing that '[t]he notion of specialized procedural rights protecting some investors, but not others, cannot readily be reconciled with the idea of a minimum customary standard of treatment due to all investments.')
[32] Vienna Convention on the Law of Treaties (VCLT), opened for signature 23 May 1969, in force 27 January 1980, 1155 UNTS 331.
[33] VCLT Article 31(3)(c).
[34] *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016.
[35] Id. para. 187.
[36] Id. para. 214.
[37] Id. para. 378.

protection of the environment and the population from situations that constitute imminent damages.'"[38]

Yet, the claimant pointed out that 'the justifications adduced by the Ministry of Environment' for denying the permit, that is, 'concerns for the environmental and indigenous people of the Imataca Forest Reserve[,] had never been raised during the four-year approval process and were not supported by a single study … to demonstrate that the project would adversely impact the Imataca region.'[39] Crystallex also claimed that 'it had submitted plans for dealing with the … indigenous communities' and had consulted them.[40]

The Tribunal found that Venezuela breached the fair and equitable treatment standard when it denied the environmental permit. In fact, it argued, a letter from the state authorities had created legitimate expectations that the project would proceed.[41] Moreover, the denial did not sufficiently elucidate reasons for denial; rather, the permit denial letter 'extend[ed] to a mere two and a half pages' and vaguely referred to climate change and 'serious environmental deterioration in the rivers, soils, flora, fauna and biodiversity in general in the plot'.[42] While the Tribunal did not contest the state's 'right (and the responsibility) to raise concerns relating to global warming, environmental issues in respect of the Imataca Reserve, biodiversity, and other related issues', it held that 'the way' the state put forward such concerns in the permit denial letter 'present[ed] significant elements of arbitrariness'.[43]

3.2 Expropriation

Several investment treaty arbitrations have dealt with the question of whether regulation allegedly aimed at protecting cultural heritage may be deemed to be an indirect expropriation. For instance, in *Glamis Gold v. United States of America*,[44] a Canadian investor claimed, *inter alia*, that measures requiring the backfilling of a previously extracted open-pit gold mine to preserve the skyline of ancient indigenous cultural landscape amounted to an indirect expropriation of its investment and a violation of fair and equitable treatment.[45] However, the Arbitral Tribunal found the claimant's expropriation argument to be without merit. In order to distinguish a non-compensable regulation and a compensable expropriation, the tribunal established a two-tiered test, by which it ascertained: 1) the extent to which the measures interfered with reasonable expectations of a stable regulatory framework, and 2) the purpose and the character of the governmental actions taken. First, the Tribunal found that the claimant's

[38] Id.
[39] Id. para. 277.
[40] Id. para. 289.
[41] Id. para. 588.
[42] Id. para. 590.
[43] Id. para. 591.
[44] *Glamis Gold, Ltd. v. United States of America*, Award, 8 June 2009, available at http://www.state.gov/documents/organization/125798.pdf.
[45] Id. para. 359.

investment remained profitable[46] and that the backfilling requirements did not cause a sufficient economic impact on the investment to constitute an expropriation.[47] Second, the Tribunal deemed the measures to be rationally related to their stated purpose.[48] The Tribunal acknowledged that 'some cultural artifacts will indeed be disturbed, if not buried, in the process of excavating and backfilling'[49] but concluded that without such legislative measures, the landscape would be harmed by significant pits and waste piles in the near vicinity.[50]

In the pending case *Dominion Minerals Corp. v. The Republic of Panama*,[51] the claimant, a U.S. company, contends that Panama used allegedly spurious environmental pretexts to deny the renewal of a mining exploration permit to the local subsidiary of the company and this amounted to an indirect expropriation of the claimant's investment in Cerro Chorca, a mining property in western Panama.[52] For the investor, a subsequent law allowing foreign investments in the mineral sectors shows that the mineral moratorium was enacted to expropriate the investment of the claimant rather than to permanently stop the extraction of mineral resources.[53] After the regulatory change permitting mining was made, however, the government faced social unrest. In fact, 'the Ngöbe-Buglé indigenous people … staged a series of violent protests and road blockades' in opposition to such law, because they '[f]ear[ed] that [it] would allow foreign state-owned companies to undertake large-scale mining projects on indigenous lands'.[54] Because the government 'faced … the threat of continuing social unrest', it finally placed 'a moratorium on all mining activity within the … regions inhabited by the Ngöbe-Buglé indigenous peoples, which included Cerro Chorca.'[55]

Yet for the indigenous peoples, '[t]hese mountains are sacred … Ngöbe ancestors entombed evil spirits in these mountains so that they could not disturb the villages on the slopes below. To make sure the spirits remained imprisoned, the hills have been off-limits to farming, hunting, and logging for generations, in effect creating an ecological preserve that protects the natural resources on which the Ngöbe depend.'[56] Therefore, for the Ngöbe, destroying Cerro Chorca would unleash the spirits imprisoned in it and upset the natural balance of the fragile mountain ecosystem. As the case is still in an early phase, it is not yet possible to foresee the outcome of the case.

In another pending case, *South American Silver Limited (SAS) v. Bolivia*, the Bermudan subsidiary of a Canadian company alleges that the host state, *inter alia,* expropriated the company's ten mining concessions near the village of Malku

[46] Id. para. 366.
[47] Id. para. 536.
[48] Id. para. 803.
[49] Id. para. 805.
[50] Id.
[51] *Dominion Minerals Corp. v. The Republic of Panama*, Request for Arbitration, 29 March 2016.
[52] Id. para. 2.
[53] Id.
[54] Id. para. 42.
[55] Id. para. 44.
[56] Marian Ahn Thorpe, 'The Other Side of the Mountain', *Cultural Survival*, June 2010.

Khota in the Bolivian province of Potosí.[57] The company requests restitution in kind and damages or, alternatively, full compensation.[58] The company notes that '[t]he vast majority of local residents in and around the Malku Khota Mining Project are indigenous people, of the Aymara or Quechua ethnic groups,'[59] and that it has tried to maintain ongoing dialogue with the communities.[60] Nonetheless, tensions emerged. For the company, 'the [g]overnment itself, and not the local communities, was the one pressing for the nationalization of the Malku Khota Project' for economic reasons, namely the benefits associated with SAS's discovery of a large deposit of silver, indium, and gallium.[61] For the claimant, the expropriation did not have a public purpose, as 'it bears no logical or proportional relationship with the stated objective of pacifying the area.'[62]

In its Counter-Memorial,[63] the respondent alleges that the claimant violated 'human, social, and collective rights of the Indigenous Communities that live in the area', and that such violations operate as a jurisdictional or admissibility bar.[64] For Bolivia, the reversion of the concessions to state ownership was justified by a public interest: the need to restore public order in the area and to protect the rights of the indigenous communities.[65] Bolivia also highlights that it is 'the country with the highest percentage of indigenous population in Latin America,' as '62% of the Bolivian population identifie[s] themselves as indigenous.'[66] Because of its demographic composition, Bolivia is a 'plurinational' state. It acknowledges 'the precolonial existence of indigenous nations and peoples … [and] guarantees their free determination with the frame of the unity of the State, … [and] their culture … in accordance with [the] Constitution and the law'.[67] The Plurinational Constitutional Tribunal of Bolivia has further clarified that the state 'not only acknowledges the indigenous peoples as different cultures … but also as nations', that is, 'as historical communities with a determined home territory that shar[e] differentiated language and culture' [and have the] political capability to define their destiny … within the … State.'[68]

Bolivia notes that 'several Indigenous Communities [live] in the area of the Project', that they have inhabited these lands since time immemorial, … and 'shar[e] territory, culture, history, languages and organizations or legal, political, social and economic institutions of their own.'[69] According to the Bolivian Constitution, such communities have, *inter alia*, 'the right to land', including 'the

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[57] *South American Silver Limited v. the Plurinational State of Bolivia*, PCA Case No. 2013-15, Claimant's Statement of Claim and Memorial, 24 September 2014, para. 9.
[58] Id. para. 10.
[59] Id. para. 45.
[60] Id. para. 47
[61] Id. para. 96.
[62] Id. para. 144.
[63] *South American Silver Limited v. the Plurinational State of Bolivia*, PCA Case No. 2013-15, Objections to Jurisdiction, Admissibility and Counter-Memorial on the Merits, 31 March 2015 (unofficial English translation).
[64] Id. para. 4.
[65] Id. paras 6–7.
[66] Id. para. 33.
[67] Id. para. 35.
[68] Id. para. 36.
[69] Id. para. 41.

exclusive use and exploitation of the renewable natural resources' and the right to the 'prior and informed consultation and the participation in the benefits for the exploitation of the non-renewable natural resources that are located in their territory'.[70] Moreover, they have 'the power to apply their own norms, … and [to define] … their development in accordance with their cultural criteria and principles of harmonic coexistence with Mother Nature.'[71]

Bolivia notes that indigenous peoples consider Malku Khota as 'a sacred place',[72] despite the fact that it has been exploited since Spanish colonization,[73] and 'consider themselves ancestral owners of the minerals of the Andean mountains.'[74] Therefore, the state contends, opposition to the project came from Indigenous Communities that saw in the project a violation to their ancestral beliefs and an impending risk to the environment on which their survival depended.[75] Bolivia accuses the company of fomenting division and violence among the indigenous communities, and thus interfering with their right to self-government and their cultural traditions. From its perspective, the government 'did not have any other option but to declare the Reversion to re-establish the public order.'[76]

With regard to the applicable law, the investor argues that international investment law require arbitral tribunals to 'apply the treaty itself, as *lex specialis*, supplemented by international law if necessary'.[77] Bolivia expressly requires the Tribunal 'to interpret the Treaty in light of the sources of international and internal law that guarantee the protection of the rights of the Indigenous peoples'.[78] In this regard, it refers to customary norms of treaty interpretation as restated in the Vienna Convention on the Law of Treaties, requiring adjudicators to take into account the context of a treaty, which includes, according to Article 31(3)(c), 'any relevant rules of international law applicable in the relations between the parties'.[79]

Moreover, Bolivia argues that 'under international public law, the obligations concerning the fundamental rights of the Indigenous Communities prevail over the obligations concerning foreign investment protection.'[80] In support of this argument, Bolivia relies on *Indigenous Peoples of Sawhoyamaxa v. Paraguay*, in which the Inter-American Court of Human Rights held that 'applying bilateral commercial agreements does not justify breaching State obligations arising out of the American Convention.'[81]

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[70] Id. para. 47.
[71] Id.
[72] Id. para. 90.
[73] Id. para. 71.
[74] Id. para. 72.
[75] Id. para. 80.
[76] Id. para. 84.
[77] *South American Silver Limited v. the Plurinational State of Bolivia*, Claimant's Statement of Claim and Memorial, para. 116.
[78] *South American Silver Limited v. the Plurinational State of Bolivia*, Objections to Jurisdiction, Admissibility and Counter-Memorial on the Merits, para. 192
[79] Id. para. 193.
[80] Id. para. 202.
[81] Id. para. 203.

Bolivia derives the 'superior position or special status' of human rights in the international legal system from two pillars. First, Article 103 of the Charter of the United Nations provides 'the supremacy' of the obligations established in the Charter over any other obligation acquired by its members. Under Article 56 of the Charter, its members pledge to take action for the achievement of several purposes, including the respect of human rights.[82] Second, norms concerning the fundamental human rights of human beings are *erga omnes* obligations.[83] According to Simma and Kill, 'it is possible that norms relating to economic, social, and cultural rights could also constitute rules applicable in the relations among States, even if there is no independent treaty obligation running between the States in question, and even if we assume that such obligations are not owed *erga omnes* … [T]he fact that the Vienna Convention's preamble proclaims the State Parties' universal respect for, and observance of, human rights and fundamental freedoms for all may tip the scale towards a broader conception of applicability'.[84] Bolivia also recalls various international law instruments protecting indigenous rights, including the American Convention on Human Rights,[85] the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), the International Labour Organization (ILO) Convention 169,[86] and the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women.[87] It also refers to the United Nations Guiding Principles on Business and Human Rights[88] and the Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises[89] 'as evidence of the international public order.'[90]

In its Reply to the respondent's Counter-Memorial,[91] the claimant denies any allegation of unlawful conduct and restates that '[t]he Tribunal … must rely upon the Treaty as the primary source of applicable law'.[92] The claimant 'does

[82] Id. para. 205.
[83] Id. para. 206.
[84] Id. (quoting Bruno Simma and Theodor Kill, 'Harmonizing Investment Protection and International Human Rights: First Steps Towards a Methodology', in Christina Binder, Ursula Kriebaum, August Reinisch and Stephan Wittich (eds.), *International Investment Law for the 21st Century: Essays in Honor of Christoph Schreuer* (Oxford: OUP 2009) 702.
[85] American States Organization, American Convention on Human Rights, 7 to 22 of November of 1969, 1144 UNTS 123; 9 ILM 99 (1969).
[86] International Labor Organization, Convention 169 concerning Indigenous and Tribal Peoples in Independent Countries, adopted 27 June 1989, in force 5 September 1991, 28 ILM 1382.
[87] American States Organization, Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women, 9 June 1994, 33 ILM 1534 (1994).
[88] United Nations Guiding Principles on Business and Human Rights Implementing the United Nations 'Protect, Respect and Remedy' Framework (2011), developed by the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises.
[89] John G. Ruggie and Tamaryn Nelson, Human Rights and the OECD Guidelines for Multinational Enterprises: Normative Innovations and Implementation Challenges, Harvard Kennedy School Working Paper No. 15-045 (2015).
[90] *South American Silver Limited v. the Plurinational State of Bolivia*, Objections to Jurisdiction, Admissibility and Counter-Memorial on the Merits, para. 220.
[91] *South American Silver Limited v. the Plurinational State of Bolivia*, Claimant's Reply to Respondent's Counter-Memorial on the Merits and Response to Respondent's Objection and Admissibility, 30 November 2015.
[92] Id. para. 238.

not dispute the basic notion that treaties should generally be construed in harmony with international law'[93] and argues that 'a systemic interpretation of the Treaty is called for under international law'.[94]

Yet, the company contends that 'Bolivia has not satisfactorily established why the Tribunal should give primacy to the rights of indigenous communities over the clear terms of the Treaty'.[95] In fact, quoting Bruno Simma, the company contends that Article 31(3)(c) of the VCLT 'can only be employed as a means of harmonization qua interpretation, and not for the purpose of modification, of an existing treaty."[96] The company also points out that '[t]he phrase "relevant rules of international law" in Article 31(3)(c) of the Vienna Convention refers to the sources of law set forth in Article 38 of the Statute of the [International Court of Justice], i.e., international conventions, customary international law, general principles of law recognized by civilized nations.'[97] Therefore, it contests that the UNDRIP, the UN Guiding Principles on Business and Human Rights, and the OECD Guidelines for Multinational Enterprises can be considered 'rules of international law' that may be taken into account in the interpretation of treaties.[98] The company qualifies these instruments as 'non-binding' instruments that 'lack the State practice and *opinio juris* elements that would transform them into embodiments of customary international law'.[99] With regard to the American Convention on Human Rights, the ILO Convention 169, and the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women, the claimant notes that its home country, the United Kingdom, is not party to these treaties.[100] Moreover, the company argues that 'Bolivia has not established, let alone suggested, that [all the mentioned instruments] … constitute either customary international law or general principles of law'.[101] The claimant argues that 'Bolivia seeks to use indigenous peoples' rights as a shield to justify their unlawful conduct.'[102] The case has not been decided yet; it will be interesting to see how the Arbitral Tribunal will settle the dispute.

In *Bear Creek v. Peru*,[103] the claimant, a Canadian company, contended that Peru had failed to afford its investment, the Santa Ana Silver mining project, the protection set out in the Canada–Peru Free Trade Agreement (FTA). In particular, it claimed, *inter alia*, that Peru unlawfully expropriated its investment.[104] The Santa Ana project lies in a border region. Under Peruvian law, 'a foreign national can only gain rights to natural resources in border

[93] Id. para. 245.
[94] Id. para. 238.
[95] Id.
[96] Id. para. 245 (quoting Bruno Simma, 'Foreign Investment Arbitration: A Place for Human Rights?', 60 *International Comparative Legal Quarterly* (2011) 573, 584).
[97] Id. para. 246.
[98] Id. para. 247.
[99] Id.
[100] Id. para. 249.
[101] Id. para. 251.
[102] Id. para. 253.
[103] *Bear Creek Mining Corporation v. Republic of Perú*, ICSID Case No. ARB/14/21, Award, 30 November 2017.
[104] Id. para. 113.

regions when the foreign national makes a case to the Peruvian Government for a public necessity'.[105] The company 'initiated the procedure to obtain the necessary mining rights'.[106] A subsequent decree declared that the Santa Ana project was 'a public necessity' and authorised the claimant to acquire mining concessions.[107]

However, protests against the project took place. Protesters demanded the cancellation of all mining projects and the protection of Khapia Hill, a sacred place for the Aymaras.[108] The government subsequently declared Khapia Hill to be part of the nation's cultural heritage.[109] However, this did not stop the civil unrest. After the protest became violent,[110] Peru revoked the project's status as a public necessity—the legal condition for the claimant's ownership of mineral concessions.[111]

The *amici curiae* brief submitted by a non-governmental organization, and accepted by the Arbitral Tribunal, highlights that the Santa Ana project lies in a poor, rural, and border area whose peasant communities 'ethnically and culturally belong to the Aymara group'.[112] The *amici* contend that the company 'did not do what was necessary to understand the doubts, worries and anxieties and the Aymara culture … [T]he company acted as if it were sufficient to promise benefits to some of the … communities in the areas surrounding the project … without needing to work closely with [all of the relevant] communities.'[113] Therefore, some communities opposed the project and the company 'did not obtain the social license to operate.'[114]

According to the brief, 'the Aymara have a deep respect for mother earth (*Pachamama*), and it is their responsibility to protect her'.[115] Their principal economic activities are agriculture, fishing, and livestock farming[116] and the 'communities have deep cultural and social ties with their … land and natural resources'.[117] For the Aymara, '[t]he territory is not only a geographical space but represents a spiritual bond for the communities'.[118] Therefore, the Aymara people were concerned with 'the risk posed by mining activities for the "guardian mountains", which represent extremely important spiritual sanctuaries for all the population in the area'.[119] Reportedly, '[t]he communities were very worried about the possible contamination of their lands and water, which is

[105] Id. para. 124.
[106] Id. para. 140.
[107] Id. para. 149.
[108] Id. para. 183.
[109] Id. para. 186.
[110] Id. paras 189–190.
[111] Id. para. 202.
[112] Id. para. 219.
[113] Id. para. 218.
[114] Id.
[115] Id. para. 226.
[116] Id. para. 219.
[117] *Bear Creek Mining Corporation v. Republic of Peru*, Amicus Curiae Brief Submitted by the Association of Human Rights and the Environment – Puno and Mr. Carlos Lopez PhD, 9 June 2016, p. 7.
[118] Id.
[119] Id.

scarce in the region, and the impact on their sacred sites (such as the Apu Khapia and Lake Titicaca).'[120] Therefore, the Aymara had 'concerns regarding change to the natural landscape, the integrity of their territories, and the negative effects on their sanctuaries and culture'.[121]

The claimant contends that it engaged in 'meaningful and extensive community relations programs'[122] and that it obtained the communities' support for the Santa Ana project.[123] The company also claims that it had 'exceeded the requirements of domestic and international law'[124] and had obtained the 'social license' to operate.[125] For the claimant, Peru's action amounted to an indirect expropriation because it permanently deprived the company of 'its ability to own and operate its lawfully acquired mining concessions'.[126] For the company, this deprivation was a disproportionate response to 'the stated goal of quelling political pressure and social protests'.[127]

The Tribunal acknowledged the 'strong political pressure' put on Peru due to 'social unrest'.[128] It also questioned 'whether Claimant took the appropriate and necessary steps to engage all of the relevant and likely to be affected local communities, and whether its approach contributed significantly to the nature and extent of the opposition that followed.'[129] It noted that 'support for the Project came from communities that were receiving some form of benefits (i.e. jobs, direct payments for land use, etc.) and that those communities that remained silent or objected were either not receiving benefits, were uninformed, or both.'[130] Yet, it concluded that while 'further actions by Claimant would have been feasible', the company 'complied with all legal requirements with regard to its outreach to the local communities'.[131]

The Tribunal found that the revocation of the public necessity of the mine amounted to an indirect expropriation without payment of prompt, adequate, and effective compensation and in breach of due process.[132] The Tribunal noted that 'those members of the indigenous population that opposed the Santa Ana Project have achieved their wishes: the Project is well and truly at an end. However, this does not relieve Respondent from paying reasonable and appropriate damages for its breach of the FTA.'[133] The members of the Arbitral Tribunal disagreed on how to assess damages.

The Tribunal noted that 'the ILO Convention 169 imposes direct obligations only on States. Contrary to Respondent's arguments, private companies cannot "fail to comply" with ILO Convention 169 because it imposes no direct

[120] Id. p. 15.
[121] *Bear Creek Mining Corporation v. Republic of Perú*, Award, para. 226.
[122] Id. para. 232.
[123] Id. para. 235.
[124] Id. para. 242.
[125] Id. para. 246.
[126] Id. para. 347.
[127] Id. para. 347.
[128] Id. para. 401.
[129] Id. para. 406.
[130] Id. para. 407.
[131] Id. para. 412.
[132] Id. paras 416, 447–448.
[133] Id. para. 657.

obligations on them. The Convention adopts principles on how community consultations should be undertaken, but does not impose an obligation of result. It does not grant communities veto power over a project.'[134]

In his Partial Dissenting Opinion, appended to the final award,[135] Arbitrator Philippe Sands disagreed 'with the Majority's assessment of the amount of damages that are due … and in particular the failure to reduce that amount by reason of the fault of the Claimant in contributing to the unrest.'[136] For the Arbitrator, 'the Project collapsed because of the investor's inability to obtain a "social license", the necessary understanding between the Project's proponents and those living in the communities most likely to be affected by it.'[137] The Arbitrator pointed out that 'the viability and success of a project such as this, located in the community of the Aymara peoples … was necessarily dependent on local support.'[138] For the Arbitrator, '[t]he fact that Claimant did not—on the evidence before the Tribunal—take real or sufficient steps to address those concerns and grievances, and to engage the trust of all potentially affected communities, appears to have contributed, at least in part, to some of the population's general discontent with the Santa Ana Project.'[139] The Arbitrator held that 'the investor's outreach programme was inadequate: it failed to involve all the potentially affected communities, offering jobs only to some and engaging in consultations which were uneven and insufficient across the totality of communities'.[140] He concluded that '[t]he Canada-Peru FTA is not … an insurance policy against the failure of an inadequately prepared investor to obtain such a license.'[141] Therefore, Sands argued, the amount of damages should be reduced.[142]

Referring to the preamble of the ILO Convention 169, to which Peru is a party, Sands highlighted that such preamble 'recognizes "the aspirations of [indigenous and tribal] peoples to exercise control over their own institutions, ways of life and economic development and to maintain and develop their identities, languages and religions, within the framework of the States in which they live", and calls attention to "the distinctive contributions of indigenous and tribal peoples to the cultural diversity … of humankind and to international cooperation and understanding"'. For the Arbitrator, '[t]his preambular language offers encouragement to any investor to take into account as fully as possible the aspirations of indigenous and tribal peoples.'[143]

Although Article 15 of the ILO Convention 169 imposes the duty to consult indigenous peoples on governments, rather than investors, 'the fact that the Convention may not impose obligations directly on a private foreign investor as

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[134] Id. para. 664.

[135] *Bear Creek Mining Corporation v. Republic of Peru*, ICSID Case No. ARB/14/21, Partial Dissenting Opinion, Professor Philippe Sands, QC, 12 September 2017.

[136] Id. para. 4.

[137] Id. para. 6.

[138] Id.

[139] Id. para. 19.

[140] Id. para. 33.

[141] Id. para. 37.

[142] Id. para. 4.

[143] Id. para. 7.

such does not, however, mean that it is without significance or legal effects for them.'[144] Rather, the Arbitrator pointed out that human rights 'are complemented by an obligation on all parts, public and private parties, not to engage in activity aimed at destroying such rights.'[145] The Arbitrator added that '[a]s an international investor, the Claimant has legitimate interests and rights under international law; local communities of indigenous and tribal peoples also have rights under international law, and these are not lesser rights'.[146] The Arbitrator also noted that for the Aymara peoples, pre-Inca communities that have been in Peru for centuries,[147] 'this land is not only a geographical space'; rather, the guardian mountains 'represent extremely important spiritual sanctuaries for all the population in the area.'[148]

Analogously, in a pending arbitration, *Cosigo Resources, and others v. Colombia*,[149] the claimants contend that the creation of a national park amounted to a wrongful expropriation of their gold mining concession.[150] Reportedly, 'the prospect of extractive activity in the area sparked conflict among local indigenous groups'.[151] The claimants state that although state authorities had approved the project,[152] the creation of the Yaigojié Apaporis national park led to the suspension of all mining activities in the area of the mining concession.

In its response, Colombia refers to its constitutional and international law obligations to protect biodiversity and indigenous peoples' rights (referring to both the Convention on Biological Diversity[153] and the ILO Convention 169).[154] In fact, the Amazonian forest is one of the richest areas of the world in biological and cultural diversity.[155] Therefore, the establishment of a natural park was intended to protect the natural and cultural values associated with it. The respondent then raises a number of jurisdictional and substantive objections. As the case is still in an early phase, it is not possible to foresee whether the case will be settled or how the arbitral tribunal will decide it.

4. Critical Assessment

What is the relevance of these and similar arbitrations to international investment law, international cultural law, and international law more generally?

144 Id. para. 10.
145 Id.
146 Id. para. 36.
147 Id. para. 25.
148 Id. para. 16 (internal reference omitted).
149 *Cosigo Resources, Ltd., Cosigo Resources Sucursal Colombia, Tobie Mining and Energy, Inc. v. Republic of Colombia*, UNCITRAL, Notice of Demand and Demand for Arbitration and Statement of Claim, 19 February 2016.
150 Id. para. 1.
151 Id. para. 11.
152 Id. para. 12.
153 United Nations Convention on Biological Diversity, 5 June 1992, in force 29 December 1993, 31 ILM 818.
154 *Cosigo Resources, and Others v. Colombia*, Respuesta de la República de Colombia a la Solecitud de Arbitraje de las Demandantes, 16 March 2016, paras 8–9.
155 Id. para. 11.

In several investment treaty arbitrations, economic interests intertwine with cultural concerns. In general terms, these cases have a significance that extends beyond international investment law itself because of their potential impact on cultural governance and international law as a whole.

From an international investment law perspective, these cases illustrate how arbitral tribunals have dealt with (or chosen not to deal with) cultural concerns. Arbitral tribunals have demonstrated some level of deference to state regulatory measures aimed at protecting cultural heritage when the host state has raised such cultural concerns.[156] However, arbitral tribunals have adopted a more cautious stance when cultural arguments were presented by *amici curiae* or by the claimants.[157] Local communities impacted by FDI do not have direct access to arbitral tribunals, and therefore their arguments must be espoused by their home government. While local communities can present *amicus curiae* briefs reflecting their interests, investment tribunals are not legally obligated to consider such briefs; rather, they have the ability to do so should they deem it appropriate.

Arbitrations related to cultural heritage demonstrate that international investment law is not a self-contained regime; rather, it is part and parcel of international law. International investment law is both influenced by, and can itself influence, international law. As one Tribunal explained, IIAs 'ha[ve] to be construed in harmony with other rules of international law of which it forms part, including those relating to human rights'.[158]

From an international cultural law perspective, disputes related to cultural heritage can affect the way international cultural law is implemented (or not). Not only can arbitral tribunals contribute to good governance in international economic relations, but they may also contribute to good *cultural governance* by expressing the need to govern cultural phenomena according to due process and the rule of law.[159] If private property is expropriated—whether directly or indirectly—compensation must be paid.[160] While states have the right to protect cultural heritage, they must treat foreign companies fairly and equitably.

At the same time, the interplay between the promotion of FDI and the protection of cultural heritage highlights the power imbalance between the two fields of international law and makes the case for rethinking and strengthening the current regime protecting cultural heritage. Even if there is no inherent tension between these two subfields of international law in theory, tensions often arise in practice. While the international investment regime is characterised by binding, effective, and timely dispute settlement mechanisms, international cultural law is characterised by a complex legal framework. There is no dedicated specialised international court empowered to adjudicate violations of

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156 *Glamis Gold v. United States*, Award.

157 *Grand River v. United States*, Award.

158 *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partuergoa v The Argentine Republic*, ICSID Case No. ARB/07/26, Award, 8 December 2016, para. 1200.

159 V. Vadi, 'Global Cultural Governance by Arbitral Tribunals: The Making of a *Lex Administrativa Culturalis*', 33 *Boston University International Law Journal* (2015) 101–138.

160 *Unglaube, Marion and Reinhard Hans Unglaube v. Republic of Costa Rica*, ICSID ARB No. 09/20, Award, 16 May 2012 (with regard to indirect expropriation); *Compañia del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica*, Award, 17 February 2000, ICSID Case No ARB/96/1, 39 ILM (2000) 1317 (with regard to direct expropriation).

international cultural law. Not only do most UNESCO instruments lack dispute settlement or compliance mechanisms, but they do not even include a clause listing possible dispute-resolution tools.

Certainly, a state's obligations to foreign investors under investment law cannot be used to justify violations of other obligations it has under international cultural law. For instance, in the *Sawhoyamaxa* case,[161] the Inter-American Court of Human Rights clarified that the state's investment law obligations did not exempt it from protecting and respecting the property rights of the Sawhoyamaxa.[162] Rather, the Court noted that compliance with investment treaties should always be compatible with the human rights obligations of the state.[163] Vice versa, compliance with international cultural law does not justify state breaches of international investment law obligations.

From a general international law perspective, the intersection of international investment law and international cultural heritage law constitutes a paradigmatic example of the possible interaction between different treaty regimes. The increased proliferation of treaties and specialization of different branches of international law make some overlap unavoidable. General treaty rules on hierarchy—namely *lex posterior derogat priori*[164] and *lex specialis derogat generali*[165]—may not be entirely adequate to govern the interplay between treaty regimes, because the given bodies of law do not exactly overlap; rather, they have different scopes, aims, and objectives.[166]

Can investment treaty tribunals take into account or apply other bodies of law in addition to international investment law? Customary norms of treaty interpretation as restated in the VCLT require, *inter alia*, adjudicators to take into account the context of a treaty, which includes any relevant rules of international law applicable in the relations between the parties. Nonetheless, given their institutional mandate, which is to settle investment disputes, there is a risk that investment treaty tribunals water down or overlook noteworthy cultural aspects of a given case. Arbitrators may not have specific expertise in international cultural law, as their appointment requires expertise in international investment law. Furthermore, due to the emergence of a *jurisprudence constante* in international investment law, there is a risk that tribunals do conform to these *de facto* precedents without necessarily considering analogous heritage-related cases adjudicated before other international courts and tribunals. This is not to say that consistency in decision-making is undesirable; clearly, it can enhance the coherence and predictability of the system contributing to its legitimacy.

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161 Inter-American Court of Human Right, *Case of the Sawhoyamaxa Indigenous Community v. Paraguay*, Judgement of 29 March 2006, Merits, Reparations and Costs.

162 Id. para. 140.

163 Id.

164 VCLT Article 30.

165 See Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law, adopted by the International Law Commission at its Fifty-eighth session, in 2006, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/61/10, para. 251), p. 2.

166 Donald McRae, 'International Economic Law and Public International Law: The Past and the Future', 17 *Journal of International Economic Law* 627 (2014) 635.

However, the selection of the relevant precedents matters, as it can impact the decision.

5. Policy Options

After having critically assessed the interplay between international investment law and international cultural law, and highlighted the power imbalance between the two systems, which perpetuates the power imbalance among states, investors, and local communities, this section now examines two avenues that can facilitate a better balance between the public and private interests in international investment law: 1) a 'treaty-driven approach'; and 2) a 'judicially driven approach.'[167]

5.1 A Treaty-Driven Approach to Promote the Consideration of Cultural Concerns in International Investment Law

A text-driven approach suggests reform to bring international investment law better in line with cultural concerns.[168] It promotes the consideration of cultural heritage in international investment law, relying on the periodical (re)negotiation of IIAs. Treaty drafters can expressly accommodate the protection of cultural heritage in the text of future IIAs or renegotiate existing ones.[169] For instance, reference to the protection of cultural heritage could be inserted in the preambles, exceptions, carve-outs, and annexes of IIAs.[170] In this regard, IIAs might empower states to adopt special measures to protect cultural heritage.

Yet, state practice remains uneven. Most existing IIAs do not contain any explicit reference to cultural heritage. Moreover, IIAs generally include 'survival clauses that guarantee protection under the treaty … for a substantial period after the treaty has elapsed'.[171] Therefore, 'it is unrealistic to expect that treaty drafting can solve the conflict between [international investment law] and other community interests on its own'.[172] While countries gradually rebalance their IIAs, it is crucial to consider other mechanisms to promote the consideration of cultural heritage in international investment law and arbitration.[173]

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[167] Mihail Krepchev, 'The Problem of Accommodating Indigenous Land Rights in International Investment Law', 6 *Journal of International Dispute Settlement* (2015) 42–73, 45.
[168] Stephan W. Schill and Vladislav Djanic, *International Investment Law and Community Interests*, SIEL WORKING PAPER No. 2016/01 (2016), 1–27, 4.
[169] Vadi, *Cultural Heritage in International Investment Law and Arbitration*, 277–286.
[170] Schill and Djanic, *International Investment Law and Community Interests*, 15.
[171] Id. 16.
[172] Id.
[173] Id.

5.2 A Judicially Driven Approach to Promote the Consideration of Cultural Heritage in International Investment Arbitration

A judicially driven approach suggests that international investment law already possesses the tools needed to address the interplay between investors' rights and community interests.[174] Such an approach promotes the consideration of cultural heritage in international investment law, relying on its interpretation and application by arbitral tribunals. Its implicit assumption is that '[w]hile [international investment law] is a highly specialized system, it is not a self-contained one, but forms part of the general system of international law'.[175]

Arbitral tribunals have limited jurisdiction and cannot adjudicate on the infringement of international cultural law. Yet, according to customary rules of treaty interpretation restated in the VCLT, when interpreting a treaty, arbitrators can take other international obligations of the parties into account.[176] Therefore, arbitral tribunals can and should interpret international investment law in conformity with the system to which it belongs.[177] As mentioned, international investment law is not a self-contained regime, but constitutes an important field of international law. As such, it should not frustrate the aims and objectives of the latter, which include the protection of cultural heritage, cultural rights, and the rights of indigenous peoples. Rather, arbitral tribunals should interpret international investment law taking into account 'any relevant rules of international law applicable in the relations between the parties'.[178] Moreover, some norms protecting cultural entitlements have acquired *jus cogens* status.[179]

Examples of binding cultural entitlements abound. For instance, Article 1 of both the International Covenant on Civil and Political Rights (ICCPR)[180] and the ICESCR[181] recognise the right of self-determination, i.e., the peoples' right to 'freely determine their political status and freely pursue their economic, social, and *cultural* development'.[182] The same provision also clarifies that international economic co-operation is 'based upon the principle of mutual benefit, and international law' and that 'in no case may a people be deprived of its own means of subsistence'.[183] Significantly, the principle of self-determination is commonly regarded as a *jus cogens* rule. A number of UNESCO instruments have been widely ratified.

There are additional instances of non-binding cultural entitlements. For instance, indigenous culture plays a central role in the UNDRIP. Although the

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[174] Id. 4.
[175] Id. 16.
[176] VCLT Article 31(3)(c).
[177] Schill and Djanic, *International Investment Law and Community Interests*, 16.
[178] VCLT, Article 31(3)(c).
[179] VCLT Article 53. On *jus cogens* and international investment law, see Valentina Vadi, 'Jus Cogens in International Investment Law and Arbitration', 46 *Netherlands Yearbook of International Law* (2015) 357–388.
[180] International Covenant on Civil and Political Rights (ICCPR), 16 December 1966, in force 23 March 1976 (1967) 6 ILM 368 *et seq*.
[181] International Covenant on Economic, Social, and Cultural Rights (ICESCR), adopted 16 December 1966, in force 3 January 1976, (1967) 6 ILM 360 *et seq*.
[182] ICCPR, Article 1.1 and ICESCR, Article 1.1 (emphasis added).
[183] ICCPR, Article 1.2 and ICESCR, Article 1.2.

UNDRIP *per se* is not binding, it can coalesce in customary international law and therefore become binding. Some of its contents already express customary international law or repeat provisions appearing in binding treaty law.

In conclusion, international investment law does not provide much consideration to cultural heritage, particularly in the texts of international investment agreements. International arbitral tribunals have limited or no specific mandate to protect cultural heritage. Nonetheless, international law can influence the interpretation and application of international investment law, especially when applied to cultural entitlements that are binding or have a peremptory character. Interpretation in conformity with general international law is required by the principle of systemic integration as restated in Article 31(3)(c) of the VCLT.

Yet, despite the possibilities offered by treaty drafting and systemic interpretation, the consideration of cultural heritage in international investment law and arbitration remains far from widespread. On the contrary, arbitral tribunals often seem reticent to refer to, let alone consider, cultural entitlements. Therefore, increased efforts by all actors involved—treaty negotiators, arbitrators, academics, and local communities—are needed to foster such consideration.

Conclusions

The review by an international tribunal of domestic regulations can improve good cultural governance and the transparent pursuit of legitimate cultural policies. While each state retains the right to regulate within its own territory, international investment law poses vertical constraints on such a right. Adherence to this international regime adds a circuit of external accountability, forcing states to consider the interests of the investors affected by their policies. The growing importance of such tribunals means that most governments will need to consider the impact of regulations (including cultural policies) on foreign investors and their investments before enacting such measures in order to avoid potential claims and subsequent liability.[184] Whether this may cause a regulatory chill remains a matter of debate.[185]

At the same time, international investment law is not a self-contained regime; rather, it is part and parcel of public international law and needs to develop in conformity with it. Arbitral tribunals should take cultural concerns into account in light of customary rules of treaty interpretation as restated by the Vienna Convention and should settle investment disputes 'in conformity with principles of justice and international law.'[186]

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[184] E. Benvenisti, 'Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders', 107 AJIL (2013) 295.

[185] K. Tienhaara, 'Regulatory Chill and the Threat of Arbitration: A View from Political Science', in C. Brown and K. Miles (eds.) *Evolution in Investment Treaty Law and Arbitration* (Cambridge: CUP 2011).

[186] VCLT, preamble.