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International Investment Law and the Tangible and Intangible Aspects of Cultural Heritage: Substantive Discipline and Dispute Settlement Interactions

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Relazione di Dottorato – Dottorato in Diritti Umani: Evoluzione, Tutela e Limiti in Cotutela con l'École Normale Supérieure de Cachan/Université Paris Saclay

Dottorando: Gabriele Gagliani - XXIX Ciclo

Tesi: “International Investment Law and the Tangible and Intangible Aspects of Cultural Heritage: Substantive Discipline and Dispute Settlement Interactions”

I tre anni di dottorato, effettuato in co-tutela all'Università degli Studi di Palermo (co-direttore di tesi il prof. Massimo Starita) e dell'École Normale Supérieure de Cachan/Université Paris Saclay (co-direttore di tesi la prof.ssa Marie Cornu), e con i co-direttori di tesi i professori Claudio Dordi e Laurent Manderieux dell'Università Commerciale Luigi Bocconi, mi hanno permesso di ampliare notevolmente le mie conoscenze e competenze. Le ricerche svolte per la mia tesi, sviluppata su *“International Investment Law and the Tangible and Intangible Aspects of Cultural Heritage: Substantive Discipline and Dispute Settlement Interactions”* e redatta in inglese, mi hanno portato ad approfondire in maniera interdisciplinare questioni legate ai diritti umani, con particolare attenzione ai diritti culturali, ma anche, come indicato dal titolo stesso, problemi posti dal diritto internazionale degli investimenti e dal diritto internazionale della cultura e del patrimonio culturale.

Muovendo dai pochissimi studi effettuati sul tema, la mia ricerca si è orientata sull'analisi dei trattati internazionali esistenti e sulle dispute internazionali che coinvolgono gli investimenti stranieri e il patrimonio culturale. In tal modo ho cercato di analizzare e mettere in luce tutte le possibili sfaccettature della complessa relazione esistente tra questi due settori. Tutte le attività poste in essere mi hanno fatto pervenire alla conclusione che il diritto internazionale degli investimenti, pur mirato a disciplinare gli investimenti stranieri, può tuttavia rappresentare un valido alleato per la protezione e la salvaguardia del patrimonio culturale nelle sue diverse forme.

In particolare, la possibilità prevista dall'accordo di co-tutela di svolgere le attività legate al dottorato anche durante il periodo di ricerca all'estero presso l'École Normale Supérieure de Cachan/Université Paris Saclay, usufruendo dei materiali e delle infrastrutture di questa Istituzione, mi ha fornito ulteriori stimoli di riflessione e mi ha consentito di estendere ulteriormente il mio campo di ricerca. Ho potuto anche tenere presso la suddetta Università due seminari sul tema *“L'investissement portant sur un contrat de sauvetage maritime de patrimoine culturel”* il 25 gennaio 2016, e sul tema *“Le Patrimoine Culturel Immatériel et le Droit International”* il 10 settembre 2015. Ho inoltre redatto due rapporti su questi temi per il gruppo di ricerca *Droit, Patrimoine et Culture – Nouveaux Champs de Recherches*, diretto dalla Prof.ssa Cornu.

Oltre ai seminari seguiti a Palermo, Parigi e Milano nell'ambito delle attività del programma di dottorato in co-tutela e co-direzione di tesi, ho avuto modo di partecipare a numerose conferenze e cicli di seminari e corsi collegati ai temi della mia ricerca. Segnalo qui di seguito solo i più rilevanti:

- Sono stato relatore sul tema *“The Expropriation of Cultural and Natural Heritage and of Heritage-Related Rights under International Law – Bridging Public Interest and Private Profit”*, alla conferenza organizzata, tra gli altri, dalla European Society of International Law (ESIL/SEDI) presso l'Università di Bologna/Campus di Ravenna il 27 e 28 ottobre 2016 e incentrata su *“UNESCO World Heritage Between Education and Economy – A Legal Analysis”*. Il tema della mia relazione, concernente la regolamentazione dell'espropriazione del patrimonio culturale e naturale e dei diritti umani collegati, costituisce uno degli argomenti più salienti da me trattati nella tesi di dottorato.

- Ho partecipato all'edizione 2015 e 2016 della Transatlantic Intellectual Property Summer Academy. Nell'edizione del 2015, che ha avuto luogo presso la Universidad de Barcelona dal 22 al 26 giugno 2015, sono stato relatore sul tema "*Cultural Products and International Trade*". Nell'edizione 2016, presso la Universidad de Alicante dal 5 al 9 settembre 2016 sono stato relatore sul tema "*International Cultural Heritage Law and International Technology Transfer and Investment Law: from Treaty Provisions to Investment Arbitration*".

- Sono stato relatore sull'argomento "*International Investment Disputes and Intellectual Property: The Technical Reasons of an Inappropriate Marriage*" alla Biennial Conference della Society of International Economic Law (SIEL), a Johannesburg (Sud Africa) il 7, 8 e 9 luglio 2016, incentrata su "*International Economic Law in a Diverse World*". L'articolo relativo alla relazione, che discute criticamente del rapporto tra i diritti degli investitori stranieri e dei diritti di proprietà intellettuale, è stato accettato per la pubblicazione sul *Journal of World Trade* Vol.51, Iss.2, (April 2017).

- Sono stato relatore in merito al tema "*The International Court of Justice and Cultural Heritage: International Cultural Heritage Law Through the Lenses of the World Court Jurisprudence?*" alla conferenza tenutasi alla Georgetown University Law Center, Washington D.C. (U.S.A.), il 29 e il 30 marzo 2016, riguardante "*Intersections in International Cultural Heritage Law*". Su proposta del Comitato Scientifico della conferenza, il mio articolo sulla relazione è in corso di pubblicazione in un volume collettaneo.

- Sono stato relatore sull'argomento "*The Interpretation of General Exceptions in International Trade and Investment Law: Is a Sustainable Development Interpretive Approach Possible?*" alla 2014 Biennial Research Conference della American Society of International Law (ASIL) presso la città di Denver, Colorado (U.S.A.) il 13, 14 e 15 novembre 2014, concernente "*Reassessing International Economic Law and Development: New Challenges for Law and Policy*". L'articolo che ho scritto per la relazione è stato pubblicato sul *Denver Journal of International Law and Policy* Vol.43, No.4 (2015).

- Ho partecipato al 27th Helsinki Summer Seminar on "*International investment Law: Between Public and Private?*" organizzato dall'Erik Castrén Institute of International Law and Human Rights con la University of Helsinki, Faculty of Law, svoltosi a Helsinki (Finlandia) dal 18 al 29 agosto 2014. Oltre a seguire i corsi ho anche sostenuto l'esame finale del Summer Seminar, ottenendo così il relativo Diploma con distinzione (*with distinction*).

- Ho partecipato come membro del Comitato Scientifico all'organizzazione di due conferenze internazionali tra loro collegate. La prima, sul tema "*Besoins Humains Fondamentaux, Éthique et Droit des Affaires*", si è tenuta all'Università Bocconi il 26 maggio 2014; la seconda, riguardante "*Éthique, Affirmations Identitaires et Culturelle et Droit International de l'Économie*", si è svolta presso l'Università della Valle d'Aosta il 18 dicembre 2015. Entrambe le conferenze hanno potuto contare sull'appoggio e la cooperazione, tra gli altri, dell'Ambasciata di Francia in Italia e dell'Institut Français. Un volume collettaneo nel quale è inserito un mio contributo su "*Regards croisés sur les conventions UNESCO et le droit international de l'économie: entre interactions pratiques et gouvernance mondiale*" è in corso di pubblicazione nella collana CIDOIE di G. Giappichelli Editore.

- Sono stato relatore per l'Institut Français/ Centre Saint Louis di Roma in merito a "*Les Formations en Droit*" in occasione del "*Forum Franco-Italien Journées d'Informations sur les Études Supérieures en France et en Italie et sur les Filières Franco-Italiennes*", che ha avuto luogo il 29 e 30 novembre 2014.

Infine, ho avuto l'opportunità di svolgere varie attività come assistente di insegnamento e di ricerca in diversi corsi, tra i quali il corso di Diritto Internazionale presso l'Università Commerciale Luigi Bocconi a Milano. Come chargé de cours presso l'Université Senghor de la Francophonie ho prestato assistenza per il corso *Protection et Transmission du Patrimoine Culturel*, nell'ambito di un Master en Relations Internationales – Spécialité en Développement Europe-Afrique.

Short Summary of the Thesis in English

The relationship between international investment law and cultural heritage has commanded little attention and only recently. Certainly, international investment law has become one of the most prominent branches of international law. Its development has been strictly connected to the soaring growth of bilateral treaties on the promotion and protection of foreign investment and free trade agreements with foreign investment chapters. In turn, the status and place of cultural heritage under international law has grown, significantly progressing from some provisions included in international humanitarian conventions on the protection of heritage during armed conflicts.

In light of the few studies existing on the subject of this thesis, which have in general concluded that conflictual and ambiguous relations exist between international investment law and cultural heritage, this thesis proposes to analyze this relation from both the substantive and dispute settlement standpoints.

The idea that the relation between foreign investment and cultural heritage, regulated in different ways and 'intensities' by international law, could be positive was a general premise for all the research. Indeed, among investments, foreign investments have a great importance in a moment of economic crisis and difficulty in finding appropriate resources to safeguard heritage. Investments are hence vital for culture.

The researches and analyses carried out for the thesis have shown that investment treaties often contain a number of provisions concerning culture and cultural heritage. With regard to international disputes, investment disputes have involved or touched upon different cultural forms and expressions: from UNESCO sites to cultural industries, to *lieux de mémoire* and indigenous communities' heritage. Further, quite surprisingly, the international rules protecting foreign investors have sometimes been invoked, or resorted to, by subjects that had invested specifically in cultural 'resources' or to protect economic activities based on indigenous communities' culture.

The studies and researches carried out for this thesis have made it possible to reach and demonstrate a number of conclusions. First, the researches carried out have demonstrated that foreign investments are necessary to protect, safeguard, preserve and promote any form of cultural expression, and a strong interaction exists between the international regulation of foreign investments and cultural heritage. It has thus been shown that there exists a symbiotic relationship between international investment law and cultural heritage. Second, it has been possible to prove that, within international culture and cultural heritage law, there exists a 'legitimate space' for international investment law. Symmetrically, international investment arbitration can represent a valid cultural dispute settlement mechanism. Lastly, it is possible to assert that merging international rules on foreign investments and international rules on culture or cultural heritage can lead to create, or support the existence of, a more transparent, legitimate and rule-of-law-based system.

In the light of all these considerations, the research, analysis and reflection carried out for the thesis has demonstrated how positive the relation between international investment law and cultural heritage can be for states and the society. This, without denying any potentially negative effect. One might hope that the results obtained allow to adapt any practice in the field of culture. The protection of cultural heritage can indeed be strongly enhanced through the regulation of foreign investment.

Résumé Bref de la Thèse en Français

(‘Le droit international des investissements et les aspects tangibles et intangibles du patrimoine culturel : discipline substantielle et règlement des différends’)

La relation entre droit international des investissements et patrimoine culturel a fait l’objet de rares études et réflexions, et ce uniquement de manière récente. D’une part, le droit international des investissements a connu une croissance et un développement considérables uniquement dans les dernières trois décennies. D’autre part, comme certains auteurs l’ont souligné, le patrimoine culturel a un statut quelque peu ‘incertain’ en droit international.

À la lumière des rares études sur ce sujet, qui généralement mettent en évidence les rapports conflictuels et ambigus entre droit international des investissements et patrimoine culturel, la thèse s’est proposée d’analyser la relation existant entre la réglementation internationale des investissements étrangers et le patrimoine culturel dans ses multiples expressions, et cela aussi bien sur le plan des règles substantielles que du contentieux et de la résolution des différends d’investissements concernant la culture.

L’idée que la relation entre les investissements étrangers et le patrimoine, réglés par le droit international de manière et amplitude différentes, puisse apporter des avantages mutuels a servi de prémisse générale pour toutes les études menées dans le cadre de la thèse. Parmi les investissements, les investissements étrangers revêtent une grande importance dans les périodes de crise économique et de difficulté à rassembler les ressources nécessaires à préserver le patrimoine. Les investissements sont donc vitaux pour la culture. Cela ne contredit pas l’idée qu’il existe des situations de ‘conflit’, quand les activités économiques peuvent potentiellement causer des dommages et/ou représenter un danger pour le patrimoine.

Les recherches et les analyses effectuées ont montré que les traités en matière d’investissements contiennent souvent plusieurs dispositions concernant la culture et le patrimoine culturel. En matière de litiges, les différends d’investissement ont impliqué ou touché aux formes et expressions les plus variées de la culture : des sites UNESCO patrimoine de l’humanité aux industries culturelles, aux lieux de mémoire et au patrimoine des communautés indigènes. En outre, d’une façon quelque peu surprenante et inattendue mais significative, les règles qui protègent les investisseurs internationaux ont été invoquées par des investisseurs qui avaient réalisé des investissements dans les biens et ‘ressources’ culturelles ainsi que pour défendre les activités économiques relatives au « capital culturel » des communautés indigènes.

Les diverses études conduites dans le cadre de la présente thèse ont permis de montrer plusieurs aspects et facettes de la relation entre investissements étrangers et patrimoine et de tirer diverses conclusions. Les recherches effectuées ont montré la nécessité d’investissements étrangers pour la protection, sauvegarde, conservation et valorisation de chaque expression culturelle, et les avantages d’une interaction entre régulation internationale des investissements et patrimoine culturel : la relation symbiotique entre droit international des investissements et patrimoine culturel a été démontrée. Cette première réflexion conclusive « soulève » un deuxième élément : il existe, dans le droit international de la culture et du patrimoine, un espace légitime et ample réservé au droit international des investissements. Symétriquement, l’arbitrage d’investissements peut représenter un instrument valide de résolution des différends en matière de patrimoine. Enfin, on peut soutenir que l’intersection des règles internationales en matière d’investissements étrangers avec les règles internationales en matière culturelle peut être déterminante dans la création, ou soutenir la présence,

d'un système qui tienne compte – à travers des standards précis de transparence, légalité et légitimité
– de l'ensemble des intérêts impliqués.

Substantive Summary of the Thesis in English

A. Introduction: Foreign investment and Cultural Heritage in International Law

The relationship between international investment law and cultural heritage has commanded little attention and only recently. On the contrary, other similar topics have been at the center of scholarly and institutional debates and discussions. The relation between international trade law and culture is a good example (intended as trade in goods, trade in services and intellectual property, under the three key agreements administered by the World Trade Organization, WTO).

Certainly, international investment law has become one of the most prominent branches of international law. Its development has been strictly connected to the soaring growth of bilateral treaties on the promotion and protection of foreign investment and free trade agreements with foreign investment chapters. The rules stemming from these treaties have become relevant where foreign investors, once the necessary conditions have been met, decide to invest in another state, the host state. In addition, the possibility for foreign investors to file claims with *ad hoc* investment arbitral tribunals or investment arbitral tribunals constituted and administered by international institutions (first and foremost the *International Centre for the Settlement of Investment Disputes*, ICSID, in Washington D.C.) through arbitral clauses included in treaties, contracts or legislations, has allowed this field of international law to expand further. Investment law has thus partly overlapped with other sectors, ranging from the environment to energy, from intellectual property to culture, from local traditions to cultural property. In turn, the status and place of cultural heritage under international law has grown, significantly progressing from some provisions included in international humanitarian conventions on the protection of heritage during armed conflicts. As a result, a substantial *corpus* of rules applicable to heritage also in time of peace has emerged. Among these, it is worth mentioning the 1972 *Convention Concerning the Protection of the World Cultural and Natural Heritage* and the debated 2005 *Convention on the Protection and Promotion of the Diversity of Cultural Expressions*, both administered by the *United Nations Educational, Scientific and Cultural Organization*, UNESCO.

B. A Complex Relationship? Methodological and Research Perspective

The above-mentioned circumstances allow to evaluate the reasons for the 'relative novelty' of the subject of the interaction of international investment law and culture (relative novelty since, as noted in the thesis, the first investment dispute involving heritage dates back to the 1970s).

On this line, two salient points are worth mentioning. On the one hand, international investment law has experienced a remarkable growth and development in the last 30 years. The number of treaties on the subject keeps increasing, with no correlative intergovernmental institution to fix its features and assure a 'jurisprudential' coherence. Indeed, in international investment law, there exists no intergovernmental organization corresponding to the WTO, to centralize the multiple, and somehow divergent, initiatives in international trade law. On the other hand, as pointed out by some scholars, the status of cultural heritage under international law is somehow 'uncertain'. This despite the numerous conventions administered by the UNESCO and other international instruments

that, though often focusing specifically on other matters, such as human rights, intellectual property and biological resources, address the protection of heritage. Nowadays, it seems possible to talk about an 'international culture and cultural heritage law' as branch of international law concerning culture, a broader concept than the one of cultural heritage which however overlaps and is strictly connected to it. In this sense, the terms 'cultural and natural heritage', 'cultural heritage', 'cultural property', 'culture' are used here interchangeably. It is nonetheless worth noting that, as some scholars have pointed out, this field of international law is in part a 'terra incognita'. A field in constant evolution and with a complex and composite character, still not completely defined, and which overlaps and could be identified sometimes with a number of other fields of international law.

In light of the few studies existing on the subject of this thesis, which have in general concluded that conflictual and ambiguous relations exist between international investment law and cultural heritage, this thesis proposes to analyze this relation from both the substantive and dispute settlement standpoints. Methodologically, the research has focused on the analysis of treaties and conventions, giving precedence to the specific provisions and clauses of interests for the two branches of law studied here. Great attention has been paid to international disputes, even if not yet resolved and *in itinere*. Constant reference has been made to national (where existent) and international doctrine (where appropriate).

C. Substantive and Dispute Settlement Interactions Between Alliances and Synergies

The idea that the relation between foreign investment and cultural heritage, regulated in different ways and 'intensities' by international law, could be positive was a general premise for all the research. Indeed, investments are in general necessary for the protection, safeguard, transmission and valorization/exploitation of cultural heritage. Among investments, foreign investments have a great importance in a moment of economic crisis and difficulty in finding appropriate resources to safeguard heritage. Investments are hence vital for culture. This, even though it is undeniable that 'conflictual' situations might emerge in practice, where economic activities could potentially endanger and/or damage heritage. Nevertheless, the existence of these cases should not make us jump to hasty conclusions.

The researches and analyses carried out for the thesis have shown that investment treaties often contain a number of provisions concerning culture and cultural heritage. Among them, the s.c. 'exceptions' provisions, allowing to justify measure or conducts that would have otherwise been contrary to the treaty of reference, and 'carve outs', that exclude the application of the relevant treaty to specific matters or sectors, stand out. The distinction between these types of provisions is sometimes unclear. The cultural 'exemption' (or, as some call it, the 'cultural exception') under the *North American Free Trade Agreement*, NAFTA, which excludes the application of the NAFTA to measures or conducts adopted or maintained in connection with cultural industries (such as radio, television, cinema or press) is a classical example. Depending on the underlying treaty or agreement, culture and cultural heritage values are taken into consideration during the negotiation of investment treaties. Conversely, international conventions and bilateral agreements on cultural heritage do not refer to international investment law, though they sometimes refer to international trade law and intellectual property.

Besides those provisions that explicitly safeguard natural and traditional resources of a territory, the norms of one or the other branch of international law can be relevant even in the

interpretation and application of the specific treaties in the context of international disputes. The applicability of customary rules created in the framework of inter-state relations to investment disputes, often foreign investors (individual or companies) and host states, is not a matter on which doctrine and tribunals agree unanimously. However, in several cases, international customary rules or rules stemming from other international conventions have been referred to by arbitral tribunals in their analyses. Even the cultural circumstances and contexts where foreign investors had acted have sometimes been relevant in the arguments used by the parties in dispute and by arbitral tribunals to reach or support their conclusions.

With regard to international disputes, it is worth mentioning that no international tribunal or institutions is specialized in the resolution of cultural or cultural heritage disputes. This type of disputes has otherwise been dealt with, or resolved in, other fora, such as the International Court of Justice (ICJ) and the Dispute Resolution Mechanism (through the Dispute Settlement Body, DSB) at the WTO. These disputes have involved or touched upon different cultural forms and expressions: from UNESCO sites (*Southern Pacific Properties - Middle East - Limited v. Arab Republic of Egypt*; *Compañía del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica*; *Parkerings-Compagniet AS v. Republic of Lithuania*) to cultural industries (*Joseph Charles Lemire v. Ukrain*; *United Parcel Service of America Inc. v. Government of Canada*), to *lieux de mémoire* (*Renée Rose Levy and Gremcitel S.A. v. Republic of Peru*) and indigenous communities' heritage (*Glamis Gold, Ltd. v. The United States of America*). Further, quite surprisingly, the international rules protecting foreign investors have sometimes been invoked, or resorted to, by subjects that had invested specifically in cultural 'resources' (*Malaysian Historical Salvors, SDN, BHD v. The Government of Malaysia*; *Victor Pey Casado and Presidente Allende Foundation v. Republic of Chile*) or to protect economic activities based on indigenous communities' culture (*Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*).

Investment arbitral tribunals have showed some sensitivity and attention for international cultural heritage norms at different levels and in different ways. This should be however considered in the light of the fundamental, inherent character of arbitration. In arbitration, parties can choose arbitrators among individuals who are specialized in specific sectors relevant to the specific dispute at hands. However, arbitral tribunals have limited jurisdiction and in the circumscribed sources of (international) law on which these tribunals are based. In fact, as mentioned, arbitral tribunals can be created *ad hoc* or administered by an institution (such as ICSID). Conversely, for instance, the jurisdiction of the ICJ potentially extends to any legal dispute concerning any question of international law (Article 36 of the Statute of the International Court of Justice). In addition, arbitral tribunals are 'dissolved' once decided on the specific case for which they have been created for, contrary to permanent adjudicatory bodies such as the ICJ.

In both cases, they are created to know and judge on specific contentious matters, with a limited jurisdiction based on investment treaties. In truth, no treaty is created in a *vacuum*, and a universe of international norms and principles apply to treaties anyway. However, even if specifically allowed by provisions such as Article 42 of the Washington Convention of 1965 (which created ICSID), general international law norms can be imported *cum grano salis*, precisely for the nature of arbitration. Each investment arbitral tribunal is based on, and refers to, one or more specific treaties. Hence, it is not easy to enlarge the interpretative space and to apply general international law norms in the underlying cases. Any such interpretation or application has always to be based on a 'robust' and unassailable legal basis. Otherwise, arbitral decisions would risk to be illegitimate and could be annulled.

In addition, the researches carried out have allowed to deal with more specific subjects. Among them: the meaning of cultural heritage having a cultural and economic value; the expropriation of cultural and natural heritage and heritage-related rights (being it possible to expropriate intangible

assets such as contractual rights and intellectual property rights, as maintained by a well-established international jurisprudence); the contribution of international investment law to the good governance of the tangible and intangibles cultural resources of a territory through the promotion of specific transparency standards and respect for the rule of law.

D. Concluding Remarks: A 'Vital' Relationship Between Treaties and International Disputes

The studies and researches carried out for this thesis have made it possible to reach and demonstrate a number of conclusions.

A *caveat* is however necessary before proceeding. A number of investment disputes involving heritage both directly and indirectly have emerged recently. It remains to be ascertained whether host states will resort to arguments based on the legitimacy of cultural policies in these contentious cases, that cover different sectors, from infrastructure to telecommunication. It is too early to anticipate any of the arguments used by the parties, or any of the conclusions that the relevant investment tribunals will reach. In addition, one should not underestimate the difficulty of following and monitoring every and each aspect of these arbitral proceedings. If certain states have in fact adopted high transparency standards, making available to the public all the acts of arbitral proceedings they are parties to, other states do not consider transparency as a value, at least in this field. In light of the different arguments and reasoning adopted in these disputes and other that might arise in the meantime, the conclusions of this thesis cannot, and should not, be considered as absolute. Any change or nuance and clarification, if accepted by international tribunals and included in a well-established jurisprudence on any of the topics discussed in this work, might well require new reflections on the conclusions reached here.

With this *caveat* it is possible to address a first conclusion. First, the researches carried out have demonstrated that foreign investments are necessary to protect, safeguard, preserve and promote any form of cultural expression, and a strong interaction exists between the international regulation of foreign investments and cultural heritage. It has thus been shown that there exists a symbiotic relationship between international investment law and cultural heritage. In this type of relation, one of the beings involved (or both of them) draws mutual benefits from an alliance, though one of the two (or both) might represent a mortal danger for the other. In a similar fashion, international investment law can cause problems to cultural heritage in practice, but can also be a valid ally for recuperating, protecting, safeguarding and promoting this heritage. Concurrently, foreign investments are attracted by heritage, since investing near cultural or natural heritage, or in cultural industries, pays off significantly. The possibility that some conflicts arise should not lead to conclude that this entire relationship is conflictual or ambiguous, neither to doubt about the 'positive' nature of this relation. If these doubts are not expressed when one talks about human rights, that often conflict with each other and with cultural heritage, similarly this should not happen for the international regulation of foreign investment and heritage. The explicit inclusion of references and/or provisions on heritage or cultural industries in investment treaties and the (even though timid, fluctuating and 'balkanized') reference to international economic law instruments within international cultural heritage conventions support this conclusion.

This first concluding remark is connected to a second consideration. In light of the above, it has been possible to prove that, within international culture and cultural heritage law, there exists a 'legitimate space' for international investment law. In other words, if international conventions on

biological resources or human rights can be included among the founding instruments of international cultural law, investment treaties can equally be counted among these instruments. If one wishes to put in place efficient and effective cultural policies it is not possible to overlook international investment law. The more famous heritage sites are, and the higher number of visitors they feature, the stronger is the appeal for foreign investors that might help add value to local cultural resources. International investment regulation can thus be one of the key instruments for the safeguard and promotion of heritage. Further, the researches have shown that a certain flexibility and freedom exists for host states to adapt the obligations that they assume and the discipline of foreign investments through bilateral and multilateral instruments. Hence, when these instruments are negotiated, and even after if the possibility is duly 'included' in these instruments, it exists a 'room for maneuver' to regulate and channel foreign investments towards specific sectors, including culture. The norms and arbitral decisions that concur in creating international investment law can thus be fully included among international cultural heritage law instruments.

Symmetrically, international investment arbitration can represent a valid cultural dispute settlement mechanism. From the institutional viewpoint, it has already been noted that no cultural heritage-specialized international tribunal exists. For the sake of clarity, scholars and practitioners alike commonly refer to 'international investment arbitration', based on the sources of these tribunals' jurisdiction (international investment agreements, national legislation protecting foreign investors and/or contracts). This is the same terminology used along this thesis and the analysis of the interpretation (by scholars and international tribunals) and of the implementation of international investment instruments and cultural heritage shows that investment disputes involving heritage are actually real 'cultural heritage disputes'. Where culture is involved, there is no opposition or distinction between investment disputes and cultural heritage disputes, but full overlap. Investment arbitration is thus a dispute settlement mechanism that perfectly adapts to cultural and cultural heritage contentious cases. The possibility, as noted, to choose arbitrators who are specialized in both fields of international law studied here, and to adapt the arbitral proceedings to the specific needs of each case, represent important features. It is true that, as shown, there might be some problems with regard to the international law instruments to be applied in practice in each specific case. It is nonetheless possible to make a positive judgment on this settlement method for cultural disputes, even in light of the characteristics of other mechanisms, such as those provided by the ICJ or the WTO.

Lastly, it is possible to assert that merging international rules on foreign investments and international rules on culture or cultural heritage can lead to create, or support the existence of, a more transparent, legitimate and rule-of-law-based system. In this sense, it has been shown that culture is key for sustainable development – without it, no sustainable development can last. Bilateral cultural heritage treaties are the pillar for inter-state cooperation in cultural matters or for the restitution of cultural property. Investment treaties oblige states to maintain non-discriminatory conducts and to respect transparent procedures and legal rules. The work carried out for the thesis allow to conclude that the merging of these two fields has promoted the emergence of standards of conduct to protect heritage, as such and as an indirect effect of the adoption of adequate conduct following investment treaties. This is a further aspect of this positive relationship.

In the light of all these considerations, the research, analysis and reflection carried out for the thesis has demonstrated how positive the relation between international investment law and cultural heritage can be for states and the society. This, without denying any potentially negative effect. One might hope that the results obtained allow to adapt any practice in the field of culture. The protection of cultural heritage can indeed be strongly enhanced through the regulation of foreign investment.

Résumé Substantiel de la Thèse en Français

(‘Le droit international des investissements et les aspects tangibles et intangibles du patrimoine culturel : discipline substantielle et règlement des différends’)

A. Introduction : les investissements étrangers et le patrimoine culturel dans le droit international

La relation entre droit international des investissements et patrimoine culturel a fait l’objet de rares études et réflexions, et ce uniquement de manière récente. En revanche, d’autres thèmes voisins, ont été déjà au centre de recherches, débats et approfondissements, tant aux niveaux académique qu’institutionnel : le rapport entre droit international du commerce et la culture en général en est un exemple (dans sa triple ‘articulation’ – commerce de biens, commerce de services et propriété intellectuelle – résultant des trois accords fondamentaux administré par l’Organisation Mondiale du Commerce, OMC).

Le droit international des investissements s’est déjà affirmé comme une des branches les plus importantes du droit international. Cette « montée en puissance » est liée à l’augmentation exponentielle du nombre des traités bilatéraux relatifs à la promotion et protection des investissements étrangers, ou en matière de libre-échange contenant des sections spécifiques en matière d’investissement. L’ensemble de règles dérivant des traités revêt une signification importante chaque fois qu’un investisseur étranger, étant donné les conditions nécessaires pour se prévaloir de ces règles, décide d’investir dans un autre pays, l’état hôte. De surcroît, la possibilité pour les investisseurs étrangers de saisir des tribunaux arbitraux constitués *ad hoc* ou sous l’égide d’institutions internationales (le *Centre international pour le règlement des différends relatifs aux investissements*, CIRDI, à Washington D.C, au premier rang) à travers les clauses arbitrales contenues dans les traités, contrats et législations nationales, a conduit à une expansion significative de cette branche du droit international. Les nouveaux développements dans la matière ont touché différents secteurs, de l’environnement à l’énergie, de la propriété intellectuelle à la culture, et enfin, récemment, des traditions locales au patrimoine culturel. Le patrimoine culturel a donc vu grandir son importance et son statut dans le droit international, à partir de quelques dispositions de conventions sur le droit humanitaire concernant la protection du patrimoine en cas de conflit armé. En résulte un corpus substantiel de règles qui protègent le patrimoine culturel, désormais applicable même en temps de paix. Mentionnons, entre autres, la *Convention concernant la protection du patrimoine mondial, culturel et naturel* de 1972 et la *Convention sur la protection et la promotion de la diversité des expressions culturelles* de 2005, très controversée : les deux conventions, qui sont administrées par l’*Organisation des Nations unies pour l’éducation, la science et la culture*, UNESCO, revêtent une importance particulière.

B. Une relation complexe ? Perspective méthodologique et de recherche

D'une part, le droit international des investissements a connu une croissance et un développement considérables uniquement dans les dernières trois décennies. Le nombre de traités en matière d'investissements continue à augmenter, sans toutefois la création d'un 'siège institutionnel' qui permette d'en fixer les caractères et d'en assurer une cohérence 'jurisprudentielle'. Il manque en effet, en matière d'investissements, une organisation internationale qui, à l'instar de l'OMC en matière de commerce international, centralise des tendances et initiatives multiples et diverses. D'autre part, comme certains auteurs l'ont souligné, le patrimoine culturel a un statut quelque peu 'incertain' en droit international. Ceci alors même qu'existent aujourd'hui des conventions administrées par l'UNESCO et de nombreux autres instruments internationaux qui concernent sa conservation, bien que ces instruments se rapportent le plus souvent aux droits de l'homme, à la propriété intellectuelle et aux ressources biologiques.

Aujourd'hui, il semble possible de parler d'un '*droit international de la culture et du patrimoine culturel*' comme une branche du droit international qui touche à la culture, concept plus ample qui souvent se superpose avec celui de patrimoine culturel, auquel il est toutefois strictement rattaché. En ce sens, les termes 'patrimoine culturel et naturel', 'patrimoine culturel', 'culture' sont utilisés ici de façon interchangeable. Il faut cependant garder à l'esprit que, comme certains l'ont signalé, il s'agit en partie d'une '*terra incognita*', en évolution continue et à caractère complexe et composite, difficile à définir précisément, et qui coïncide et s'identifie parfois avec de nombreux autres secteurs du droit international.

À la lumière des rares études sur ce sujet, qui généralement mettent en évidence les rapports conflictuels et ambigus entre droit international des investissements et patrimoine culturel, la thèse s'est proposée d'analyser la relation existant entre la réglementation internationale des investissements étrangers et le patrimoine culturel dans ses multiples expressions, et cela aussi bien sur le plan des règles substantielles que du contentieux et de la résolution des différends d'investissements concernant la culture. Sur le plan méthodologique, la recherche a été centrée sur l'analyse de traités et conventions en privilégiant les dispositions et clauses d'intérêt pour les deux secteurs. Une attention particulière a été portée aux différends, même si certains sont toujours en cours. Référence constante a été faite à la doctrine nationale et internationale, chaque fois que cela était approprié.

C. L'Interaction entre investissements étrangers et le patrimoine au niveau des traités et conventions internationales et du contentieux

L'idée que la relation entre les investissements étrangers et le patrimoine, réglés par le droit international de manière et amplitude différentes, puisse apporter des avantages mutuels a servi de prémisse générale pour toutes les études menées dans le cadre de la thèse. Les investissements résultent en général nécessaires pour protéger, sauvegarder, transmettre et valoriser le patrimoine culturel. Parmi les investissements, les investissements étrangers revêtent une grande importance dans les périodes de crise économique et de difficulté à rassembler les ressources nécessaires à préserver le patrimoine. Les investissements sont donc vitaux pour la culture. Cela ne contredit pas l'idée qu'il existe des situations de 'conflit', quand les activités économiques peuvent potentiellement causer des dommages et/ou représenter un danger pour le patrimoine. L'existence de ces derniers cas ne doit donc pas conduire à des conclusions trop hâtives.

Les recherches et les analyses effectuées ont montré que les traités en matière d'investissements contiennent souvent plusieurs dispositions concernant la culture et le patrimoine

culturel: entre autres, les 'exceptions', des clauses qui permettent de justifier certaines mesures ou conduites normalement en violation des règles imposées par le traité spécifique, et les dispositions 'carve-out', qui excluent de l'applicabilité des traités auxquels elles sont rattachées à certains secteurs ou matières. La distinction entre ces types de clauses n'est toutefois pas toujours claire. L'"exemption" (ou exception) culturelle dans l'*Accord de libre-échange nord-américain*, ALENA, qui empêche que l'ALENA soit appliqué à des mesures ou des conduites adoptées ou maintenues en relations avec les industries culturelles (comme par exemple la radio, la télévision, le cinéma ou la presse) en est un exemple classique. En fonction des traités ou accords en question, certains secteurs ou certaines valeurs tels que la culture et le patrimoine sont souvent pris en considération pendant les négociations des accords en matière d'investissements. A l'inverse, les conventions internationales et les accords bilatéraux sur le patrimoine, tout en considérant parfois le droit international du commerce et la propriété intellectuelle, ne tiennent pas fondamentalement compte du droit international des investissements.

Au-delà des dispositions qui protègent explicitement les ressources naturelles et traditionnelles d'un territoire, les normes d'un secteur particulier du droit international peuvent devenir pertinentes dans le processus d'interprétation et d'application des traités au cours d'un différend. L'applicabilité de règles coutumières qui furent créées pour les relations interétatiques dans le contexte du droit international classique, au contentieux d'investissements, qui implique souvent un investisseur étranger (donc un individu ou une société) et l'état hôte de l'investissement étranger, n'est pas un point sur lequel la doctrine et les tribunaux internationaux font l'unanimité. Néanmoins, dans certains contextes, normes coutumières internationales ou règles contenues dans d'autres conventions ont été invoquées par les tribunaux arbitraux dans leurs analyses : les circonstances et l'environnement 'culturel' dans lesquels les investisseurs étrangers ont investi ont été décisives dans les argumentations des parties en cause et dans les argumentations utilisées par les tribunaux pour donner du poids à leurs décisions.

En matière de litiges, il faut avant tout relever qu'il n'existe pas au niveau international un tribunal ou une institution spécialisée dans la résolution des différends « culturels ». Ce type de différend a en fait été traité par différents fora, entre autres la Cour internationale de justice (CIJ) et l'Organe d'appel de l'OMC. Ces différends ont impliqué ou touché aux formes et expressions les plus variées de la culture : des sites UNESCO patrimoine de l'humanité (comme par exemple *Southern Pacific Properties - Middle East - Limited v. Arab Republic of Egypt*; *Compañia del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica*; *Parkerings-Compagniet AS v. Republic of Lithuania*) aux industries culturelles (*Joseph Charles Lemire v. Ukraine*; *United Parcel Service of America Inc. v. Government of Canada*), aux lieux de mémoire (*Renée Rose Levy and Gremcitel S.A. v. Republic of Peru*) et au patrimoine des communautés indigènes (*Glamis Gold, Ltd. v. The United States of America*). En outre, d'une façon quelque peu surprenante et inattendue mais significative, les règles qui protègent les investisseurs internationaux ont été invoquées par des investisseurs qui avaient réalisé des investissements dans les biens et 'ressources' culturelles (*Malaysian Historical Salvors, SDN, BHD v. The Government of Malaysia*; *Victor Pey Casado and Presidente Allende Foundation v. Republic of Chile*) ainsi que pour défendre les activités économiques relatives au « capital culturel » des communautés indigènes (*Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*).

Les tribunaux arbitraux d'investissements ont réservé une certaine sensibilité et attention aux normes internationales en matière de patrimoine culturel à différents niveaux. Ce fait doit être évalué à la lumière d'un caractère fondamental de l'arbitrage : cette méthode de résolution des différends suppose que les parties en conflit puissent choisir comme arbitres du différend des experts dans les secteurs relatifs au différend spécifique (secteurs du droit international mais aussi dans le secteur de l'investissement). Cette 'liberté de choix' implique toutefois que le tribunal arbitral ait une juridiction

extrêmement limitée pour juger sur des questions précises et sur la base d'un nombre restreint de sources de droit international. À l'inverse, par exemple, la juridiction de la CIJ s'étend potentiellement sur tous les différends d'ordre juridique ayant pour objet tout point de droit international (Article 36 du Statut de la Cour Internationale de Justice). De plus, cela implique que les tribunaux arbitraux soient dissous une fois jugé sur le cas spécifique pour lequel ils ont été créés, contrairement aux organismes permanents de résolution des différends tels que la CIJ.

Les tribunaux arbitraux internationaux peuvent être créés *ad hoc* ou être 'administrés' par une institution (comme dans le cas des tribunaux arbitraux ICSID). Mais, dans les deux cas, ils sont créés pour juger des différends spécifiques, avec une juridiction limitée qui se base souvent sur des traités internationaux d'investissements. Certes, aucun traité n'est créé dans un vide normatif et il existe un univers de normes et principes qui sont appliqués en relation aux traités. Mais, même en présence des provisions telles que l'Article 42 de la Convention de Washington (à la base de la création du CIRDI), des normes 'externes' peuvent être importées *cum grano salis* précisément basées sur la nature de la procédure arbitrale. Chaque tribunal fait référence à un ou plusieurs traités bilatéraux bien spécifiques et souvent très différents les uns des autres. En conséquence, étendre l'espace interprétatif et appliquer les normes internationales dans un sens général n'est pas simple pour les tribunaux arbitraux et doit être toujours basé sur une assise juridique solide et 'inattaquable'. S'il en était autrement, les décisions arbitrales risqueraient d'être considérées 'illégitimes' et pourraient faire l'objet d'un recours en annulation.

Enfin, les recherches conduites ont également permis d'aborder des thèmes plus spécifiques, et notamment, la signification du patrimoine culturel en tant que valeur économique ; l'expropriation de patrimoine culturel et naturel et des droits des investisseurs étrangers liés aux biens qui en font partie (puisque'il est bien possible exproprier des biens intangibles tels que les droits dérivant des contrats ou les droits de propriété intellectuelle, comme affirmé aujourd'hui par une jurisprudence bien établie au niveau international) ; et la contribution du droit international des investissements à la bonne gouvernance des richesses tangibles et intangibles d'un territoire, à travers la promotion de standards de transparence et règles de conduite spécifiques.

D. Remarques conclusives : une relation 'vitale' entre traités et différends internationaux

Les diverses études conduites dans le cadre de la présente thèse ont permis de montrer plusieurs aspects et facettes de la relation entre investissements étrangers et patrimoine et de tirer diverses conclusions.

Un avertissement toutefois s'impose avant de s'engager dans les conclusions. Grand nombre de différends concernant le patrimoine culturel, d'une manière directe ou indirecte, ont émergé récemment. Il reste à voir si les états hôtes feront recours à des arguments défensifs basés sur la légitimité des politiques culturelles dans les différends d'investissements récemment apparus. Il est trop tôt pour prédire la teneur des arguments qui pourraient être utilisés par les états impliqués dans ces litiges, et pour identifier les conclusions auxquelles pourraient parvenir les tribunaux arbitraux. De plus, il ne faut pas sous-estimer non plus la difficulté de « faire le suivi » de tous les aspects et développements de certains différends. Bien que certains états aient adopté des standards de transparence très élevés, en publiant tous les actes des différends dans lesquels ils sont impliqués, d'autres ne considèrent pas toujours la transparence comme essentielle, au moins dans ce domaine. Etant donné les différentes thèses soutenues par les parties en litige dans les différends *in itinere* ou

d'autres différends qui pourraient émerger entre-temps, les considérations faites dans la présente thèse ne peuvent donc pas revêtir une valeur absolue ou définitive. Chaque changement, nuance ou clarification effectués par une quelconque décision d'une jurisprudence compétente dans les thèmes discutés ici, pourrait en effet bien exiger des nouvelles réflexions sur les conclusions auxquelles cette étude est parvenue.

Ceci étant établi, il est maintenant possible de s'acheminer vers une première conclusion. Les recherches conduites ont montré la nécessité d'investissements étrangers pour la protection, sauvegarde, conservation et valorisation de chaque expression culturelle, et les avantages d'une interaction entre régulation internationale des investissements et patrimoine culturel : la relation symbiotique entre droit international des investissements et patrimoine culturel a été démontrée. Dans ce type de relation, une (ou deux) entité(s) bénéficient mutuellement d'une alliance, bien que l'un ou les deux d'entre eux puissent entrer en conflit ou représenter un danger pour l'autre entité. Ainsi le droit international des investissements, tout en pouvant imposer aux états hôtes des obligations qui pourraient limiter leur marge de manœuvre en matière de politiques culturelles dans la pratique, peut aussi représenter un allié précieux pour la récupération, la protection, la sauvegarde et la valorisation de ce patrimoine. La possibilité que des conflits émergent ne doit toutefois pas pousser à qualifier cette relation comme nécessairement conflictuelle, ni à mettre en doute que les règles internationales sur les investissements étrangers puissent renforcer la tutelle du patrimoine. Même les droits de l'homme sont souvent en conflit entre eux et en conflit avec le patrimoine culturel (comme par exemple dans le cas de certaines pratiques traditionnelles africaines qui sont contraires à certains droits humains), sans que la relation entre culture et droits de l'homme soit définie comme conflictuelle. L'inclusion de références ou clauses qui s'appliquent spécifiquement au patrimoine et aux industries culturelles dans les traités en matière d'investissements, et la connexion, quoique timide, irrégulière et partielle, des conventions sur le patrimoine aux instruments relatifs au droit international de l'économie renforce une telle considération.

Cette première réflexion conclusive « soulève » un deuxième élément : à la lumière de ce qui est affirmé ci-dessous, il existe, dans le droit international de la culture et du patrimoine, un espace légitime et ample réservé au droit international des investissements. Si les conventions en matière biologique et sur les droits humains font partie des instruments fondateurs du droit international du patrimoine culturel, les traités en matière d'investissements peuvent également pleinement en faire partie. Il n'est en effet pas possible d'ignorer le droit international des investissements lors de la mise en place de politiques culturelles concrètes et efficaces. Ainsi, plus la renommée et la fréquentation d'un site culturel particulier seront importantes, plus l'attrait exercé sur les investisseurs ayant une capacité, à travers les moyens à disposition, d'ajouter de la valeur aux ressources locales, sera fort. La réglementation internationale en matière d'investissements étrangers peut donc être l'un des instruments principaux pour sauvegarder et valoriser le patrimoine. En outre, les recherches conduites ont permis de relever une certaine flexibilité et liberté des états dans la modulation des obligations et de la discipline des investissements étrangers à travers les traités bilatéraux et les conventions multilatérales. Il existe par conséquent, au moment de la négociation de ces traités ou, si dûment inclus dans les traités, même successivement, une marge de manœuvre pour la réglementation et l'orientation des investissements vers des secteurs déterminés, comme la culture. Par conséquent, les normes et les décisions arbitrales qui concourent à constituer le droit international des investissements peuvent être pleinement pris en compte comme des instruments de droit international du patrimoine.

Symétriquement, l'arbitrage d'investissements peut représenter un instrument valide de résolution des différends en matière de patrimoine. D'un point de vue structurel, il a déjà été signalé qu'il n'existe pas un tribunal international spécialisé dans les différends relatifs au secteur culturel.

Pour être clair à cet égard, la thèse se réfère toujours à l'arbitrage international d'investissements en tenant compte de la base sur laquelle repose la juridiction du tribunal arbitral (par exemple traités bilatéraux d'investissements, législations nationales qui protègent les investisseurs étrangers, ou contrats entre les états/administrations publiques et les investisseurs). Ce schéma, suivi au cours des recherches conduites et l'analyse de l'interprétation (de la doctrine et des tribunaux internationaux) et de l'application des instruments internationaux en matière d'investissements et de patrimoine culturel, démontre que les différends d'investissements relatifs au patrimoine sont des vrais 'différends culturels'. Il n'y a pas d'opposition entre litiges d'investissements et litiges culturels mais coïncidence pleine. L'arbitrage d'investissements est donc l'un des mécanismes de résolution de différends qui peut s'adapter parfaitement aux différends culturels et relatifs au patrimoine. La possibilité, comme indiqué, de choisir des arbitres spécialisés dans les deux secteurs du droit international étudiés, et d'adapter la procédure arbitrale aux exigences spécifiques de chaque cas, procurent un outil particulièrement utile. Néanmoins il est vrai que, comme relevé, des problèmes sur la question des instruments internationaux applicables lors d'un litige peuvent surgir. Toutefois, il est possible d'exprimer un jugement généralement positif sur ce moyen de résolution des litiges culturels internationaux, et ce à la lumière des caractéristiques d'autres mécanismes, tels que celui fourni par la Cour internationale de justice et le Mécanisme de résolution des différends de l'OMC.

Enfin, on peut soutenir que l'intersection des règles internationales en matière d'investissements étrangers avec les règles internationales en matière culturelle peut être déterminante dans la création, ou soutenir la présence, d'un système qui tienne compte – à travers des standards précis de transparence, légalité et légitimité – de l'ensemble des intérêts impliqués. Dans ce sens, il est démontré que la culture est l'un des éléments fondamentaux du développement durable car sans elle il ne peut y avoir de développement durable. Les échanges culturels sont un élément clé du progrès, sans compter, bien entendu, l'importance du tourisme 'culturel' et des industries culturelles pour l'économie de chaque pays. Les traités bilatéraux en matière de patrimoine servent de pilier pour la coopération entre états en matière culturelle et pour la restitution du patrimoine. A l'inverse, Les traités sur les investissements étrangers obligent les états au maintien de conduites non discriminatoires et au respect de procédures transparentes selon les règles juridiquement établies. Le travail effectué pour la présente thèse a révélé qu'au moment où la culture et le patrimoine font l'objet d'investissements étrangers, les règles internationales sur les investissements étrangers protègent la culture et le patrimoine. En outre, indirectement, les traités en matière d'investissements imposent des standards de conduite aux états hôtes qui ont des répercussions positives sur les standards de protection, gestion et valorisation du patrimoine.

Au vu des observations qui précèdent, le travail de recherche, d'analyse et de réflexion effectué pour cette thèse a permis de démontrer combien la relation entre droit international des investissements et le patrimoine culture peut être avantageuse pour les états et pour la société : cela, sans nier les conflits qui émergent parfois entre investissements et culture. Il reste l'espoir que ce qui a été démontré puisse permettre dans la pratique d'adapter les politiques en matière culturelle, en tenant compte de la nécessité d'investissements étrangers. La tutelle du patrimoine culturel pourrait en effet bien utilement être renforcée au niveau de la réglementation internationale des investissements étrangers.

Sintesi Sostanziale della Tesi in Italiano

(‘Il Diritto Internazionale degli Investimenti e il Patrimonio Culturale Materiale e Immateriale: Disciplina Sostanziale e Interazioni a Livello di Risoluzione delle Controversie’)

A. Introduzione: gli Investimenti Stranieri e il Patrimonio Culturale nel Diritto Internazionale

La relazione tra il diritto internazionale degli investimenti e il patrimonio culturale è stata oggetto di studi e riflessioni soltanto in tempi recenti ed in maniera non esauriente. Altri temi, invece, sono stati al centro di ricerche, dibattiti e approfondimenti, sia a livello universitario che istituzionale: i rapporti fra il diritto internazionale del commercio (nella sua triplice articolazione - commercio di beni, commercio di servizi e proprietà intellettuale - risultante dai tre accordi fondamentali amministrati dall’Organizzazione Mondiale del Commercio, OMC) e la cultura ne sono un esempio.

Di certo, il diritto internazionale degli investimenti si è affermato nel tempo come uno dei rami più importanti del diritto internazionale. Tale ascesa è dovuta all’aumento esponenziale dei trattati bilaterali sulla promozione e protezione degli investimenti stranieri o in materia di libero commercio contenenti apposite sezioni concernenti gli investimenti. L’insieme delle regole derivanti da tali trattati ha assunto grande significato ogni qualvolta un investitore straniero, esistendo le condizioni per goderne, investe in un altro stato, lo stato recettore. La possibilità poi per gli investitori stranieri di adire tribunali arbitrali costituiti *ad hoc* o sotto l’egida di istituzioni internazionali (al primo posto *l’International Centre for the Settlement of Investment Disputes*, ICSID, a Washington D.C.) attraverso clausole arbitrali inserite in trattati, contratti o legislazioni nazionali, ha determinato un’ulteriore espansione di tale ramo del diritto internazionale. I nuovi sviluppi della materia hanno coinvolto diversi altri settori, dall’ambiente all’energia, dalla proprietà intellettuale alla cultura, dalle tradizioni locali al patrimonio culturale. A sua volta, quest’ultimo ha visto crescere la sua rilevanza e il suo status nel diritto internazionale, a partire da alcune disposizioni di convenzioni in materia di diritto umanitario riguardanti la protezione del patrimonio in casi di conflitto armato. Ne è derivato nel tempo un *corpus* sostanziale di regole a protezione del patrimonio culturale applicabile anche in tempo di pace. Tra queste, si possono menzionare la *Convenzione sulla Protezione del Patrimonio Mondiale, Culturale e Naturale dell’Umanità* del 1972 e la discussa *Convenzione sulla Protezione e la Promozione della Diversità delle Espressioni Culturali* del 2005, entrambe amministrare dall’*Organizzazione delle Nazioni Unite per l’Educazione, la Scienza e la Cultura*, UNESCO.

B. Una Relazione Complessa? Prospettiva Metodologica e di Ricerca

Le circostanze menzionate sopra permettono di svolgere diverse riflessioni sulla ragione della ‘relativa novità’ del tema dell’interazione tra diritto internazionale degli investimenti e cultura (relativa perché la prima controversia rilevante sull’argomento risale agli anni ’70).

Su questa linea, due punti si impongono all’attenzione. Da un lato, il diritto internazionale degli investimenti ha conosciuto una ‘crescita’ e uno sviluppo notevole solo negli ultimi 30 anni. Il numero dei trattati in materia di investimenti continua a crescere, senza tuttavia la correlativa creazione di una

‘sede istituzionale’ che permetta di fissarne i caratteri e di assicurare una coerenza ‘giurisprudenziale’. Manca infatti, in materia di investimenti, un’organizzazione internazionale la quale, come l’OMC in materia di commercio internazionale, accenti in qualche modo tendenze ed iniziative multiple e diverse. Dall’altro lato, come segnalato da parte della dottrina, il patrimonio culturale ha uno *status* ancora in qualche modo ‘incerto’ in diritto internazionale. Questo nonostante esistano diverse convenzioni amministrative dall’UNESCO specificamente relative alla cultura e al patrimonio e numerosi altri strumenti internazionali concernenti la cultura, pur riguardando spesso direttamente materie come i diritti umani, la proprietà intellettuale e le risorse biologiche.

Sembra dunque possibile oggi discutere di un ‘*diritto internazionale della cultura e del patrimonio culturale*’ quale ramo del diritto internazionale che interessa la cultura, concetto più ampio che spesso si sovrappone al patrimonio culturale e comunque vi è strettamente connesso. E i termini ‘patrimonio culturale e naturale’, ‘patrimonio culturale’, ‘cultura’ sono usati qui in maniera intercambiabile. Va però tenuto sempre presente che, come segnalato da alcuni, si tratta in buona parte di una ‘*terra incognita*’, in continua evoluzione e a carattere complesso e composito, non ancora completamente definito, il quale coincide e si identifica talvolta con numerosi altri settori del diritto internazionale.

Alla luce dei pochi studi esistenti sul tema, che generalmente hanno rilevato rapporti conflittuali e ambigui tra la regolamentazione internazionale degli investimenti stranieri e il patrimonio culturale, la presente tesi si è proposta di analizzare la relazione esistente tra questi ultimi sia in merito alla disciplina sostanziale che relativamente alla risoluzione delle controversie. Sul piano metodologico, la ricerca si è incentrata sull’analisi di trattati e convenzioni privilegiando le specifiche disposizioni e le clausole di interesse per entrambi i settori. Grande attenzione è stata altresì riservata alle controversie, anche non ancora risolte e dunque *in itinere*. È stato fatto poi costante riferimento alla dottrina nazionale (in verità quasi inesistente sul tema) e internazionale (ove appropriato).

C. Interazioni Sostanziali e a Livello di Risoluzione delle Controversie tra Alleanze e Sinergie

Premessa generale di tutta la ricerca è l’idea che la relazione accennata tra i due ambiti, entrambi ‘regolati’ dal diritto internazionale in modi e con ‘intensità’ diversi, sia in definitiva positiva. Gli investimenti in generale risultano infatti oggi strettamente necessari per proteggere, salvaguardare, tramandare e valorizzare il patrimonio culturale. Tra questi, quelli stranieri rivestono la massima importanza in un momento di crisi economica e di difficoltà a reperire le risorse necessarie alla tutela del patrimonio culturale. Gli investimenti sono dunque vitali per la cultura. Ciò non è in contraddizione con l’idea che esistano delle situazioni di conflitto, quando le attività economiche possono potenzialmente causare un danno e/o rappresentare un pericolo per il patrimonio culturale. Tuttavia, l’esistenza di questi casi non deve portare a conclusioni affrettate.

Le ricerche e le analisi svolte hanno dimostrato che i trattati in materia di investimenti contengono spesso diverse disposizioni concernenti la cultura e il patrimonio culturale. Tra queste, particolare rilievo hanno le cosiddette ‘eccezioni’, clausole che permettono di giustificare determinate misure o condotte altrimenti in violazione di regole imposte dal trattato di riferimento, nonché le disposizioni ‘*carve-out*’, le quali escludono l’applicabilità dei trattati in cui sono contenute a particolari materie o settori. La distinzione tra questi diversi tipi di clausole non è a volte chiara. L’‘*esenzione*’ culturale (da alcuni chiamata anche ‘*eccezione culturale*’) del *North American Free Trade Agreement*, NAFTA, che impedisce di applicare il NAFTA stesso a misure o condotte adottate o mantenute in

relazione alle industrie culturali (quali ad esempio radio, televisione, cinema e stampa) ne è un esempio classico. In maniera diversa a seconda del trattato o accordo, valori o settori quali quelli della cultura e del patrimonio culturale vengono spesso presi in considerazione in sede di negoziazione di accordi in materia di investimenti. Al contrario, le convenzioni internazionali e gli accordi bilaterali sul patrimonio culturale, pur prendendo talvolta in considerazione il diritto internazionale del commercio e la proprietà intellettuale, non tengono conto del diritto internazionale degli investimenti.

Al di là delle disposizioni che tutelano in modo esplicito le risorse naturali e tradizionali di un territorio, le norme dell'uno o dell'altro ramo del diritto internazionale possono avere rilevanza anche nel processo di interpretazione e applicazione dei trattati in sede di contenzioso. L'applicabilità di regole consuetudinarie create nelle relazioni tra Stati al contenzioso di investimenti, che coinvolge spesso un investitore straniero e lo Stato recettore dell'investimento, non è un punto su cui sussiste l'unanimità della dottrina e dei tribunali internazionali. Tuttavia, in determinati contesti, norme di diritto internazionale consuetudinario o regole discendenti direttamente da altre convenzioni sono state richiamate da alcuni tribunali arbitrali nella loro analisi: in tal senso, anche le circostanze e gli ambiti 'culturali' nei quali si sono profilati gli interventi degli investitori stranieri hanno talvolta avuto un peso decisivo nelle argomentazioni sostenute dalle parti in controversia ed in quelle poste dai tribunali arbitrali a supporto delle loro decisioni.

In materia di contenzioso, elemento assai rilevante è la mancanza di un tribunale internazionale o di un'istituzione internazionale specializzata nella risoluzione delle controversie in materia culturale e del patrimonio culturale. Questo tipo di controversie è stato invece discusso e risolto in vari *fora*, tra cui la Corte Internazionale di Giustizia (ICJ) e l'Organo di Risoluzione delle Controversie (DSB) dell'OMC. Numerose sono state ad oggi le controversie di investimenti che hanno coinvolto in vari modi la cultura. Queste dispute hanno interessato o toccato le forme e le espressioni più diverse della cultura e del patrimonio: dai siti UNESCO patrimonio dell'umanità (*Southern Pacific Properties - Middle East - Limited v. Arab Republic of Egypt*; *Compañía del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica*; *Parkerings-Compagniet AS v. Republic of Lithuania*) e dalle industrie culturali (*Joseph Charles Lemire v. Ukraine*; *United Parcel Service of America Inc. v. Government of Canada*), ai luoghi di memoria (*Renée Rose Levy and Grencitel S.A. v. Republic of Peru*) e alla cultura tradizionale di alcune comunità indigene (*Glamis Gold, Ltd. v. The United States of America*). Inoltre, in maniera forse sorprendente e inaspettata ma estremamente significativa, le regole poste a protezione degli investitori stranieri sono state talvolta invocate a proprio favore da soggetti nazionali che avevano realizzato investimenti "sulla" cultura (*Malaysian Historical Salvors, SDN, BHD v. The Government of Malaysia*; *Victor Pey Casado and Presidente Allende Foundation v. Republic of Chile*) nonché a difesa di attività economiche relative al "capitale" culturale avviate da comunità indigene (*Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*).

I tribunali arbitrali in materia di investimenti hanno riservato sensibilità e attenzione alle norme internazionali in materia di patrimonio culturale a vario livello. Ciò però deve essere valutato alla luce del carattere fondamentale dell'arbitrato. Questo metodo di risoluzione delle controversie presuppone che le parti della controversia possano scegliere come arbitri della controversia dei soggetti specializzati nei settori più rilevanti per la specifica controversia (settori del diritto internazionale ma anche settori specifici in cui l'investimento è stato realizzato). Questa libertà di scelta implica però che ogni tribunale arbitrale ha una giurisdizione limitata al singolo caso e basata su fonti del diritto (internazionale) spesso a carattere circoscritto. Al contrario, ad esempio, la giurisdizione dell'ICJ si estende potenzialmente a tutte le controversie giuridiche aventi ad oggetto qualsiasi questione di diritto internazionale (Articolo 36 dello Statuto della Corte Internazionale di Giustizia). Inoltre, ciò comporta che i tribunali arbitrali siano 'sciolti' una volta deciso lo specifico caso

per il quale sono stati costituiti, diversamente da organismi permanenti di risoluzione delle controversie come l'ICJ.

I tribunali arbitrali internazionali possono infatti essere creati "liberamente" oppure essere "amministrati" da un'istituzione (come nel caso dei tribunali arbitrali ICSID). In entrambi i casi sono creati per conoscere e giudicare di controversie specifiche, con una giurisdizione limitata che spesso si fonda sui trattati internazionali di investimenti. Vero è che nessun trattato internazionale è creato nel vuoto e vi è un universo di norme e principi che trovano comunque applicazione in relazione ai trattati. Però, anche se permesso da disposizioni quali l'Articolo 42 della Convenzione di Washington del 1965 (alla base della creazione dell'ICSID), norme "esterne" possono essere importate *cum grano salis* proprio per la natura del procedimento arbitrale. Ogni tribunale fa riferimento a uno o più trattati bilaterali ben specifici e diversi l'uno dall'altro. Ampliare lo spazio interpretativo e applicare norme internazionali in senso generale non risulta quindi facile per i tribunali arbitrali e deve essere sempre basato su una base giuridica solida e "inattaccabile". Diversamente, le decisioni arbitrali rischierebbero di essere considerate "illegittime" e potrebbero anche essere oggetto di annullamento.

Le ricerche effettuate hanno permesso anche di affrontare temi più specifici. Tra questi: il significato del patrimonio culturale, avente un valore anche economico; l'espropriazione del patrimonio culturale e naturale e dei diritti degli investitori stranieri concernenti i beni che lo costituiscono (essendo possibile espropriare anche beni immateriali quali diritti derivanti da contratti o diritti di proprietà intellettuale, come affermato oramai da una giurisprudenza *bien établie* a livello internazionale); il contributo del diritto internazionale degli investimenti al buon governo delle ricchezze tangibili e intangibili di un territorio attraverso la promozione di specifici standard di trasparenza e rispetto delle regole giuridiche.

D. Considerazioni conclusive: Una Relazione 'Vitale' fra Trattati e Dispute Internazionali

Gli studi sull'argomento oggetto della tesi hanno reso possibile dimostrare e raggiungere diverse conclusioni.

Un *caveat* è però necessario prima di addentrarsi nelle conclusioni. Diverse controversie concernenti il patrimonio culturale in modo diretto ed immediato o soltanto potenziale si sono delineate solo in tempi recenti. Rimane da accertare se gli stati recettori faranno ricorso ad argomenti difensivi basati sulla legittimità di politiche culturali in queste controversie. È troppo presto per poter anticipare con certezza gli argomenti sostenuti dagli stati coinvolti in queste e altre liti recenti in materia di patrimonio culturale, nonché per individuare con sicurezza le conclusioni alle quali perverranno i relativi tribunali arbitrali. Non è neanche da sottovalutare la difficoltà di monitorare tutti gli aspetti e tutti gli sviluppi di alcune di queste controversie. Se infatti alcuni stati hanno oramai adottato standard di trasparenza assai elevati, pubblicando costantemente tutti gli atti dei procedimenti di cui sono parte, altri non considerano la trasparenza un valore, almeno in tale campo. Alla luce delle diverse tesi sostenute in itinere in occasione dei contenziosi esistenti e di altri che potrebbero sorgere nel frattempo, le considerazioni pertinenti non possono assumere valore definitivo o assoluto. Qualunque cambiamento e/o diversa sfumatura o precisazione nelle decisioni di una giurisprudenza coerente su uno qualsiasi dei temi discussi nella tesi potrebbe ben richiedere nuove riflessioni sulle conclusioni alle quali si è pervenuti nello studio effettuato.

Con questo *caveat* è possibile avvicinarsi ad una prima conclusione. Innanzitutto, le ricerche effettuate hanno mostrato la necessità di investimenti stranieri per la protezione, salvaguardia,

conservazione e valorizzazione di qualsiasi espressione culturale, e una ricca interazione tra regolamentazione internazionale degli investimenti stranieri e patrimonio culturale. È dunque dimostrato che tra diritto internazionale degli investimenti e patrimonio culturale esiste una relazione simbiotica. In tale tipo di relazione, uno (o entrambi dei due soggetti coinvolti) ricavano mutui benefici da una alleanza, potendo tuttavia uno dei due (o entrambi) rappresentare un pericolo mortale per l'altro. Così il diritto internazionale degli investimenti può porre problemi per il patrimonio culturale nella pratica, ma può anche rappresentare un alleato più che valido per il recupero, la protezione, la salvaguardia e la valorizzazione di questo patrimonio. Gli investimenti sono a loro volta "attirati" dal patrimonio culturale e naturale, dal recupero e ristrutturazione del patrimonio ai progetti turistici concernenti paradisi incontaminati, dalla trasformazione continua delle città storiche alle attività economiche legate alle industrie culturali. La possibilità che si verifichino contrasti non deve spingere a etichettare questa relazione come necessariamente conflittuale né a mettere in dubbio la natura 'positiva' di tale relazione in senso generale. Se ciò non accade nel caso dei diritti umani, che spesso sono in contrasto tra loro stessi nonché con la protezione di determinate forme di patrimonio (come ad esempio, determinate pratiche tradizionali in Africa), analogamente non si comprende perché si debba parlare di un rapporto conflittuale o ambiguo fra diritto internazionale degli investimenti e patrimonio culturale. L'inclusione di riferimenti e/o clausole che specificamente si applicano al patrimonio o alle industrie culturali all'interno dei trattati in materia di investimenti, e il richiamo (seppur timido, altalenante e "parcellizzato") delle convenzioni sul patrimonio agli strumenti di diritto internazionale dell'economia possono rafforzare tale considerazione.

Questa prima riflessione conclusiva ha fatto emergere un secondo elemento. Alla luce di quanto affermato è stato possibile dimostrare che esiste all'interno del diritto internazionale della cultura e del patrimonio culturale uno spazio legittimo e ampio da riservare al diritto internazionale degli investimenti. Se le convenzioni in materia di risorse biologiche o sui diritti umani fanno parte degli strumenti fondanti del diritto internazionale del patrimonio culturale, ugualmente possono farlo a pieno titolo i trattati in materia di investimenti stranieri. Per attuare politiche culturali concrete ed efficaci non è possibile ignorare la regolamentazione internazionale degli investimenti stranieri. Quanto più ampia e diffusa è la fama dei siti rilevanti nei territori nonché quanto più rilevante è il numero dei visitatori, tanto più forte ed esteso è il richiamo esercitato sugli investitori i quali hanno potenzialmente la capacità, attraverso i mezzi a loro disposizione, di dare ulteriore valore alle risorse locali. La regolamentazione internazionale in materia di investimenti stranieri può dunque assurgere a strumento precipuo per la salvaguardia e valorizzazione del patrimonio culturale. Inoltre, le ricerche effettuate hanno permesso di rilevare una certa flessibilità e libertà degli stati nel modulare gli obblighi assunti e la disciplina degli investimenti stranieri attraverso i trattati bilaterali e convenzioni multilaterali. Esiste dunque al momento della negoziazione di questi trattati e, ove incluso nei trattati, anche successivamente, uno spazio di manovra per l'ulteriore regolamentazione e indirizzamento degli investimenti verso settori determinati, quali la cultura. Le norme e le decisioni arbitrali che concorrono a costituire il diritto internazionale degli investimenti possono essere pienamente annoverati quindi tra gli strumenti del diritto internazionale del patrimonio culturale.

Simmetricamente e specularmente, l'arbitrato internazionale di investimenti può rappresentare un valido sistema di risoluzione delle controversie in materia di patrimonio culturale. Dal punto di vista strutturale, è stato già segnalato che non esiste un tribunale internazionale specializzato nelle controversie culturali. Per chiarezza espositiva, si fa comunemente riferimento all'"arbitrato internazionale di investimenti", tenendo conto delle fonti sulle quali la giurisdizione di tali tribunali si basa (trattati internazionali in materia di investimenti, legislazioni nazionali a protezione degli investitori stranieri e contratti conclusi con gli investitori stranieri). Questo schema è stato seguito anche nel corso delle ricerche effettuate e l'analisi dell'interpretazione (da parte della

dottrina e dei tribunali internazionali) e dell'implementazione degli strumenti internazionali in materia di investimenti e del patrimonio dimostra che le controversie di investimenti relative alla cultura sono delle vere e proprie 'controversie culturali'. Ove la cultura viene in rilievo, non vi è distinzione tra controversie in materia di investimenti e controversie in materia di patrimonio culturale, ma piena sovrapposizione. L'arbitrato di investimenti è dunque un meccanismo di risoluzione delle controversie adatto anche alle dispute culturali e in materia di patrimonio culturale e naturale. La possibilità, come segnalato, di scegliere arbitri specializzati in entrambi i settori del diritto internazionale qui studiati e di adattare il procedimento arbitrale alle esigenze specifiche del caso rappresentano elementi da non sottovalutare. Vero è che, come rilevato, possono chiaramente sorgere problemi sugli strumenti di diritto internazionale applicabili in ogni singola controversia. Tuttavia, è possibile esprimere un giudizio complessivamente positivo su tale mezzo di risoluzione delle dispute culturali internazionali alla luce anche delle caratteristiche di altri meccanismi quali quello fornito dalla Corte Internazionale di Giustizia o il Meccanismo di Risoluzione delle Controversie dell'OMC.

Infine, è possibile sostenere che l'incrocio delle regole internazionali in materia di investimenti stranieri con le regole internazionali in materia culturale può determinare la creazione, o sostenere la presenza, di un sistema caratterizzato da determinati standard di trasparenza, legalità e legittimità. In tal senso, è dimostrato che la cultura è uno degli elementi fondamentali dello sviluppo sostenibile: senza di essa non vi può essere sviluppo duraturo. I trattati bilaterali in materia di patrimonio fungono da pilastro per la collaborazione tra stati in materia culturale e per la restituzione del patrimonio. I trattati in materia di investimenti stranieri obbligano invece gli stati a mantenere condotte non discriminatorie e a rispettare procedure trasparenti e secondo regole giuridicamente stabilite. Il lavoro svolto per la presente tesi ha dunque fatto emergere la promozione di standard di comportamento e protezione del patrimonio, in sé e quale effetto indiretto dell'adozione di condotte adeguate agli standard previsti dai trattati in materia di investimenti, come un ulteriore aspetto positivo di tale relazione.

Alla luce delle osservazioni fin qui svolte, il lavoro di ricerca, analisi e riflessione effettuato per questa tesi ha permesso di dimostrare quanto la relazione tra diritto internazionale degli investimenti e il patrimonio culturale possa essere vantaggiosa per gli stati e per la società. Questo senza negare l'esistenza di conflitti che emergono talvolta tra investimenti e cultura. Rimane la speranza che quanto dimostrato permetta di adeguare nella pratica le politiche in materia culturale. La tutela del patrimonio può essere infatti efficacemente rafforzata a partire dalla regolamentazione internazionale in materia di investimenti.

Part I. Introduction

'On Cultural Heritage and the Economy'

In 2007, a 19th-century sunken ship was recovered off the Spanish coast by an American deep-sea salvage company, Odyssey Marine Exploration. A controversy arose on the sunken ship's treasure. The treasure amounted to an estimated \$500 million in silver and gold coins.¹ The U.S. based company took the treasure and brought it to the United States of America. Spain successfully claimed ownership of the treasure in U.S. courts. Following the adjudication, the Spanish Minister of Culture declared that the treasure would have been used for artistic exhibitions and that the return to Spain of the treasure had enriched the Spanish material and artistic capital as such.²

In a similar fashion, the Colombian Government and Glocca Mora Co., a marine salvage company, had entered into an agreement for the salvage of the treasure of San José, a Spanish ship carrying a treasure of coins and bullions sunken by the British navy.³ Despite these agreements, and the subsequent assignment of rights by Glocca Mora Co. to another company (the U.S. company Sea Search Armada) with the agreement of the Colombian Government, some problems subsequently aroused and the Colombian parliament passed a law substantially attributing to the State the right to all the treasure. Hence, Sea Search Armada successfully filed suit against Colombia in Colombian courts. However, it was unsuccessful when it sought filed a case for violation of human rights, and among them the right to property, to the Inter-American Commission on Human Rights.⁴

In 2000, Blaenavon Industrial Landscape in the United Kingdom was inscribed on the World Heritage List under the 1972 UNESCO *Convention Concerning the Protection of the World Cultural and Natural Heritage*. The UNESCO itself signals that:

*'[t]he area around Blaenavon is evidence of the pre-eminence of South Wales as the world's major producer of iron and coal in the 19th century. All the necessary elements can still be seen – coal and ore mines, quarries, a primitive railway system, furnaces, workers' homes, and the social infrastructure of their community.'*⁵

In a similar but somewhat different fashion, in 1978 the Wieliczka and Bochnia Royal Salt Mines in Poland were inscribed in the same list. The UNESCO website provides relevant information about this site, underscoring the importance of these mines for the mining techniques adopted:

¹ A. Goodman, *U.S. Court Backs Spain Over \$500M Sea Treasure*, CNN, (4 February 2012), available at <http://edition.cnn.com/2012/02/01/world/europe/spain-u-s--treasure-dispute/>.

² Id.

³ *Sea Search Armada v. Republic of Colombia*, (D.D.C. 2011), p.1-2, available <http://law.justia.com/cases/federal/district-courts/district-of-columbia/dcdce/1:2010cv02083/145469/19/>.

⁴ BusinessWire, *American group, Sea Search Armada, Sues Colombia for Human Rights Violations*, (10 April 2013), available at <http://www.businesswire.com/news/home/20130410006046/en/American-Group-Sea-Search-Armada-Sues-Colombia>.

⁵ UNESCO World Heritage List, *Blaenavon Industrial Landscape*, available at <http://whc.unesco.org/en/list/984>.

*'[t]he deposit of rock salt in Wieliczka and Bochnia has been mined since the 13th century. This major industrial undertaking has royal status and is the oldest of its type in Europe. The site is a serial property consisting of Wieliczka and Bochnia salt mines and Wieliczka Saltworks Castle. The Wieliczka and Bochnia Royal Salt Mines illustrate the historic stages of the development of mining techniques in Europe from the 13th to the 20th centuries: both mines have hundreds of kilometers of galleries with works of art, underground chapels and statues sculpted in the salt, making a fascinating pilgrimage into the past. The mines were administratively and technically run by Wieliczka Saltworks Castle, which dates from the medieval period and has been rebuilt several times since in the course of its history.'*⁶

In 1986, when a sounding for the construction of an underground parking in Besançon was carried out, a mosaic and, later, another mosaic and the plan of an ancient Roman Domus were found. Researches revealed that the site, where some pits for the extraction of clay were present, had been inhabited since protohistory.⁷ Similarly, the researches conducted in the French city of Nîmes before the starting of the works to construct an underground parking revealed a part of the ancient city.⁸

There are however other ways in which economic activity is connected to cultural heritage. Trade and business can indeed be 'at the heart' or at the basis of the creation or safeguard of cultural heritage expressions. Culinary traditions might well qualify as cultural heritage, as it happened in the case of the gastronomic meal of the French,⁹ the traditional Mexican cuisine,¹⁰ and the Mediterranean diet.¹¹ Italy recently requested UNESCO to register the Neapolitan pizza in the *Representative List of the Intangible Cultural Heritage of Humanity* under the 2003 UNESCO Convention on intangible cultural heritage.¹² As some scholars indicated, if international trade had not taken place when the American continent was discovered, nowadays pizza would not exist since some basic ingredients such as tomatoes would not be present in Italy.¹³

This is not to imply that taking into account the economic value of cultural heritage is an easy and obvious procedure. After the 2010 financial crisis, Italy, as many other countries, saw its rating downgraded by rating agencies such as Standard & Poor. An Italian state

⁶ UNESCO World Heritage List, *Wieliczka and Bochnia Royal Salt Mines*, available at <http://whc.unesco.org/en/list/32>.

⁷ Institut National de Recherches Archéologiques Préventives (INRAP) - Atlas Archéologique, *Parking de la Mairie*, available at <http://multimedia.inrap.fr/atlas/besancon/sites/2696/Parking-de-la-Mairie#.V309tmOeu1s>.

⁸ Institut National de Recherches Archéologiques Préventives (INRAP) - Sites Archéologiques, *Les mosaïques du quartier antique de Nîmes*, available at <http://www.inrap.fr/les-mosaïques-du-quartier-antique-de-nimes-110>.

⁹ UNESCO Representative List of the Intangible Cultural Heritage of Humanity, *Gastronomic Meal of the French*, available at <http://www.unesco.org/culture/ich/en/RL/gastronomic-meal-of-the-french-00437?RL=00437>.

¹⁰ UNESCO Representative List of the Intangible Cultural Heritage of Humanity, *Traditional Mexican Cuisine – ancestral, ongoing community culture, the Michoacán Paradigm*, available at <http://www.unesco.org/culture/ich/en/RL/traditional-mexican-cuisine-ancestral-ongoing-community-culture-the-michoacan-paradigm-00400>.

¹¹ UNESCO Representative List of the Intangible Cultural Heritage of Humanity, *Mediterranean Diet*, available at <http://www.unesco.org/culture/ich/en/RL/mediterranean-diet-00884>.

¹² ABC News, *Italy Nominates the Neapolitan Pizza for UNESCO Cultural Heritage List*, (4 March 2016), available at <http://www.abc.net.au/news/2016-03-05/italy-nominates-pizza-for-unesco-heritage-list/7223276>.

¹³ M. C. Maffei, *Culinary Traditions as Cultural Intangible Heritage and Expressions of Cultural Diversity*, in S. Borrelli, F. Lenzerini (Eds.), *Cultural Heritage, Cultural Rights, Cultural Diversity*, (Martinus Nijhoff: 2012, Leiden/Boston), p.248.

auditor (the *Procuratore della Corte dei Conti del Lazio*) considered that the credit downgrade, with the ensuing negative consequences on international markets for Italy, had not duly taken into account the cultural heritage ‘assets’ of Italy.¹⁴ This question has generated much debate on the role of cultural heritage and its contribution to a state’s patrimony altogether.¹⁵ But the answer on whether cultural heritage should be factored in as other state’s economic assets is not straightforward: the outcome might be the application of a fully-fledged market logic to cultural heritage. It remains true that since national courts, as a part of the State, are capable to express the *opinio juris* of the State itself (i.e. the idea that a conduct is legally compulsory), and that this latter together with a repeated practice (*diuturnitas*) might create an international customary rule (if supported by several States and given certain conditions),¹⁶ the Italian courts position might have some significance at the international level.

This latter remark allows at the same time to expose the multifaceted values and dimensions of cultural heritage. Walking in the streets of Paris, Rome or Istanbul one cannot avoid eye contact and stupor with the great churches and cathedrals that are a constant feature of these and many other cities in the world. Although many old churches, such as medieval cathedrals are nowadays commonly regarded as relevant examples of cultural heritage and example of relevant cultural values, at the time of their construction they were also something different. As significantly pointed out by some, cathedrals are representative of a history of peoples and societies, of the growth of cities and social organizations, and as an indicator of prosperity.¹⁷ The Cathedral of York is a good example of all this. The cathedral, built under Archbishop Thomas of Bayeux, the first Norman Archbishop, was built in 20 years, a record time for the Middle Age, and was intended as a ‘political statement which demonstrated the Normans’ cultural and political superiority.’¹⁸ The current cathedral still stands on Norman foundations.¹⁹

The previous considerations do not exclude the existence of economic activities which endanger cultural heritage. When Oman decided to significantly reduce the size of a UNESCO protected site, in a way which destroyed the universal value of the site, the UNESCO World Heritage Committee deleted the Arabian Oryx Sanctuary from the World Heritage List.²⁰ Oman had proceeded to the reduction of the site in order to start hydrocarbon prospection.²¹ Similarly, the building of a four-lane bridge in the Elbe Valley drove the World Heritage

¹⁴ J. Rankin, *Italy Threatens to Sue Standard & Poor’s for Failing to Value Its History and Art*, The Guardian, (4 February 2014), available at <http://www.theguardian.com/business/2014/feb/05/italy-standard-poors-value-history-art-culture>.

¹⁵ L. Castellani, *Agenzie di Rating e Patrimonio Culturale*, *Rivista di Arti e Diritto On-Line* 3, (2014), available at <http://www.aedon.mulino.it/archivio/2014/3/castellani.htm>.

¹⁶ Article 38.1.b of the *Statute of the International Court of Justice*, adopted on 26 June 1945, entered into force on 24 October 1945.

¹⁷ W. W. Clark, *Medieval Cathedrals*, (Greenwood Press: 2006, Westport, Connecticut/London).

¹⁸ History of York, *Norman – The Norman Minster*, available at <http://www.historyofyork.org.uk/themes/norman/the-norman-minster>.

¹⁹ *Id.*

²⁰ UNESCO World Heritage List, *Arabian Oryx Sanctuary*, available at <http://whc.unesco.org/en/list/654>.

²¹ UNESCO News, *Oman’s Arabian Oryx Sanctuary: First Site Ever to be Deleted from UNESCO’s World Heritage List*, 28 June 2007, available at <http://whc.unesco.org/en/news/362/>.

Committee to delete Germany's Dresden Elbe Valley from the World Heritage List.²² UNESCO also expressed concerns over a tower that the Government of Myanmar decided to build in the ancient city of Pagan to give tourists a fine view of the city.²³ The plurality of forms that cultural heritage can take makes it necessary to have a careful look at any sort of activity and its consequences. A recent project to develop the Nicaraguan Canal, which would allow for ships which are too large to pass through the Panamanian Canal to cross the Pacific to the Caribbean, runs through the lands of several indigenous communities and forecasts a shadow of environmental damage.²⁴ Further, the Nicaraguan Government has apparently failed to properly consult with the affected indigenous communities, thus violating their procedural rights to give a free, prior and informed consent to the project, as alleged by the indigenous communities.²⁵

All the cases previously mentioned testify to the strong link between investments and economic activity in general and cultural heritage. The pervasive nature of culture, which is inherent in any type of human activity, and the consequent omnipresence of cultural heritage, as an established expression of culture, makes it necessarily connected also to economic activities. Indeed, culture and cultural heritage have both social/cultural and economic values and dimensions. While culture and cultural heritage might be the result of an economic activity and might have been created for an 'economic' purpose, cultural heritage might also generate in turn economic benefits. For instance, cultural heritage might be a valuable source of job creation thanks to heritage-led tourism development and, as mentioned, it might represent an asset to be considered when the solvability of a sovereign is under consideration. This is not to deny the social value of this heritage: to the contrary, although these two values, the economic and the social one, are often regarded as distant, the economic value is driven among others by the aesthetic and humanist characters of heritage. These characters, which make cultural heritage incommensurable from a social perspective, have been instrumental for some to attach a monetary value from the economic standpoint. Only, the peculiarities of cultural heritage concerning its nature and values make it necessary adapt any economically-driven analysis applied to culture, cultural industries and cultural heritage. Consequently, any stance in terms of (international) economic law and policy concerning cultural heritage should consider or take into account the social and cultural values and dimensions of cultural heritage as well. While it might be true that cultural heritage presents indeed the character of non-rivalry and non-excludability in consumption, benefitting all visitors/users without any diminution for other visitors/users, the enjoyment of any cultural heritage expression might generate costs in terms of its protection, conservation and/or

²² UNESCO News, *Dresden is Deleted from UNESCO's World Heritage List*, 25 June 2009, available at <http://whc.unesco.org/en/news/522/>.

²³ F. Lenzerini, *Article 12 Protection of Properties Not Inscribed on World Heritage List*, in F. Fracioni, F. Lenzerini (Eds.), *The 1972 World Heritage Convention: A Commentary*, (Oxford University Press: 2008, New York), p.209.

²⁴ Cultural Survival, *Construction of Nicaraguan Canal Threatens Indigenous Lives and Livelihoods*, in *Standing Strong from the Ground*, Cultural Survival Quarterly 39-2, (June 2015), available at <https://www.culturalsurvival.org/publications/cultural-survival-quarterly/construction-nicaragua-canal-threatens-indigenous-lives-and->

²⁵ *Id.*

enjoyment, particularly if it is regarded as a public good or a global public good.²⁶ On the other hand, it has been argued that culture and cultural industries promote creativity and, in turn, innovation and economic benefit: this has led to the ‘economization’ of cultural policies within which cultural significance is not the only force behind government intervention.²⁷ Hence, the interrelation between the cultural and economic value of cultural goods and services is fundamental to devise cultural policies and to understand those already in place.²⁸

These considerations are not however only prospective: international law and policies touching upon cultural heritage already in place have factored in all the above-mentioned issues. The *United Nations Educational, Scientific and Cultural Organization* (UNESCO) itself has clearly recognized that economic and financial resources are necessary in order to preserve and protect the World Heritage.²⁹ In order to give real content and meaning to the objective of protecting cultural heritage a *World Heritage Fund* which provides annually around \$4 million to give assistance to those State Parties in need has been created.³⁰ In addition, other mechanisms have been devised. *Funds-in-Trust*, i.e. specific donations given by countries to support certain projects, such as the Flemish Funds-in-Trust, a Flemish-financed project which supports the development of World Heritage management capacity in the Arab States have been added to the above-mentioned more ‘traditional’ instruments.³¹ It is also in this context that the UNESCO has concluded bilateral agreements with some State Parties, such as the *Convention de Coopération entre l’Organisation des Nations Unies pour l’Éducation, la Science et la Culture et le Gouvernement de la République Française sur la Protection et la Mise en Valeur du Patrimoine Monumental et Urbain*.³² Further, the UNESCO World Heritage Center and the *United Nations Foundation and Fauna & Flora International* operate together a grant program (the *Rapid Respond Facility*) aiming at protecting areas of high biodiversity value and, in particular, natural World Heritage sites in times of crises.³³

It goes without saying that, if economic and financial resources are key to protect and safeguard cultural heritage, economic and financial support is not sufficient or at least should couple with, or be channeled to support, other initiatives. Such a broader perspective might take into account that a balance has to be stricken between economic support for cultural heritage-related initiatives and the economic development of those areas where cultural heritage is located. In 2008 the World Heritage Center has adopted a list of primary

²⁶ F. Benhamou, *Public Intervention for Cultural Heritage: Normative Issues and Tools*, in I. Rizzo, A. Mignosa (Eds.), *Handbook on the Economics of Cultural Heritage*, (Edward Elgar: 2013, U.K./U.S.A.), p.5-6.

²⁷ A. Klammer, A. Mignosa, L. Petrova, *Cultural Heritage Policies: A Comparative Perspective*, in I. Rizzo, A. Mignosa (Eds.), *Op. Cit.*, p.37.

²⁸ *Id.*

²⁹ UNESCO, *About World Heritage – Funding*, available at <http://whc.unesco.org/en/funding/>.

³⁰ UNESCO, *About World Heritage – Funding – World Heritage Fund*, available at <http://whc.unesco.org/en/world-heritage-fund>.

³¹ UNESCO, *Our Partners – Flemish Funds-in-Trust*, available at <http://whc.unesco.org/en/ffit>.

³² UNESCO, *Our Partners – France-UNESCO Cooperation Agreement (CFU)*, available at <http://whc.unesco.org/en/cfu>; *Convention de Coopération entre l’Organisation des Nations Unies pour l’Éducation, la Science et la Culture et le Gouvernement de la République Française sur la Protection et la Mise en Valeur du Patrimoine Monumental et Urbain*, signed on 16 October 1997, available at <http://whc.unesco.org/uploads/organizations/documents/organization-338-9.PDF>.

³³ *RRF – Rapid Response Facility*, available at <http://www.rapid-response.org/>.

factors/threats which affect the *'outstanding universal value of cultural heritage properties.'*³⁴ A quick reading of the list makes it clear that almost all factors might be directly or indirectly connected to economic activity. Among these factors one might include:

- '- buildings and development (such as housing or industrial areas development);*
- transportation infrastructure (such as ground and underground transportation infrastructures);*
- utilities or service infrastructure (such as water infrastructure and renewable energy facilities);*
- pollution (such as air pollution, including excessive smoke or other airborne particulates);*
- biological resources use and modification (such as aquaculture or land conversion);*
- physical resource extraction (such as mining, quarrying or oil and gas activities);*
- local conditions affecting physical fabric (spanning from radiation/light to pests);*
- social and cultural uses of heritage (such as touristic activities);*
- invasive/aliens species or hyper-abundant species (such as feral animals or fish pests);*
- management and institutional factors (such as monitoring and management activities).'*³⁵

These factors reveal something extremely relevant: basic activities needed for development, such as water infrastructure, might alter and/or affect cultural heritage. This signals the unavoidable connection between any human activity to any form of cultural heritage. However, beyond this first remark, these factors further reveal that there is always an inner tension between any human development and the safeguard of cultural heritage expressions, be them tangible or intangible. To turn a blind eye to this tension and to develop policies and rules which overlook it cannot lead to the long-term preservation of cultural heritage., but only to short- and medium-term results. If cultural heritage should be preserved for its value for human societies and civilizations, human societies and civilizations should also survive and prosper to appreciate and attach value to cultural heritage. A symbiotic relation exists.

The comments above apply not only to cultural heritage in a strict sense, but also to cultural goods and services, which are expressions or manifestations of cultural heritage and which contribute both directly and indirectly to the survival of cultural heritage. And this leads to realize that with regard to these latter, there might exist a misalignment between the cultural and economic value attached to any form of cultural heritage. Cultural goods' *'aesthetic properties, their spiritual significance, their role as purveyors of symbolic meaning, their historic importance, their significance in influencing artistic trends, their authenticity, their integrity, their uniqueness and so on'* give rise to their cultural value.³⁶ But the cultural and

³⁴ UNESCO, *World Heritage Center – List of Factors Affecting the Properties*, available at <http://whc.unesco.org/en/factors/>.

³⁵ *Id.*

³⁶ D. Throsby, *Determining the Value of Cultural Goods: How Much (or How Little) Does Contingent Value Tells Us?*, *Journal of Cultural Economics* 27:275-285, (2003), p.280, available at

economic values might adopt different metrics, and there might well be cases where a low economic value is associated with a high cultural value and vice versa.³⁷

Once all these elements are on the table, one realizes how difficult is the task to approach and assess the relationship between them at the international law level. Indeed:

*'...international law may now properly be regarded as a complete system. By this it is meant not that there is always a clear and specific legal rule readily applicable to every international situation, but that every international situation is capable of being determined as a matter of law, either by the application of specific legal rules where they already exist, or by the application of legal rules derived, by the use of known legal techniques, from other legal rules or principles.'*³⁸

This 'complete system' has undergone a remarkable evolution and development in the XXth century. This has led to the emergence of some new branches or fields beyond the 'traditional' ones. Among the former one might include international economic law, which encompasses international trade law, international investment law and intellectual property, and international cultural heritage law. As indicated by its title, this research thesis focuses on the relationship between international investment law and tangible and intangible cultural heritage. The main question and focus of this work are the nature of relationship existing between international investment law and cultural heritage. In order to reply to this question, both the substantive international investment law rules which concern cultural heritage and the investment disputes where cultural heritage or cultural issues were at stake will be discussed. The final goal is to draw conclusions and potential insights and lessons to be applied in both fields of international investment law and international cultural heritage law.

Part II of this work will discuss the genesis, development and current 'status' of international investment law and of international cultural heritage law. Since cultural heritage law is an extremely composite field of international law, both tangible and intangible cultural heritage, as well as the human rights approach to this branch, will be taken into consideration. Further, though cultural heritage will be divided and distinguished in its tangible and intangible forms, following the current international law and policy predominant approach, the merits and drawbacks, as well as the legitimacy of this approach, will be assessed along this work in the light of international investment disputes involving cultural heritage. This discussion is necessary to lay the grounds for Part III of this work, where the substantive and dispute settlement interaction between investment law and cultural heritage are analyzed. To this end, international investment law substantive rules and investment disputes involving both cultural heritage and cultural issues will be taken into account. Certainly, cultural heritage is a 'stricter' concept than culture, but as a premise of this approach, any question affecting or touching upon culture will directly or indirectly concern cultural heritage. Given the extreme variety of cultural heritage questions that have emerged in international

http://culturalheritage.ceistorvergata.it/virtual_library/Art_THROSBY_D-Determining_the_Value_of_Cultural_Goods_.pdf.

³⁷ *Id.*

³⁸ M. Dion, R. McCorquodale, S. Williams, *Cases & Materials on International Law*, (Oxford University Press: 2011, U.K.), p.3, quoting R. Jennings, A. Watts, *Oppenheim's International Law*, (Longman: 1992).

investment disputes up to now, a case-by-case analysis has been retained as an appropriate methodology to address their relationship at the dispute settlement level. It is worth stressing already that arbitral tribunals have differed widely as for their approaches to disputes: accordingly, the account of relevant facts and the related legal analysis carried out in this research work might change from case to case. Finally, in Part IV of this work, the possible insights and lessons to be learned by this interaction will be assessed, together with some considerations on current trends and potential future developments.

Part II. Investments, Cultural Heritage and International Law

Chapter II.1. International Investment Law: Genesis, Development and Challenges

II.1.A. International Investment Law: Looking to the Past

One might safely say that international investment law developed as an independent branch of international law from the practice of diplomatic protection and claims commissions and has evolved from the treatment of foreigners and their property under international law.³⁹ Claims commissions were created in order to adjudicate claims on the treatment that States accorded to foreign nationals and their property.⁴⁰ These commissions find their roots in the *s.c. Jay Treaty* (the *1794 Treaty of Amity, Commerce and Navigation between Great Britain and the United States*), which aimed at creating the first arbitration system of its kind in modern diplomacy, using joint commissions driven by legal and diplomatic considerations.⁴¹ This is regarded as the modern foundation of the adjudicative model of world order.⁴² A further step in the establishment of this branch of international law was the common agreement among European and U.S. international lawyers, by the early 1900s, that it existed a minimum standard of justice in the treatment of foreigners, a standard similar to the one accepted by '*civilized states*'.⁴³ Moreover, the decisions of the *General Claims Commission*, which had been created for the settlement of all claims of citizens of both Mexico and the United States which had arisen between 1868 and 1927 (with the exclusion of claims of American citizens against Mexico '*arising out of the revolutionary disturbances in that State during the period from 1910 to 1920*'),⁴⁴ immensely contributed to the international law on the treatment of individual aliens by States.⁴⁵ Nonetheless, this has not meant that diplomatic protection was completely ruled out as an option.

Quite to the contrary, diplomatic protection has maintained a key role for a long time in international law and relations. In the *Mavrommatis Palestine Concessions* case, the Greek government filed with the Permanent Court of International Justice (PCIJ) a suit arising from the refusal on the part of the Government of Palestine and the U.K. Government (since Palestine was a British protectorate at the time) to recognize the rights that Mr. Mavrommatis had acquired under agreements concluded with the Ottoman Empire for public works to be

³⁹ A. Newcombe, L. Paradell, *Law and Practice of Investment Treaties – Standards of Treatment*, (Kluwer Law International: 2009, The Netherlands), p.1-3.

⁴⁰ D. M. Johnston, *The Historical Foundations of World Order – The Tower and the Arena*, (Martinus Nijhoff Publishers: 2008, The Netherlands), p.635.

⁴¹ *Id.*

⁴² *Id.*

⁴³ A. Newcombe, L. Paradell, *Op. Cit.*, p.11-12.

⁴⁴ Reports of International Arbitral Awards, *General Claims Commission (Convention of September 8, 1923) (United Mexican States, United States of America)*, 4 February 1926 – 23 July 1927, Volume IV, pp.1-769, available at http://legal.un.org/riaa/cases/vol_IV/1-769.pdf.

⁴⁵ J. Gijsbertus De Beus, *The Jurisprudence of the General Claims Commission, United States and Mexico – Under the Convention of September 8, 1923*, (Martinus Nijhoff: 1938, The Netherlands), p.1-2.

constructed in Palestine.⁴⁶ The Greek Government hence requested the Court to find that both respondent had wrongfully refused to recognize these rights and had to make reparation for the consequent loss incurred by Mr. Mavrommatis.⁴⁷ Discussing whether it had jurisdiction to entertain the Greek claims and whether there was a dispute between States (or Members of the League of Nations),⁴⁸ the Court found that:

*'A dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons. The present suit between Great Britain and Greece certainly possesses these characteristics. The latter Power is asserting its own rights by claiming from His Britannic Majesty's Government an indemnity on the ground that M. Mavrommatis, one of its subjects, has been treated by Palestine or British authorities in a manner incompatible with certain international obligations which they were bound to observe. [...] In the case of the Mavrommatis concessions it is true that the dispute was at first between a private person and a State – i.e. between M. Mavrommatis and Great Britain. Subsequently, the Greek Government took up the case. The dispute then entered upon a new phase; it entered the domain of international law, and became a dispute between two States. Henceforward therefore it is a dispute which may or may not fall under the jurisdiction of the Permanent Court of International Justice. [...] [i]t is an elementary principle of international law that a State is entitled to protect its subjects, when injured by acts contrary to international law committed by another State, from whom they have been unable to obtain satisfaction through the ordinary channels. By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights – its rights to ensure, in the person of its subjects, respect for the rules of international law.'*⁴⁹

Later, in the *Case Concerning Certain German Interests in Polish Upper Silesia*, the Court was faced with claims concerning certain German interests in the land property, movable property and intellectual property which had been allegedly prejudiced by the Polish government.⁵⁰ The Court found that the part of the *Geneva Convention Concerning Upper Silesia* concluded by Germany and Poland in 1922 concerning expropriation was in derogation of the general rules of international law on the treatment of foreigners and the principle of respect for vested rights, hence implicitly recognizing the existence of these latter.⁵¹ International investment law has emerged precisely from the development of these rules and principles.

Nowadays, international investment law is primarily based on international investment agreements (IIAs).⁵² According to recent data, some 3100 bilateral and

⁴⁶ *The Mavrommatis Palestine Concessions*, PCIJ, Judgment N.2, Series A - No.2, 30 August 1924, p.7.

⁴⁷ *Id.*

⁴⁸ *Ibid.*, p.10-11.

⁴⁹ *Ibid.*, p.11-12.

⁵⁰ *Case Concerning Certain German Interests in Polish Upper Silesia*, PCIJ, Judgment, Merits, Series A – N.7, p.5.

⁵¹ *Ibid.*, p.22.

⁵² A. Newcombe, L. Paradell, *Op. Cit.*, p.1.

multilateral investment agreements have been concluded between States to this day, and some 2370 investment agreements are currently in force.⁵³ Investment treaties generally establish certain obligations that host States have to respect towards foreign investors. Over the past 45 years, they have become the most important legal mechanism for the governance of foreign direct investment⁵⁴ and, among them, bilateral investment treaties (BITs) represent the sheer majority of investment treaties concluded.⁵⁵ One of the major feature of investment treaties is that they often contain dispute settlement clauses, allowing not only “classical” State-to-State dispute settlement, but the possibility for foreign investors to file a claim directly against the host State with an international arbitral tribunal, once certain conditions specified in the treaties are met. Although at first blush the issues arising in the field of international investment law, which mainly originates from the dense web of investment treaties, seem relevant only for investment-related questions, they have a direct bearing on general international law. Investment law has indeed proven to be a fertile ground for the discussion of general issues such as the nationality of juridical persons in international law, the responsibility of States or the compensation due by the State in case of breach of international legal obligations.

Following the phenomenal proliferation of investment treaties during the last two decades,⁵⁶ many scholars have tried to identify the nature and function of international investment law. Some view it not only a “system” of investment protection, but as much more: it is a global administrative law⁵⁷ or a general structure of global governance, serving a constitutional function for the emerging global economy.⁵⁸ While a discussion on the nature and function of investment law is beyond the scope of this research, the idea that international investment law is a “system” will be supported. An imperfect, incoherent system but nevertheless a system, in the general sense of “*a set of things working together as parts of a mechanism or an interconnecting network, a complex whole.*”⁵⁹

As above-mentioned, the inclusion in almost every IIA of a dispute resolution clause is one prominent feature of the investment treaty system. In the majority of cases, where a dispute has arisen and its amiable resolution has failed (commonly together with the condition to wait for some time after the resolution *à l’amiabile* has failed, that is the s.c. cooling-off period), these provisions provide for the possibility for foreign investors to file a

⁵³ UNCTAD, *International Investment Agreement Navigator*, Investment Policy Hub, available at <http://investmentpolicyhub.unctad.org/IIA>.

⁵⁴ Z. Elkins, A. T. Guzman, B. Simmons, *Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960 – 2000*, in M. Waibel, A. Kaushal, K.-H. L. Chung, C. Balchin, *The Backlash Against Investment Arbitration: Perceptions and Reality*, (Cambridge University Press: 2006, UK), p.369.

⁵⁵ UNCTAD, *Op. Cit.*

⁵⁶ *Id.*

⁵⁷ G. Van Harten, M. Loughlin, *Investment Treaty Arbitration as a Species of Global Administrative Law*, *The European Journal of International Law*, Vol.17 No.1, (2006).

⁵⁸ B. Kingsbury, S. W. Schill, *Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law*, NYU School of Law, Public Law Research Paper No.09-46, (2 Septemeber, 2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1466980; S. W. Schill, *The Multilateralization of International Investment Law*, (Cambridge University Press: 2009, UK), p.373.

⁵⁹ Oxford Dictionaries, *System*, Oxford University Press, available at <http://www.oxforddictionaries.com/definition/english/system>.

claim against the host State with an *ad hoc* or administered arbitration tribunal.⁶⁰ In this context, the *International Centre for the Settlement of Investment Disputes* (ICSID) established under the *Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (the ICSID Convention or Washington Convention), which entered into force in 1966, is the leading institution for the resolution of investment disputes.⁶¹ Being one of the five institutions which make up the World Bank, the Center has its headquarters in Washington, but arbitration hearings under the Center aegis might be held at different arbitration centers worldwide which have special agreements with ICSID.⁶² Also, it is worth stressing that, while treaty-based investment arbitration could also take place under the rules of other institutions or even as *ad hoc* arbitrations, much investment arbitration takes place outside the treaty system (e.g. contract-based claims and arbitration.)⁶³ Indeed, consent to investor-State disputes under arbitration can be found not only in international treaties and agreements but also in domestic investment laws of host States and within the contracts entered into by foreign investors and host States or State-affiliated agencies.⁶⁴

Some major development might still to be seen in the system. On this line, the negotiations of the Transatlantic Trade and Investment Partnership (TTIP), that is a free trade agreement currently negotiated between the United States and the European Union,⁶⁵ or the negotiation of the Trans-Pacific Partnership (TPP), a free trade agreement involving the economies of twelve (12) Pacific Rim nations,⁶⁶ might reveal new trends in international economic law. These and other examples of multilateral ('minilateral') agreements on investment have already been scrutinized by academia with mixed conclusions.⁶⁷ Also, the Treaty of Lisbon, signed in 2007 and entered into force in 2009, has entailed significant institutional reforms in the European Union, touching upon the EU economic policy, *inter alia*.⁶⁸ Namely, after the Treaty of Lisbon, the EU common commercial policy (which is one of the EU exclusive competences under Article 3 (1) e TFEU) explicitly includes foreign direct investments (under Article 207 TFEU).⁶⁹ Given the existence of numerous bilateral

⁶⁰ C. Leben, *L'Évolution du Droit International des Investissements*, Journal of the Centre for Energy, Petroleum and Mineral Law and Policy (CEPMLP) Vol.7, No.12 (2000), available at http://www.jurispoli.com/dt/mat/dt_invts.htm.

⁶¹ International Centre for the Settlement of Investment Disputes, *Background Information on the International Centre for Settlement of Investment Disputes (ICSID)*, p.1, available at <https://icsid.worldbank.org/apps/ICSIDWEB/about/Documents/ICSID%20Fact%20Sheet%20-%20ENGLISH.pdf>.

⁶² *Ibid.*, p.2, 6.

⁶³ M. Sornarajah, *The International law on Foreign Investment*, (Cambridge University Press: 2010, UK), p.301.

⁶⁴ International Centre for the Settlement of Investment Disputes, *Op. Cit.*, p.1.

⁶⁵ European Commission, *The Transatlantic Trade and Investment Partnership (TTIP) – TTIP Explained*, 19 March 2015, available at http://trade.ec.europa.eu/doclib/docs/2014/may/tradoc_152462.pdf.

⁶⁶ T. B. Lee, *The Just-Completed Trans-Pacific Partnership Deal, Explained*, Vox Policy & Politics, 5 October 2015, available at <http://www.vox.com/2015/10/5/9456757/trans-pacific-partnership-explained>.

⁶⁷ M. Malli, *Minilateral Treaty-Making in International Investment Law*, in A. K. Bjorklund (Ed.), *Yearbook on International Investment Law & Policy 2013-2014*, (Oxford University Press:2015, U.K.), p.528.

⁶⁸ EUR-Lex, *The Treaty of Lisbon: Introduction*, 20 May 2014, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=URISERV:ai0033>.

⁶⁹ Article 207.1 (ex Article 133 TEC) of the Treaty on the Functioning of the EU (as amended by the Lisbon Treaty), signed on 18 December 2007, entered into force on 1 December 2009:

'The common commercial policy shall be based on uniform principles, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, foreign direct investment, the achievement of uniformity

investment treaties between the EU Member States and third countries, a Regulation 1219/2012 has been adopted in order to establish transitional arrangements for these BITs.⁷⁰ The effect of this new exclusive competence of the EU has still to be seen, but given the clout of the EU as one of the world leading economic actors, it will certainly have significant consequences for the evolution of investment law.

II.1.B. International investment Law: Current Trends and Future Prospects

Although the primary source of international investment law is to be found in IIAs, international investment law has a composite nature.⁷¹ Different sources of law might apply at the same time to the treatment of foreign investment: international law (public and private), domestic law (both public and private), and, as previously mentioned, even European Union Law. Nevertheless, IIAs, of a bilateral and multilateral nature, substantive and/or procedural in character,⁷² are the primary source of host States obligations toward foreign investors. This has led some arbitral tribunals to apply of public international law to the host State-foreign investor relationship, while other tribunals have completely rejected this possibility. In *Corn Products International, Inc. v. The United Mexican States*, a U.S. corporation engaged in the production of high fructose corn syrup and in its sale to Mexican soft drink industry, brought claims against Mexico for a newly-imposed excise tax which, in its view, caused its customers to switch to sugar cane sweeteners.⁷³ Mexico argued, *inter alia*, that the excise tax was a countermeasure taken in response to prior violation of the NAFTA by the United States.⁷⁴ The arbitral tribunal concluded that the doctrine of countermeasures had been devised in the context of relations between States and was not applicable to investor-State arbitration under NAFTA Chapter XI.⁷⁵ In *BG Group Plc. v. The Republic of Argentina*, a British corporation brought claims against Argentina on the grounds that economic measures taken to reduce inflation and the public deficit including the privatization of the gas industry severely affected its investment.⁷⁶ Although Argentina tried to defend itself invoking Article 25 (Necessity) of the ILC's Draft Articles on Responsibility of States for Internationally Wrongful Acts as a

in measures of liberalization, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies. The common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action.'

⁷⁰ Regulation (EU) No. 1219/2012 of the European Parliament and of the Council of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32012R1219>.

⁷¹ P. Juillard, *L'Evolution des Sources du Droit des Investissements*, Collected Courses of the Hague Academy of International Law, Volume 250, (Brill/Nijhoff: 1994, Leiden/Boston).

⁷² For instance, ICSID, NYC, ECT, NAFTA, BITs, FTAs, TRIMs, GATS, EU association agreements, jurisprudence.

⁷³ *Corn Products International, Inc. v. The United Mexican States*, ICSID Case No. ARB(AF)/04/01, Decision on Responsibility, 15 January 2008, paras.1-4.

⁷⁴ *Ibid.*, para.6.

⁷⁵ *Ibid.*, para.161.

⁷⁶ *BG Group Plc. v. The Republic of Argentina*, UNCITRAL Arbitration Rules, Final Award, 24 December 2007, paras.1-82.

condition precluding wrongfulness, the Tribunal considered that Article 25 ‘may relate exclusively to international obligations between sovereign States.’⁷⁷ Some scholars have delved into the question of the subjects (States or foreign investors) to whom investment treaty obligations are owed, concluding that investment treaty arbitration has an ‘hybrid’ nature.⁷⁸

This ‘plurality’ of applicable sources of law is reflected in the ICSID Convention. Although the Convention is procedural in its goal (the settlement of disputes between foreign investors and host States), it contains certain provisions on the law(s) applicable to the disputes filed with the Center. Article 42 of the Convention sets forth that:

- ‘(1) The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.*
- (2) The Tribunal may not bring in a finding of non liquet on the ground of silence or obscurity of the law.*
- (3) The provisions of paragraphs (1) and (2) shall not prejudice the power of the Tribunal to decide a dispute ex aequo et bono if the parties so agree.’*

In a ‘specular’ way, under Article 54 of ICSID Additional Facility rules:

- ‘(1) The Tribunal shall apply the rules of law designated by the parties as applicable to the substance of the dispute. Failing such designation by the parties, the Tribunal shall apply (a) the law determined by the conflict of laws rules which it considers applicable and (b) such rules of international law as the Tribunal considers applicable.*
- (2) The Tribunal may decide ex aequo et bono if the parties have expressly authorized it to do so and if the law applicable to the arbitration so permits.’*

Other agreements contain similar provisions. Under Article 1131.1 of NAFTA, concerning the governing law:

‘A Tribunal established under this Section shall decide the issues in issue in accordance with this Agreement and the applicable rules of international law...’.

Under Article 35 of UNCITRAL Arbitration Rules:

- ‘1. The arbitral tribunal shall apply the rules of law designated by the parties as applicable to the substance of the dispute. Failing such designation by the parties, the arbitral tribunal shall apply the law which it determines to be appropriate. 2. The*

⁷⁷ *Ibid.*, paras.407-408.

⁷⁸ Z. Douglas, *The Hybrid Foundation of Investment Treaty Arbitration*, *The British Yearbook of International Law* Vol.74, Iss.1, (2003).

arbitral tribunal shall decide as amiable compositeur or ex aequo et bono only if the parties have expressly authorized the arbitral tribunal to do so. 3. In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract, if any, and shall take into account any usage of trade applicable to the transaction.'

This is not to exclude the possibility that investment agreements might also include provisions which explicitly identify the law applicable to investor-State disputes. In such a case, these provisions generally summon international law or relevant principles of international law in one way or another.⁷⁹ Nevertheless, IIAs are considered extremely relevant to other types of provisions: those ones which sets forth the standards of protection enjoyed in the host State by foreign investors.

Indeed, under IIAs, host states have several obligations toward foreign investors. First and foremost, some IIAs contain provisions on the promotion, admission and establishment of foreign investment, that is they provide for specific rules on the pre-establishment phase of foreign investment and on their admission in the territory of the host State.⁸⁰ Further, host states have several obligations toward foreign investments (and investors) once the investment has been established. These obligations, which are commonly included in identically- or similarly-drafted provisions in all IIAs,⁸¹ concern the most-favored nation treatment (MFN), the national treatment, the fair and equitable treatment obligation (FET), the full protection and security treatment obligation (FPS) and the case of expropriation of foreign investments.

Both the most-favored nation treatment and the national treatment obligations are a 'specification' of the non-discrimination principle, which pervades international economic law in general. Indeed, both the international trade regime and the international investment one regulate *de jure* and *de facto* discrimination.⁸² While the MFN treatment calls for the State not to discriminate between similarly-situated foreign persons, entities, goods, services or investments, the national treatment obligation calls for non-discrimination between similarly-situated domestic and foreign persons, entities, goods, services or investments.⁸³ From an economic point of view, non-discrimination can minimize market distortions and thus has positive effects on goods allocation and production; it can have the 'multiplier' effect of liberalizing trade policies; it can minimize the costs of rules creation by extending the applicability of certain rules to all other participating nations; it helps minimize transaction costs since there is no need to ascertain the origin of a certain good or investment; and it

⁷⁹ For instance, Article 8 (4) Argentina – France BIT reads as follows:

'4. L'organe d'arbitrage statuera, sur la base des dispositions du present Accord, du droit de la Partie contractante partie au differend - y compris les regles relatives aux conflits de loi -, des termes des accords particuliers eventuels qui auraient ete conclus au sujet de rinvestissement ainsi que des principes de droit international en la matiere.'

⁸⁰ A. Newcombe, L. Paradell, *Op. Cit.*, Chapter 3 – Promotion, Admission and Establishment Obligations.

⁸¹ C. Leben, *Op. Cit.*.

⁸² R. Alford, *The Convergence of International Trade and Investment Arbitration*, Santa Clara Journal of International Law Vol. 12, Iss.1, (2014), p.37, available at <http://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1148&context=scujil>.

⁸³ A. Newcombe, L. Paradell, *Op. Cit.*, p.147.

avoids mutually destructive actions from parties entering into the same agreement.⁸⁴ Further, it has been eminently suggested that non-discrimination, specifically in the form of MFN treatment, avoids the creation of blocks among nations with the consequences of tensions and disputes between blocks and left-out nations.⁸⁵ Counterarguments often focus on the necessity of preferential (i.e. a different) treatment for developing and least-developed countries from an economic standpoint and, from a political standpoint, being based on a system of unanimity and consensus, it gives holdout nations a special position to prevent agreement or reduce it to the least common denominator and to other nations incentives to stay out of the agreement.⁸⁶ With regard to the specific purpose of the national treatment obligation, some have stressed that this obligation prohibits a country to favor itself over other countries and thus outlaws protectionist use of domestic instruments.⁸⁷ In sum, national treatment and most-favored nation treatment provisions contained within any international economic treaty generally promote conditions of competition between, depending on the circumstances, goods, services or investors.⁸⁸

Similarities and differences between the non-discrimination principle in international trade and in international investment law have been extensively debated by international scholars and practitioners alike, paying special attention to the possibility of cross-fertilization between these two branches of international economic law.⁸⁹ Since the national treatment and the most-favored nation treatment are relative standards of treatment, i.e. they have a content only in relation to the treatment afforded to someone or something else,⁹⁰ the relevant analysis for both consist in identifying the relevant comparator (the sector, industry or companies to be compared) and the determination of a less favorable treatment (a violation of the standard of treatment).⁹¹ However, even looking at the national treatment obligations in investment treaties, the scope, content vary widely from treaty to treaty.⁹² While one might safely extend to every national treatment obligation some considerations made on the NAFTA-specific provision that it allows equality of competitive opportunities for comparable investors in like circumstances.⁹³ In *Occidental Exploration and Production Company v. The Republic of Ecuador*, an American investor had entered into a participation

⁸⁴ J. H. Jackson, *The World Trading System – Law and Policy of International Economic Relations*, (Massachusetts Institute of Technology: 1997, U.S.A.), p.159.

⁸⁵ *Id.*

⁸⁶ *Ibid.*, p.159-160.

⁸⁷ P. Van den Bossche, W. Zdouc, *The Law and Policy of the World Trade Organization – Text, Cases and Materials*, (Cambridge University Press: 2013, U.K.), p.349; G. M. Grossman, H. Horn, P. C. Mavroidis, *National Treatment*, in H. Horn, P. C. Mavroidis, *Legal and Economic Principles of World Trade Law*, (Cambridge University Press: 2013, U.S.A.), p.205.

⁸⁸ T. Weiler, *Methanex Corp. V. USA – Turning the Page on NAFTA Chapter Eleven?*, *Journal of World Investment and Trade* Vol.6, Iss.6, (2005), p.915

⁸⁹ J. Kurtz, *The Use and Abuse of WTO Law in Investor-State Arbitration: Competition and its Discontents*, *European Journal of International Law* Vol.20, Iss.4, (2009); R. Howse, E. Chalamish, *The Use and Abuse of WTO Law in Investor-State Arbitration: A Reply to Jürgen Kurtz*, *European Journal of International Law* Vol.20, Iss.4, (2009); N. DiMascio, J. Pauwelyn, *Nondiscrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin?*, *American Journal of International Law* Vol.102, (2008).

⁹⁰ A. Newcombe, L. Paradell, *Op. Cit.*, p.147.

⁹¹ *Ibid.*, p.158, referring specifically to the national treatment standard.

⁹² *Ibid.*, p.148.

⁹³ T. Weiler, *Op. Cit.*, p.915.

contract with a State-owned corporation in Ecuador in order to undertake exploration for and production of oil in Ecuador.⁹⁴ The investor applied regularly to a national authority (*Servicio de Rentas Internas*) for the reimbursement of Value-Added Tax ('VAT') that it had paid to purchase what necessary for its exploration and exploitation activities under the contract and the exportation of the oil produced.⁹⁵ The reimbursement were made on a regular basis.⁹⁶ However, in 2001, the national authority responsible for the reimbursement of the tax started to deny all reimbursement and to require the return of the amounts previously reimbursed, on the grounds that VAT reimbursement was already considered into the participation formula under the contract concluded with the State-owned corporation.⁹⁷ As a consequence, the foreign investor started four lawsuits in the tax courts of Ecuador and an arbitration proceedings against the Ecuador claiming that the above-mentioned measures were in violation of the '*Treaty between the United States of America and the Republic of Ecuador Concerning the Encouragement and Reciprocal Protection of Investment*' (the decisions of the tax courts were still pending at the time the arbitration proceedings was commenced).⁹⁸ Under the part of Article II of the above-mentioned Treaty relevant to this case, '*[e]ach Party shall permit and treat investment, and activities associated therewith, on a basis no less favorable than that accorded in like circumstances to investment or associated activities of its own nationals or companies, or of nationals or companies of ay third country, whichever is the most favorable, subject to the right of each Party to make or maintain exceptions falling within one of the sectors or matters listed in the Protocol to this Treaty.*'⁹⁹ This provision follows the early US BIT practice to combine national treatment and most-favored nation treatment into one provision.¹⁰⁰ The foreign investor claimed the violation of the national treatment obligation on the grounds that several companies involved in the export of other goods (such as flowers, mining, seafood products, lumber, bananas and African palm oil) were entitled and continued to receive VAT refund, and thus there existed a discrimination between companies all engaged in exports even if encompassing different sectors.¹⁰¹ The Arbitral Tribunal concluded that, although there had not been an intent of discriminating against foreign-owned companies, the result of the contested measures was a less-favorable treatment for the claimant.¹⁰² This case clearly shows how difficult it might be to identify the comparator. This point has been stressed in other cases, such as *Consortium RFCC v. Royaume du Maroc*.¹⁰³ In that case, the *Société Nationale des Autoroutes du Maroc* (ADM) received from the Moroccan Government (specifically, the *Ministre marocain des Travaux Publics*) the concession for the construction, exploitation and maintenance of a highway from Rabat to Fès.¹⁰⁴ When ADM

⁹⁴ *Occidental Exploration and Production Company v. The Republic of Ecuador*, LCIA Case No.UN3467, Final Award, 1 July 2004.

⁹⁵ *Ibid.*, paras.1-2.

⁹⁶ *Ibid.*, para.2.

⁹⁷ *Ibid.*, para.3.

⁹⁸ *Ibid.*, paras.4-6.

⁹⁹ Article II of the *Treaty between the United States of America and the Republic of Ecuador Concerning the Encouragement and Reciprocal Protection of Investment*, signed August 23, 1993, entered into force May 11, 1997.

¹⁰⁰ A. Newcombe, L. Paradell, *Op. Cit.*, p.155.

¹⁰¹ *Occidental Exploration and Production Company v. The Republic of Ecuador*, *Op. Cit.*, para.168.

¹⁰² *Ibid.*, para.177.

¹⁰³ *Consortium RFCC v. Royaume du Maroc*, ICSID Case No. ARB/00/6, Award, 22 December 2003.

¹⁰⁴ *Ibid.*, paras.3-4.

launched an invitation to tender, two Italian companies (in a consortium) obtained two lots.¹⁰⁵ Following some difficulties and the impossibility for the Italian consortium to find an agreement with ADM or the Moroccan authorities, the Italian investor filed a claim with an ICSID arbitral tribunal claiming, *inter alia*, the violation of the non-discrimination obligation under Article 2.2. and 3 of the BIT concluded between Italy and Morocco.¹⁰⁶ The Arbitral Tribunal, referring to the relevant Articles, stressed that main difficulty in assessing whether non-discrimination obligations have taken place, resides in determining whether the situation of the foreign investor was identical to that of the national investor or of the one from a third country with which the host State has concluded a similar investment treaty, to later determine whether the different treatment provided was justified or not.¹⁰⁷ The Arbitral Tribunal eventually found that no discrimination under Articles 2 and 3 of the relevant treaty had been demonstrated.¹⁰⁸

The fair and equitable (FET) and full protection and security (FPS) treatment obligations are also commonly included into investment treaties. One might safely say that these absolute standards of treatment are broad. The original purpose of FET clauses was to protect foreign investors against all measures through which unfairness may have manifested itself, and it summons the idea of an unbiased, rule-based governance which makes justice to all interested parties affected by a State's decision.¹⁰⁹ FPS clauses imply that States are under an obligation to protect the investment from adverse effects, thus requiring due diligence and without creating an absolute liability standard.¹¹⁰ Some treaties and arbitral tribunals have gone beyond safeguard from physical violence, to include into this latter standard of treatment legal protection and/or security.¹¹¹ The determination of the exact scope of these obligations has given rise to interpretative problems. *ADF Group v. U.S.* arose out of a project for the modification of a junction which brought together several highways in Virginia, awarded to a company (*Shirley Contracting Corporation*), which in turn signed a sub-contract with the foreign investor (*ADF International*).¹¹² The subsequent ADF's proposals to perform some project-related works in Canada and a waiver for certain requirements were rejected by Virginia (the Department of Transportation of the Commonwealth of Virginia, VDOT) based on U.S. legislative statutory provisions, administrative regulations and contractual provisions embodying them.¹¹³ This determined a massive increase in the cost of the project for ADF and a violation of his right as foreign investor under NAFTA including the FET and FPS obligations.¹¹⁴ The Arbitral Tribunal, faced with the general wording of the relevant provision under NAFTA, warned that any general requirement to accord FET and FPS should be guided by State practice, relevant case law and other sources of customary or general international

¹⁰⁵ *Ibid.*, para.5.

¹⁰⁶ *Ibid.*, paras.8-11, 70 and ss..

¹⁰⁷ *Ibid.*, p.53.

¹⁰⁸ *Ibid.*, para.108.

¹⁰⁹ UNCTAD, *Fair and Equitable Treatment*, UNCTAD Series on Issues in International Investment Agreements II, (United Nations: 2012, New York/Geneva), p.6-7.

¹¹⁰ C. Schreuer, *Full Protection and Security*, *Journal of International Dispute Settlement* Vol.1, Iss.1 (2010), p.1-2.

¹¹¹ *Ibid.*, p.6.

¹¹² *ADF Group Inc. v. United States of America*, ICSID Case No.ARB(AF)/00/1, Award, 9 January 2003, paras.44-47.

¹¹³ *Ibid.*, paras.49-55.

¹¹⁴ *Ibid.*, paras.55, 61 and ff.

law.¹¹⁵ Indeed, Article 1105 of NAFTA reads as follows: *'Each Party shall accord to investments or investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.'* The pressing doubts on the real extension of the FET and FPS included in the provision pushed the Free Trade Commission established under NAFTA to issue a Note of Interpretation in 2001 in order to clarify that *'1. Article 1105 (1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party. 2. The concepts of 'fair and equitable treatment' and 'full protection and security' do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens. 3. A determination that there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105 (1).'* Despite this Note, in , a case concerning Canada's Log Export Regime to the investor's timber operations in British Columbia and the requirement that any of its exports be subject to a log surplus testing procedure, among other regulatory measures,¹¹⁶ the Arbitral Tribunal recognized that the most complex question brought to it was the one concerning fair and equitable treatment, due to the broad and unsettled discussion on the proper law applicable to this standard.¹¹⁷

IAs also commonly contain rules on expropriation. The rules on expropriation respond to international law rules on the protection of property. Property is generally regarded as a human right. The substance of the right to property might be well resumed in Article 1 of Protocol I of 1952 to the European Convention of Human Rights, according to which:

'Every natural or legal person is entitled to the peaceful enjoyment of his possession. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.'

This recognition has certainly strengthened the idea of the protection of property under international law, something furthered by IAs. For instance, under Article 6 of the United States Model BIT of 2004, on expropriation and compensation:

'1. Neither Party may expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization ("expropriation"), except: (a) for a public purpose; (b) in a non-discriminatory manner; (c) on payment of prompt, adequate, and effective compensation; and (d) in accordance with due process of law and Article 5 [Minimum Standard of Treatment]

¹¹⁵ *Ibid.*, para.184.

¹¹⁶ *Merrill & Ring Forestry L.P. v. The Government of Canada*, ICSID Administered Case/UNCITRAL, Award, 31 March 2010, paras.26 and ss..

¹¹⁷ *Ibid.*, para.182.

(1) through (3). 2. The compensation referred to in paragraph 1(c) shall: (a) be paid without delay; (b) be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place (“the date of expropriation”); (c) not reflect any change in value occurring because the intended expropriation had become known earlier; and (d) be fully realizable and freely transferable. ... 5. This Article does not apply to the issuance of compulsory licenses granted in relation to intellectual property rights in accordance with the TRIPS Agreement, or to the revocation, limitation, or creation of intellectual property rights, to the extent that such issuance, revocation, limitation, or creation is consistent with the TRIPS Agreement.’

This provision has been clarified by NAFTA arbitral tribunals. The case *Metalclad Corporation v. Mexico* concerned the creation and management in Mexico of a hazardous waste landfill by a Mexican company (*COTERIN*) later acquired by an U.S. company (*Metalclad Corporation*), the activities of which were affected by the denial of a municipal construction permit and of a decree (the *Ecological Decree*) declaring a natural area which encompassed the area of the landfill, for the protection of cactus.¹¹⁸ The Arbitral Tribunal clarified that:

‘[...] expropriation under NAFTA includes not only open, deliberate and acknowledged takings of property, such as outright seizure or formal or obligatory transfer of title in favor of the host State, but also covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State.’¹¹⁹

Indeed, while direct expropriation involves the direct taking of property by the State through formal transfer of title or outright physical seizure,¹²⁰ ‘creeping’ or ‘indirect’ expropriation or ‘measures the effect of which is tantamount to expropriation’ exist where measures adopted by a State have the effect of depriving ‘the investor of the use and benefit of his investment even though he may retain nominal ownership of the respective rights being the investment,’¹²¹ as specified by the Arbitral Tribunal in *Middle East Cement Shipping v. Egypt*, where the Egyptian prohibition of import of cement heavily affected the claimant’s business which was centered on cement.¹²² It is worth noting that some scholars have characterized in a somewhat different way the previously-mentioned terms, stressing for instance that

¹¹⁸ *Metalclad Corporation v. The United Mexican States*, ICSID Arbitration Facility Case No. ARB(AF)/97/1, Award, 30 August 2000, paras.2, 28-69.

¹¹⁹ *Ibid.*, para.103.

¹²⁰ See e.g. *Repsol, S.A. and Repsol Butano, S.A. v. Argentine Republic - Convenio de Solución Amigable y Avenimiento de Expropiación*, ICSID Case No. ARB/12/38, 20 March 2014, where Argentina expressly recognized to have expropriated 51% shares of the YPF company, which were the property of Repsol, S.A. and related companies.

¹²¹ *Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/99/6, Award, 19 April 2002, para.107.

¹²² *Ibid.*, paras.81-84.

'creeping' expropriation is characterized by a deliberate strategy on the part of the State.¹²³ Further and more importantly, not all state measures which interfere with property are expropriations.¹²⁴ On this line, taking into account that the specific wording of each treaty determines what is an expropriation and what is a legitimate regulation, the distinction between the two has been identified by some on the sole effect of the measure on foreign investor's property ('sole effect doctrine'), and extended by others to the purpose and context of the measure.¹²⁵ In *Methanex v. U.S.*, where a Canadian investor contended that certain measures adopted by the State of California restricting the use of methyl tertiary-butyl (MTBE) affected its business which was based on the production and sale of this product,¹²⁶ the Arbitral Tribunal held that '*as a matter of general international law, a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and, which affects, inter alios, a foreign investor or investment is not deemed expropriatory and compensable unless specific commitments had been given by the regulating government to the then putative foreign investor contemplating investment that the government would refrain from such regulation.*'¹²⁷

II.1.C. The Resolution of International Investment Disputes: An Unresolved Matter?

As clearly showed by the case law mentioned in this chapter, international investments disputes are the place where investment treaties and host States obligations are put to a test. Already in 2000, it had been eminently stressed that almost all IIAs included a dispute resolution clause which, in the case of an unsuccessful amicable resolution of the dispute, after a short period (s.c. cool-off period, which often takes 6 months), might resort to arbitration.¹²⁸ These provisions normally provide for both State-to-State or investor-to-State arbitration, and the co-existence of these two types of arbitration has generated much debate. Historically, foreign investors whose rights had been encroached upon by host States governments might have had recourse to national courts remedies, often encountering problems such as sovereign immunity, non-independent judiciary and government pressure, or they might have themselves exerted pressure on their home State government to resort to diplomatic protection.¹²⁹ In order to try to resolve the problem the problems stemming from these circumstances, States finally concluded the 1965 ICSID Convention, with the goal of

¹²³ R. Dolzer, *Indirect Expropriation of Alien Property*, ICSID Review - Foreign Investment Law Journal Vol.1, Iss.1 (1986), p.44.

¹²⁴ OECD, "*Indirect Expropriation*" and the "*Right to Regulate*" in *International Investment Law*, OECD Working Papers on International Investment, 2004/4, (OECD Publishing), p.4, available at http://www.oecd.org/daf/inv/investment-policy/WP-2004_4.pdf.

¹²⁵ *Ibid.*, p.15.

¹²⁶ *Methanex Corporation v. United States of America*, UNCITRAL, Partial Award, 7 August 2002, para.22.

¹²⁷ *Methanex Corporation v. United States of America*, UNCITRAL, Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005, Part IV – Chapter D – Page 4, para.7

¹²⁸ C. Leben, *L'Évolution du Droit International des Investissements*, *Op. Cit.*.

¹²⁹ UNCTAD, *Investor-State Dispute Settlement*, UNCTAD Series on Issues in International Investment Agreements II, (United Nations: 2014, New York/Geneva), p.23, available at http://unctad.org/en/PublicationsLibrary/diaeia2013d2_en.pdf.

establishing a neutral forum where foreign investors might have been provided with fair hearings and specialized tribunals unencumbered by political considerations.¹³⁰ The idea behind investor-to-State arbitration, was that this would have depoliticized investment disputes, preventing two States to engage directly one against the other in a dispute.¹³¹ Nonetheless, as previously mentioned, investment agreements commonly contain also State-to-State arbitration clauses, and State-to-State investment disputes have recently re-emerged. These dispute settlement clauses, which were very common in Friendship, Commerce and Navigation (FCN) Treaties, were first introduced in IIAs in 1969 in the Chad-Italy BIT.¹³² Their inclusions in IIAs, side-by-side with investor-State arbitration clauses has generated some problems: indeed, commonly agreements including both dispute settlement methods do not provide with guidance as to the relation between the process and outcome of one method on the other.¹³³ In 2003, based on the 1993 Italy-Cuba BIT, Italy started an ad hoc arbitral proceedings, both as a subject directly affected by Cuba's alleged conduct and in the exercise of diplomatic protection, claiming that Cuba had discriminated against Italian investors operating in Cuba.¹³⁴ Eventually, the Arbitral Tribunal rejected all Italian claims on the merits.¹³⁵ Cases such as this one have generated debate among scholars, and have led some to stress that the goals of investor protection are relevant, but not absolute.¹³⁶

Indeed, investment arbitration has gained importance over time. Nevertheless, one should not forget that several IIAs dispute settlement clauses provide for different dispute resolution methods, normally foreseeing consultations with a view to the amicable solution of disputes as the first step.¹³⁷ Some treaties provide that if foreign investors have submitted a dispute to the local courts of the host State, or to other agreed fora, they lose their rights to submit the dispute to arbitration (s.c.'fork in the road' provision).¹³⁸

In order for arbitral tribunals to have jurisdiction, certain conditions have to be met. Investment tribunals base their jurisdiction upon investment treaties. Therefore, even though investors often conclude contracts with host States (or public authorities therein), purely contractual claims are in principle (and at least theoretically) excluded from investment tribunals jurisdiction. In , a dispute concerning a contract for the provision of mining systems and supporting equipment for a mining project, the Tribunal highlighted that purely

¹³⁰ *Ibid.*, p.24.

¹³¹ P. Bhagnani, *Revisiting the Countermeasures Defense in Investor-State Disputes: Approach and Analogies*, in A. K. Bjorklund (Ed.), *Yearbook on International Investment Law & Policy 2013-2014*, (Oxford University Press: 2015, U.K./U.S.), p.452.

¹³² N. Bernasconi-Osterwalder, *State-State Dispute Settlement in Investment Treaties*, IISD Best Practices Series – October 2014, p.1, available at <https://www.iisd.org/sites/default/files/publications/best-practices-state-state-dispute-settlement-investment-treaties.pdf>.

¹³³ *Ibid.*, p.16.

¹³⁴ *The Republic of Italy v. The Republic of Cuba*, Ad Hoc Arbitration, Award, 1 January 2008, para.46 ff..

¹³⁵ *Ibid.*, p.103-104.

¹³⁶ A. Roberts, *State-to-State Investment Treaty Arbitration: A Hybrid Theory of Interdependent Rights and Shared Interpretive Authority*, Harvard International Law Journal Vol. 55, No.1, (2014), available at http://www.harvardilj.org/wp-content/uploads/2014/03/HILJ_55-1_Roberts.pdf.

¹³⁷ See for instance the *Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Chile for the Promotion and Protection of Investments with Protocol*, signed on 8 January 1996, entered into force on 21 April 1997.

¹³⁸ A. Newcombe, L. Paradell, *Op. Cit.*, p.70.

contractual claims would difficultly pass the jurisdictional test of treaty-based tribunals, and recalled that in previous cases other tribunals had excluded their jurisdiction on the grounds that contract claims do not constitute or amount to breaches of substantive standards of the BIT at hand.¹³⁹ The Tribunal also pointed out that even in the presence of an umbrella clause in the relevant treaty, not all contract disputes based on that clause would turn into investment disputes under the treaty, in the absence of a connection between a contract and a treaty.¹⁴⁰ In fact, under umbrella clauses (or other similarly worded clauses), a State undertakes the obligation to honor obligations to foreign investors' investments, whether these obligations stem from local laws or contracts.¹⁴¹ The exact scope of investment arbitral tribunals is hence still a debated issue and a case-by-case analysis is necessary to determine whether the each arbitral tribunal's jurisdiction .

II.1.D. International Investment Law: Looking to the Future with a Critical Eye

This is not to deny that the arbitration system has attracted a long-standing criticism. Already in 1985, the United States Supreme Courts had the opportunity to express itself on it. In a case involving several corporations and a sales agreement containing an arbitration clause referring to the Japan Commercial Arbitration Association in case of breach of the agreement or disputes arising from certain articles thereof, following a disputes between the parties, a petition was filed in Federal District Court seeking an order to compel arbitration in accordance with the arbitration clause of the sales agreement.¹⁴² Faced with the question of the submission of antitrust claims to arbitration, the Court of Appeals had reversed the District Court decision to submit these claims to arbitration.¹⁴³ The Supreme Court stressed that if the arbitration would have been permitted to go forward, United States courts might have had the opportunity, at the award-enforcement stage, *'to ensure that the legitimate interest in the enforcement of the antitrust laws had been addressed,'* since the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (1958 Convention or New York Convention) invoked by the petitioner *'reserves to each signatory country the right to refuse enforcement of an award where the "recognition or enforcement of the award would be contrary to the public policy of that country."* In a much relevant passage, the Supreme Court highlighted the expansion of international trade and of the use of international arbitration and hence, *'if they [arbitral tribunals] are to take a central place in the international legal order, national courts will need to "shake off the old judicial hostility to arbitration"...and also their customary and understandable unwillingness to cede jurisdiction of a claim arising under*

¹³⁹ *Joy Mining Machinery Limited v. The Arab Republic of Egypt*, ICSID Case No.ARB/03/11, Award on Jurisdiction, 6 August 2004, paras.15, 75, 77.

¹⁴⁰ *Ibid.*, para.81.

¹⁴¹ M. Malik, *The Expanding Jurisdiction of Investment-State Tribunals: Lessons for Treaty Negotiators*, IISD Issues in International Investment Law – Background Papers for the Developing Country Investment Negotiators' Forum, Singapore, (October 2007), p.5-6, available at https://www.iisd.org/pdf/2007/inv_expanding_jurisdiction.pdf.

¹⁴² *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 666 (1985), available at <http://caselaw.findlaw.com/us-supreme-court/473/614.html>.

¹⁴³ *Id.*

domestic law to a foreign or transnational tribunal.’¹⁴⁴ Consequently, the Supreme Court ordered the respondent to honor its bargain and held the agreement to arbitrate enforceable. Despite this judgment, Justice Stevens dissented, arguing that:

‘The Court’s repeated incantation of the high ideals of “international arbitration” creates the impression that this case involves the fate of an institution designed to implement a formula for world peace. But just as it is improper to subordinate the public interest in enforcement of antitrust policy to the private interest in resolving commercial disputes, so it is equally unwise to allow a vision of world unity to distort the importance of the selection of the proper forum for resolving this dispute. Like any other mechanism for resolving controversies, international arbitration will only succeed if it is realistically limited to tasks it is capable of performing well – the prompt and inexpensive resolution of essentially contractual disputes between commercial partners. As for matters involving the political passions and the fundamental interests of nations, even the multilateral convention adopted under the auspices of the United Nations recognizes that private international arbitration is incapable of achieving satisfactory results. In my opinion, the elected representatives of the American people would not have us dispatch an American citizen to a foreign land in search of an uncertain remedy for the violation of a public right that is protected by the Shearman Act. This is especially so when there has been no genuine bargaining over the terms of the submission, and the arbitration remedy provided has not even the most elementary guarantees of fair process. Consideration of a fully developed record by a jury, instructed in the law by a federal judge, and subject to appellate review, is a surer guide to the competitive character of a commercial practice than the practically unreviewable judgment of a private arbitrator.’¹⁴⁵

In particular, criticism toward the investment system has centered on whether investment treaties, especially in the light of the interpretation given by arbitral tribunals, promote development. Indeed, the relationship between investment protection and the development of host States has attracted much attention from academia, international organizations, think tanks and legal practitioners alike. Some of the actors taking part in this debate have questioned whether the system of investment protection fosters the development of host states and whether it should do so. In order to answer such a question, it is necessary to preliminarily clarify the concept of development or sustainable development as it will be referred to in this paper.¹⁴⁶ In accordance with the definition of the *Brundtland Report*, sustainable development is intended as development that “meets the needs of the present without compromising the ability of future generations to meet their own needs.”¹⁴⁷ In this sense, sustainable development is strongly linked to the protection of the environment,

¹⁴⁴ *Id.*

¹⁴⁵ *Mitsubishi Motors Corp. V. Soler Chrysler-Plymouth, Inc., Op. Cit.*

¹⁴⁶ Here, the two terms will be used interchangeably.

¹⁴⁷ Report of the World Commission on Environment and Development, *Our Common Future*, Annex to Document A/42/427 – Development and International Cooperation: Environment, 20 March 1987, para. 27, available at http://conspect.nl/pdf/Our_Common_Future-Brundtland_Report_1987.pdf.

human rights and the promotion of societal values.¹⁴⁸ Certainly, foreign direct investments are key for the development of host states, since they provide capital to finance infrastructures, technology and know-how transfer, capacity building, furtherance of competition in the market and so on.¹⁴⁹ However, the positive effect of investment treaties on the flow of foreign direct investment is highly disputed by economists.¹⁵⁰ Some evidence has suggested that potential host States are more likely to sign BITs simply when their competitors have done so.¹⁵¹ Despite the lack of evidence about the benefits of this competition for development, here it is submitted that investment treaties could have a positive impact both in attracting foreign direct investment and in fostering the development of the host State. Scholars have recognized that economic globalization requires market-supporting institutions to flourish.¹⁵² Investment treaties could favor the creation of these institutions, signal markets the goodwill of States towards foreign capital and foster integration between States, locking in national reforms and favoring the adoption of similar economic policies. Further, with their impact on State sovereignty, it is undeniable that investment treaties have significant public policy implications¹⁵³ and real repercussions on the development of host States. It has not been uncommon for host States to be faced with situations where they had to choose between respecting investment treaties obligations or pursuing public (developmental) policies. In this context, some illustrative cases are the *Philip Morris v. Australia* case,¹⁵⁴ where Australian legislation regulating the packaging of tobacco-related products for public health purposes has been challenged by Philip Morris, the *Santa Elena v. Costa Rica* case,¹⁵⁵ which concerned the compensation due following an expropriatory measure taken for the creation of a natural reserve, or the *Methanex v. The United States* case,¹⁵⁶ where California's ban of a gasoline additive based on environmental reasons was challenged by a foreign investor.

With this in mind, it has been argued that currently international investment law does not foster the development of host States: investment law actually fully and merely coincides with the protection of foreign investment. To the contrary, in order for international investment law to contribute to development, the protection of foreign investment should be coupled with a sufficient degree of policy space left to host States. Moreover, the limitation of

¹⁴⁸ Id., Chairman's Foreword; Office of the High Commissioner of Human Rights, *Human Rights, Poverty Reduction and Sustainable Development: Health, Food and Water – A Background Paper*, World Summit on Sustainable Development, Johannesburg, 26 August 4 September 2002, available at <http://www.ohchr.org/Documents/Publications/HRPovertyReductionen.pdf>; A. Sen, *Development as Freedom*, (Alfred A. Knopf: 2001, New York).

¹⁴⁹ N. Bernasconi-Osterwalder, L. Johnson (Eds.), *International Investment Law and Sustainable Development – Key cases from 2000-2010*, IISD (2011) p. 12, available at http://www.iisd.org/pdf/2011/int_investment_law_and_sd_key_cases_2010.pdf.

¹⁵⁰ For opposing views, see L. Colen, D. Persyn, A. Guariso, *What Type of FDI Is Attracted by Bilateral Investment Treaties?*, LICOS Discussion Paper Series, Discussion Paper 346/2014, available at <http://www.econ.kuleuven.be/licos/publications/dp/dp346>, and N. Bernasconi-Osterwalder, L. Johnson (Eds.), *Op.Cit.*, p.12.

¹⁵¹ Z. Elkins, A. T. Guzman, B. Simmons, *Op. Cit.*, p.370.

¹⁵² Id.

¹⁵³ N. Bernasconi-Osterwalder, L. Johnson (Eds.), *Op. Cit.*, p.14.

¹⁵⁴ *Philip Morris Asia Limited v. The Commonwealth of Australia*, UNCITRAL, PCA Case No. 2012-12.

¹⁵⁵ *Compañía del Desarrollo de Santa Elena S.A. v. The Republic of Costa Rica*, ICSID Case No. ARB/96/1, Final Award, 17 February 2000.

¹⁵⁶ *Methanex Corporation v. United States of America*, Final Award on Jurisdiction and Merits, *Op. Cit.*

investors capacity to bring disputes against States could have positive effects. The obvious reply to this consideration is that it is the States that negotiate and conclude investment treaties and contribute to the creation of international law and, therefore, they fully bear the responsibility for the curtailing of their own sovereignty. However, there is substantive evidence showing that when they concluded investment treaties, States did not really know the impact of such treaties: BITs were initially considered pieces of paper, something for the press and the signing of which provided for photo opportunities during visits of high-level delegations from other countries.¹⁵⁷ In addition, as it will be further discussed below, here it is argued that the failure of international investment law to take into appropriate consideration developmental concerns stem not only from the design or structure of the system, that is from how international investment treaties are drafted, but from the interpretation that investment tribunals have given to them. Consequently, although structural changes are certainly needed to redress the imbalance in the system and to favor the development of host States, certain elements of the system could already allow the pondering and promotion of developmental needs of host States by investment tribunals.

These changes and possible solutions will be discussed below. At this point, it is worth noting that the distinction between the structure of the system of investment protection and its interpretation by investment tribunals although clear in theory, is extremely blurred in practice. The interpretation of legal provisions always involves a part of creation by the interpreter. Interpreting the law amounts to some extent to making the law and this is even more so in the realm of international law.¹⁵⁸ Moreover, investment tribunals are not the sole interpreters of investment treaties' provisions. Rather, States are the creators of the law, but their interpretation and application of the law affects what tribunals decide in particular cases. This could happen, for instance, with the creation of specific mechanisms through which States can clarify or resolve disputes on the interpretation or application of treaty provisions.¹⁵⁹ As a result, one can assert that neither States nor investment tribunals enjoy ultimate interpretive authority in all circumstances,¹⁶⁰ and that it is difficult to distinguish between a creator and an interpreter of the law.

As above-mentioned, the different features of the international investment law system as it is currently designed and its interpretation by arbitral tribunals (that is, the way international investment treaties are drafted and investment arbitration is conducted) have a direct bearing on its capacity to address developmental concerns. Several features stand out, bearing in mind that here it is not possible to claim to be exhaustive, given the complexity and

¹⁵⁷ L. N. Skovgaard Poulsen, E. Aisbett, *When the Claim Hits: Bilateral Investment Treaties and Bounded Rational Learning*, World Politics Vol. 65 Iss. 2, (April 2013), p.280-281.

¹⁵⁸ See for instance I. Venzke, *How Interpretation Makes International Law - On Semantic Change and Normative Twists*, (Oxford University Press: 2012, U.K.).

¹⁵⁹ See for instance the Free Trade Commission, composed of representatives of the NAFTA parties or their designees, under Article 2001 of the *North American Free Trade Agreement* (NAFTA), adopted on 17 December 1992, entered into force on 1 January 1994, available at <https://www.nafta-sec-alena.org/Default.aspx?tabid=97&ctl=SectionView&mid=1588&sid=ed3bd8c9-2d73-45fb-9241-d66364f8037a&language=en-US#A2001>; or the Commission mentioned in Article 51 of the 2004 *Canada Model Agreement for the Promotion and Protection of Investments*, available at <http://italaw.com/documents/Canadian2004-FIPA-model-en.pdf>.

¹⁶⁰ A. Roberts, *Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States*, The American Journal of International Law, Vol.104, (2010), p. 179.

fast-paced evolution in the system. A first element, with pervasive consequences on the entire system, is the unfettered possibility for investors to challenge States through investment arbitration. Whenever an investor considers that there has been a breach of his rights under the Treaty (and sometimes under contracts), it can bring a claim against the host State and obtain substantial compensation. This possibility, coupled with the broad and vague language of most investment treaties,¹⁶¹ has led to a significant expansion of certain obligations of the host State (such as the one to grant a stable business environment, an extremely broad obligation),¹⁶² to a curtailment of its freedom to pursue public policies (which, whenever the foreign investor's rights are encroached on, according to some investment tribunals, do not dispel the obligation for the State to substantially compensate the foreign investor, nor do they affect the amount of the compensation due),¹⁶³ to legal uncertainty on general obligations (such as the real content of the ubiquitous fair and equitable treatment obligations).¹⁶⁴ Moreover, the possibility for foreign investors to bring unrestrained arbitral claims against States can even frustrate, *a priori*, the tentative of reforms (the so-called "regulatory chill"), thus preventing host States from developing or implementing certain policies.¹⁶⁵ A possible way out is maybe the one currently under discussion in the *Transatlantic Trade and Investment Partnership* (the "TTIP") negotiations between the European Union (the "EU") and the United States where, although an investor-to-State dispute settlement clause seems to be currently envisaged, the EU has proposed mechanisms to reduce the risk of frivolous and unfounded investors claims and has launched public consultations on the matter.¹⁶⁶ The TTIP negotiation is still to be concluded and the effectiveness of any proposed solution remains to be seen.

A second problematic element of the investment protection system is the lack of transparency, openness and public participation in arbitral proceedings. Although transparency seems to have gained some currency in investment arbitration,¹⁶⁷ in the past arbitral tribunals such as the one in *Biwater v. Tanzania*,¹⁶⁸ a case concerning the provision of water and sewerage services, did not hesitate to take measures to assure the confidentiality of arbitral proceedings even in the presence of a significant public interest in the dispute. The same arbitral tribunal¹⁶⁹ accepted and took into consideration *amici curiae* briefs, that is briefs expressing the view of third non-disputing parties with an interest in the dispute.

¹⁶¹ N. Bernasconi-Osterwalder, L. Johnson (Eds.), *Op. Cit.*, p.13.

¹⁶² See e.g. *CMS Gas Transmission Co. v. Republic of Argentina*, ICSID Case No. ARB/01/8, Award, 12 May 2005, paras. 273-281.

¹⁶³ See e.g. *Compania del Desarrollo de Santa Elena S.A. v. The Republic of Costa Rica*, Final Award, *Op. Cit.*, paras. 71-72.

¹⁶⁴ A. Newcombe, L. Paradell, *Op. Cit.*, p.263.

¹⁶⁵ See K. Tienhaara, *Regulatory Chill and the Threat of Arbitration: A View from Political Science*, in C. Brown, K. Miles (Eds.), *Evolution in Investment Treaty Law and Arbitration*, (Cambridge University Press: 2011, UK).

¹⁶⁶ See Question 9 in European Commission, *Public Consultation on Modalities for Investment Protection and ISDS in TTIP*, Trade, Consultation Document, March 2014, available at http://trade.ec.europa.eu/doclib/docs/2014/march/tradoc_152280.pdf.

¹⁶⁷ For a recent codification of rules on transparency see the UNCITRAL, *Rules on Transparency in Treaty-Based Investor-State Arbitration*, in United Nations, *Report of the United Nations Commission on International Trade Law*, Forty-sixth Session (8-26 July 2013), available at http://unctad.org/meetings/en/SessionalDocuments/a68d17_en.pdf.

¹⁶⁸ *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008, para. 51.

¹⁶⁹ *Id.*, paras. 356-391.

However, the arbitral tribunal, recalling the view of the arbitral tribunal in the decision in *Methanex v. United States of America*,¹⁷⁰ implicitly recognized that no general obligation to accept *amici curiae* briefs exists. Each and every single investment tribunal can decide differently, since investment tribunals awards lack precedential value, that is they cannot bind future investment tribunals, and the absence of a (standing) appeal facility (such as the Appellate Body of the World Trade Organization) adds to the uncertainty. The result is that certain relevant values and interest (and primarily, the interest to development) are not appropriately considered by arbitral tribunals. Clearly, making arbitral procedures public and opened could favor business organizations as well (since they could qualify as *amici curiae*), whereas non-governmental organizations (which often act as *amici curiae*) do not necessarily represent the view of civil society, something that the State is in charge of doing.¹⁷¹ In any event, granting access to arbitral proceedings to *amici curiae* would make arbitral tribunals and disputing parties accountable in the public eye and investment tribunals would be in a position to hear and balance all relevant arguments and interests involved in each case.

Once some the most remarkable elements of the system of investment protection which hamper the host States developmental efforts have been identified, further reflection can be given to some possible solutions. Some international organizations have made relevant proposals of reform, focusing on structural changes to the system: the limitation of investor access to investor-States dispute settlement or the introduction of an appeal facility to address the problem of legal consistency and predictability have been recommended.¹⁷² Notwithstanding the beneficial effect of these changes, here it is argued that developmental concerns could be taken already into advisement already by arbitral tribunals. First and most important, developmental concerns should already be part of the equation of investment protection since they are an integral part of investment treaties. Notwithstanding the distinctiveness of each investment treaty, there seems to be a common pattern in investment treaties in respect of developmental concerns. In the United States – Azerbaijan BIT,¹⁷³ both parties recognize that the treatment accorded to investment under the Treaty will stimulate the flow of private capital and the economic development of the parties and agree that a stable framework for investment will maximize effective utilization of economic resources and improve living standards, without it being necessary to relax health, safety and environmental measures of general application. The same developmental concerns are mentioned in the Preamble of the 2012 United States Model Bilateral investment Treaty (which includes as well specific provisions on investment and environment and investment

¹⁷⁰ *Id.*, para.358.

¹⁷¹ V. Heiskanen, *Book Review – P.F. J. Macrory, A. E. Appleton, M. G. Plummer (Eds.), The World Trade Organization: Legal, Economic and Political Analysis*, Springer - 2005, *Journal of World Trade* Vol.40, Iss.6, (2006), p. 1151, quoting Peter Sutherland.

¹⁷² UNCTAD, *Reform of Investor-State Dispute Settlement: In Search of a Roadmap*, International Investment Agreement Issues Note No. 2 (June 2013), p.4, available at http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d4_en.pdf.

¹⁷³ *Treaty Between the Government of the United States of America and the Government of the Republic of Azerbaijan Concerning the Encouragement and Reciprocal Protection of Investment*, signed on 1 August 1997, entered into force on 2 August 2001, available at http://www.bilaterals.org/IMG/html/US-AZB_BIT_2001_.html.

and labor, respectively at Articles 12 and 13),¹⁷⁴ while the 2004 Canada Model BIT expressly mentions in its Preamble the promotion of sustainable development and later contemplates the relation between investment and health, safety and environmental measures in its Article 11.¹⁷⁵ Other countries, such as China, did not make reference to development in their BITs, but mentioned “*mutual benefit*”¹⁷⁶ and the “*increase of prosperity in both States*,”¹⁷⁷ which recall the concept of development. In addition, the Preamble of the 1965 *Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (the “ICSID Convention”), which established the *International Centre for the Settlement of Investment Disputes* (ICSID), the primary institutional and procedural framework for the settlement of investment disputes between governments and foreign investors,¹⁷⁸ clarifies that the Contracting States agreed to the ICSID Convention taking into consideration the need for “*international cooperation for economic development, and the role of private international investment therein*” and “[d]esiring to establish such facilities for international conciliation and arbitration under the auspices of the International Bank for Reconstruction and Development,”¹⁷⁹ whose primary goal is to foster development. Treaty preambles reveal the object and purpose of the treaties, which, according to Article 31 of the *Vienna Convention on the Law of Treaties* (the “VCLT”), codifying a rule of international customary law,¹⁸⁰ should guide the interpreter when interpreting the treaty.¹⁸¹

Further, developmental needs can be taken into consideration when adjudicating investment disputes or interpreting investment agreements through Article 31.3 (c), which gives interpretive significance, together with the context, to any relevant rules of international law applicable in the relation between the parties.¹⁸² On a similar line, Article 42 of the ICSID Convention stipulates that in the absence of an agreement between the parties on the rules of law to be applied, the tribunal shall apply the law of the Contracting State party to the dispute

¹⁷⁴ 2012 U.S. Model Bilateral Investment Treaty, available at <http://www.ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf>.

¹⁷⁵ 2004 Canada Model BIT, available at <http://italaw.com/documents/Canadian2004-FIPA-model-en.pdf>.

¹⁷⁶ *Agreement Between the Government of the People’s Republic of China and the Government of the Republic of Albania Concerning the Encouragement and Reciprocal protection of Investments*, Preamble, signed on 13 February 1993, entered into force on 01 September 1995, available at <http://investmentpolicyhub.unctad.org/Download/TreatyFile/8>.

¹⁷⁷ *Bilateral Agreement for the Promotion and Protection of investments Between the Government of the Republic of Colombia and the Government of the People’s Republic of China*, signed on 22 October 2008, entered into force on 02 July 2007, Preamble, available at <http://investmentpolicyhub.unctad.org/Download/TreatyFile/720>.

¹⁷⁸ A. Broches, *The Convention on the Settlement of Investment Disputes: Some Observations on Jurisdiction*, Columbia Journal of Transnational Law Vol.5, (1966), p.264.

¹⁷⁹ Preamble of the *Convention on the Settlement of Investment Disputes Between States and Nationals of Other States* (ICSID Convention), submitted to Governments by the Executive Directors of the International Bank for Reconstruction and Development on 18 March 1965, entered into force on 14 October 1966, available at http://www.sloarbitration.eu/Portals/0/Arbitrazno-pravo/CRR_English-final.pdf.

¹⁸⁰ See e.g. *Territorial Dispute Case (Libyan Arab Jamahiriya v. Chad)*, (1994), Judgment of 3 February 1994, para. 41; WTO Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted on 20 May 1996, p.18.

¹⁸¹ Article 31 (*General Rule of Interpretation*) of the Vienna Convention on the Law of Treaties, adopted on 23 May 1969, entered into force on 27 January 1980, available at <https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf>.

¹⁸² *Id.*

and such rules of law as may be applicable.¹⁸³ It is difficult not to consider the growing body of international rules and principles relating to development to be applicable and relevant to State-to-State or investor-to-State relations, in the context of investment treaties. The *Rio Declaration on Environment and Development* (UNCED), which in its Principle 27 calls attention to sustainable development, implicitly recognizes that already at the time of its negotiation it existed a body of international law on sustainable development.¹⁸⁴ Further, the right to development has been eminently recognized as one important principle of international law.¹⁸⁵

Sustainable development could serve to provide investment tribunals with interpretive guidance, thus working as a concept and objective. This would allow to circumvent the problems related to the uncertainty of the content of sustainable development and to take decisions tailored to the real needs of developing and least-developed countries, whose developmental situation and needs are often extremely different.¹⁸⁶ As a result, investment tribunals could (and currently can) take decisions which carefully balance the interest of the host State, with the result of favoring the State whenever developmental needs come into play. This is what, according to some scholar, the International Court of Justice has done in the *Gabčíkovo-Nagymaros* case. There, the Court used sustainable development as a concept having both procedural and substantive value:¹⁸⁷ the concept of development obliges parties to contemplate all relevant interests at stake when taking decisions and to achieve certain substantive results.¹⁸⁸

These latter considerations are not to say that all problems related to development and investment protection would be resolved through interpretative techniques. As above-mentioned, structural changes in the system are needed. Nor does it mean to ignore the inner danger that the concept of sustainable development carries: that is, to surreptitiously justify opposite positions in the name of different ideas of development (which is indeed what Professor Sands consider that happened in the *Gabčíkovo-Nagymaros* case, where both Hungary and Czechoslovakia invoked sustainable development to justify economic development on the one hand and respect for environment on the other).¹⁸⁹ However, the concept of sustainable development precisely serves to find a balance between the imperative of economic development and the need for environmental integrity, human rights respect and societal values furtherance, that is the need to strike a balance between opposite position. An interpretative use of the concept of development could be a starting point to seriously consider the impact that investment protection has on host States and to redress the imbalances that currently persist in international investment law.

¹⁸³ ICSID Convention, *Op. Cit.*

¹⁸⁴ P. Sands, *International Courts and the Application of the Concept of "Sustainable Development"*, Max Planck UNYB 3 (1999), p. 391.

¹⁸⁵ S. R. Chowdhury, E. M. G. Denters, P.J. I. M. de Waart, *The Right to Development in International Law*, (Martinus Nijhoff Publishers: 1992, The Netherlands), p.233.

¹⁸⁶ E.g. Congo, China and Honduras are all three "*developing economies*" according to the United Nations, despite their different developmental situations and needs, see United Nations, *World Economic Situation and Prospects 2013, Country Classification – Statistical Annex*, available at http://www.un.org/en/development/desa/policy/wesp/wesp_current/2013country_class.pdf.

¹⁸⁷ P. Sands, *Op. Cit.*, p. 393.

¹⁸⁸ *Id.*

¹⁸⁹ P. Sands, *Op. Cit.*, p. 393, Footnote 5.

Chapter II.2. International Cultural Heritage Law: Genesis and Development

II.2.A. International Cultural Heritage Law: Looking to the Past

International law is already in itself a ‘recent’ phenomenon. Although its origin could be found in the late medieval *ius gentium*, only at the end of the 19th century the ‘law of nations’ has developed some features that we still can see nowadays.¹⁹⁰ In its evolution, international law has undergone a significant process of diversification and expansion, which has led to the creation of new specialized branches of regulation, such as international trade law, human rights, international environmental law, etc..¹⁹¹ Among these ‘new’ branches, international cultural heritage law is certainly one of the youngest. To the extent that the distinction between public and private international law still holds true today, culture and cultural heritage have been largely regulated by public international law, while private international law has been particularly relevant to the resolution of disputes.¹⁹² Overall, and thanks to the key role of the United Nations Educational, Scientific and Cultural Organization (UNESCO) in this respect, international law seems to have taken the peculiar function of setting a *bonus pater familias* or *well-governed state* standard with regard to culture and cultural heritage.¹⁹³

Despite this late interest of international law, cultural heritage has accompanied mankind since immemorial times: culture and cultural heritage have been part of human beings’ life since their existence. Nevertheless, only recently there seems to be an adequate legal consideration of culture and cultural heritage. Both have been dealt with first in national law, and only at a later stage in international law. National legislation certainly responded to long-standing concerns on cultural heritage, but were not harmonized among themselves. The result was a fragmented landscape of national laws and regulations, sometimes pursuing different objectives. In this context, the creation of international cultural heritage law has entailed a radical change in the overall status and consideration of cultural heritage, providing a more unitary conceptual lens to protect it.

The meaning of both terms (‘culture’ and ‘cultural heritage’) has changed along history, and a different legal status (if any) has been attributed by each civilization. While it seems safe

¹⁹⁰ J. Crawford, *Brownlie’s Principles of Public International Law*, (Oxford University Press: 2012, UK), p.3, 5.

¹⁹¹ International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, Report of the Study Group of the International Law Commission, Finalized by Martti Koskenniemi, ILC Fifty-Eight Session, Geneva 1 May-9 June and 3 July-11 August 2006, available at http://legal.un.org/ilc/documentation/english/a_cn4_l682.pdf.

¹⁹² J. A. R. Nafziger, R. Kirkwood Paterson, A. Dundes Renteln, *Cultural Law: International, Comparative, and Indigenous*, (Cambridge University Press: 2010, USA), p.148.

¹⁹³ P.-M. Dupuy, *The Impact of Legal Instruments Adopted by UNESCO on General International Law*, in A. A. Yusuf (Ed.), *Standard-Setting in UNESCO Volume I – Normative Action in Education, Science and Culture*, UNESCO Reference Work Series, (UNESCO Publishing/Martinus Nijhoff Publishers: 2007, France/The Netherlands), p.358.

to say that culture includes knowledge, belief, art, morals, law, and custom,¹⁹⁴ the concept could be further stretched to cover behaviors, ideas of the mind, logical constructs, and more.¹⁹⁵ The term 'heritage' does not apparently help in narrowing the scope of the ever-evolving concept of 'cultural heritage', since it simply refers to something which has been received by a predecessor.¹⁹⁶

It follows that, although at present there are different inclusive definitions of cultural heritage in international law, these are not necessarily clear or self-explanatory. For instance, under UNESCO, cultural heritage comprises the entire corpus of material and non-physical signs and symbols, "*handed on by the past to each culture and, therefore, to the whole of humankind.*"¹⁹⁷ Also, according to the Council of Europe, cultural heritage covers "*a group of resources inherited from the past which people identify, independently of ownership, as a reflection and expression of their constantly evolving values, beliefs, knowledge and traditions...[including] the environment resulting from the interaction between people and places through time.*"¹⁹⁸ These definitions may appear too vague, and yet, they represent the landing place of a long process which started many centuries ago. Indeed, as early as in 6th AD, Theodoric the Great wrote to the Prefect of Rome requesting a keeper for Roman buildings and monuments.¹⁹⁹ In his view, the seven wonders of the world were nothing compared to the great beauty of Rome.²⁰⁰ This notion of cultural heritage was centered on monuments and buildings. Similar concerns probably underlied the issuance by Pope Pius II and Elisabeth the I of England, in 1462 and 1560 respectively, of a Papal Bull and a Proclamation to protect ancient monuments in Rome and monuments of antiquity in Church in England.²⁰¹ Later, the French Revolution and the French expansion in Italy and Egypt laid the bedrock for the development of new concepts in cultural property.²⁰² It is in 1794 that the French Temporary Commission of Arts (*Commission temporaire des arts*) brought the attention of the Public Education Committee (*Comité d'instruction publique de la Convention nationale*) on all the objects serving the purpose of education to be found, among others, in libraries, museums and collections.²⁰³ It was the first time that such a wealth of cultural heritage objects, which encompassed natural sciences, medicine, antiquities, arts and architecture, was offered to the people.²⁰⁴ These brief considerations do not imply that the evolution of the notion of cultural heritage along history has been linear. To the contrary, great advances have been accompanied by some regression. While in 1834, the kingdom of Greece enacted a law on the

¹⁹⁴ E. Burnett Taylor, *Primitive Culture: Researches Into the Development of Mythology, Phylosophy, Religion, Art and Custom*, Vol.I, (John Murray, Albemarle Street: 1971, London), p.1.

¹⁹⁵ J. Jokilehto, *Definition of Cultural Heritage – References to Documents in History*, ICCROM Working Group 'Heritage and Society', (15 January 2005), available at http://cif.icomos.org/pdf_docs/Documents%20on%20line/Heritage%20definitions.pdf.

¹⁹⁶ C. Forrest, *International Law and the Protection of Cultural Heritage*, (Routledge: 2010, UK), p.2.

¹⁹⁷ UNESCO, *Draft Medium Term Plan 1990-1995*, General Conference, Twenty-Fifth Session, Paris 1989, 25 C/4, p.57, available at <http://unesdoc.unesco.org/images/0008/000825/082539eb.pdf>.

¹⁹⁸ Article 2 (a) of the *Council of Europe Framework Convention on the Value of Cultural Heritage for Society*, adopted on 13 October 2005, entered into force on 1 June 2011.

¹⁹⁹ F. Milizia, *Memorie degli Architetti Antichi e Moderni*, Tomo I, (Remondini di Venezia: 1785), p.77.

²⁰⁰ *Ibid.*, p.78.

²⁰¹ C. Forrest, *Op. Cit.*, p.224-225.

²⁰² *Ibid.*, p.225.

²⁰³ J. Jokilehto, *A History of Architectural Conservation*, (Butterworth.Heinemann: 2002, The Netherlands), p.71.

²⁰⁴ *Id.*

protection of historic monuments, declaring that “*all objects in Greece...are regarded as the common national possession of all Hellenes,*” medieval structures were often destroyed in order to reveal classical antiquity.²⁰⁵

Broadly speaking, as per some authors, cultural heritage encompasses every manifestation of culture of human beings,²⁰⁶ almost anything man made or given value by man.²⁰⁷ In a narrower sense, it covers (‘cultural’) tangible or material objects and intangible or immaterial ideas related to such objects.²⁰⁸ The issue of a clear definition of ‘cultural heritage’ is not a theoretical one. In order to determine the precise scope of application of (national and) international law on cultural heritage, accurate definitions are needed.²⁰⁹ This is even more so, if one considers that the endless list of threats that progress poses to the tangible and intangible elements of cultural heritage are often the result of decisions taken by single individuals: the installation of poles, large-scale advertising signs, electricity and telephone cables are good examples.²¹⁰ These individuals should be held accountable where relevant rules are breached. Further, this ‘definitional’ problem sheds light on a second, related problem. In general, one could wonder whether it is possible to adopt a single definition of cultural heritage which determines the scope of application of the body of conventions, treaties, resolutions, recommendations, etc. constituting international cultural heritage law as a whole. The international legal instruments on cultural heritage contain slightly different definitions and concepts: beyond ‘cultural heritage’, they refer to ‘cultural property’,²¹¹ ‘cultural patrimony’,²¹² or ‘cultural objects.’²¹³ Some scholars have analyzed the ‘linguistic’ dimension of the different terms: each language appears to privilege a specific word and meaning.²¹⁴ Others have clearly taken a position in favor of the term ‘cultural heritage,’ to be preferred to ‘cultural property,’ due to its broader scope.²¹⁵ To avoid these ‘*embarras terminologiques*’, critics have classified these differences as the result of a simple,

²⁰⁵ *Ibid.*, p.89.

²⁰⁶ J. A. R. Nafziger, *Cultural Heritage Law: The International Regime – Report of the Director of Studies*, in J. A. R. Nafziger, T. Scovazzi (Eds.), *Le Patrimoine Culturel de l’Humanité / The Cultural Heritage of Humanity*, Centre for Studies and Research in International Law and International Relations - Académie de Droit international de La Haye, (Brill / Nijhoff: 2008, Leiden/ Boston), p.145.

²⁰⁷ C. Forrest, *Op. Cit.*, p.2.

²⁰⁸ *Id.*

²⁰⁹ M. Frigo, *Cultural Property v. Cultural Heritage: A “Battle of Concepts” in International Law?*, *International Review of the Red Cross* No. 854, (30.06.2004), p.367, available at <https://www.icrc.org/eng/resources/documents/misc/634hw6.htm>.

²¹⁰ L. V. Prott, *International Standards for Cultural Heritage*, *World Culture Report*, (UNESCO Publishing: 1998), p.222, available at <http://132.248.35.1/cultura/informe/Art14.htm>.

²¹¹ E.g. the *Convention for the Protection of Cultural Property in the Event of Armed Conflict*, adopted on 14 May 1954, entered into force on 7 August 1956, and the *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*, adopted on 14 November 1970, entered into force on 24 April 1972.

²¹² E.g. Article 9 of the 1970 *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*, *Op. Cit.*

²¹³ E. g. the *UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects*, adopted on 24 June 1995, entered into force on 1 July 1998.

²¹⁴ M. Frigo, *Op. Cit.*; M. Cornu, C. Wallaert, J. Fromageau, *Dictionnaire Comparé du Droit du Patrimoine Culturel*, (CNRS Editions : 2012, France).

²¹⁵ L. V. Prott, P. J. O’Keefe, ‘*Cultural Heritage’ or ‘Cultural Property’?*, *International Journal of Cultural Property* Vol. 1, (1992), 311.

haphazard coincidence.²¹⁶ With specific regard to the 1972 World Heritage Convention and its definition of cultural heritage of world importance, it has been stressed that the lack of a precise definition gives some flexibility in the type of cultural heritage to be included in the World Heritage List under this Convention.²¹⁷ This latter view could perhaps be extended to other conventions on cultural heritage: the integration of these different terms could make the scope of international cultural heritage law wider and more flexible altogether.

Despite these observations, a cross-reference to different international legal instruments on cultural heritage may provide some indication on the notion of 'cultural heritage' in practice in international law. Indeed, cultural heritage spans, *inter alia*, from "monuments...groups of buildings...sites...natural features...geological and physiographical formations...natural sites [and] areas",²¹⁸ to "oral traditions and expressions...performing arts...social practices, rituals and festive events...knowledge and practices concerning nature and the universe...traditional craftsmanship."²¹⁹ In this context, eminent scholars have signaled that the adoption of certain conventions has paradoxically inhibited the development of any broader definition of cultural heritage.²²⁰ Still, the reasons for the uncertainties on the notion of 'cultural heritage' are not clear.

Although, as mentioned above, the idea of the protection and preservation of cultural heritage had been already expressed, from ancient times to the Renaissance, the destruction of the enemy's cultural heritage was a normal (if not even expected) action. In *The Prince*, Machiavelli described the destruction of a conquered city as a necessary step to complete the conquest, while Alberico Gentili later confirmed this idea in legal terms.²²¹ This is not to imply that cultural heritage had no meaning at all. To the contrary, cultural heritage was valued greatly. The existence of laws restricting removal and export of cultural property beyond certain boundaries as early as 1464 under Pope Pius II in the Papal State, seems to support this view.²²² Later in 1815, Pope Pius VII is said to have sent the sculptor Canova to France, in order to negotiate the return to the Papal State of many art and cultural works and objects, following the conclusion of peace treaties by the two States.²²³ Though taken into great consideration, cultural heritage was thus the subject of mixed regulation. Following M. Quatremère de Quincy writings in the 19th century, the interest of civilization and progress was (or should have been) the main purpose of cultural heritage preservation.²²⁴ Nonetheless,

²¹⁶ T. Scovazzi, *La Notion de Patrimoine Culturel de l'Humanité dans les Instruments Internationaux – Rapport du Directeur des Etudes*, in J. A. R. Nafziger, T. Scovazzi (Eds.), *Op. Cit.*, p.14-15.

²¹⁷ S. Labadi, *UNESCO, Cultural Heritage, and Outstanding Universal Value – Value-Based Analyses of the World Heritage and Intangible Cultural Heritage Conventions*, (AltaMira Press: 2013, UK), p.28.

²¹⁸ Articles 1 and 2 of the *Convention Concerning the Protection of the World Cultural and Natural Heritage*, adopted on 16 November 1972, entered into force on 17 December 1975.

²¹⁹ Article 2 of the *Convention for the Safeguarding of the Intangible Cultural Heritage*, signed on 17 October 2003, entered into force on 23 April 2006.

²²⁰ A. Telesetsky, J. A. R. Nafziger, *Toward a Broader Concept of the Intangible Cultural Heritage*, in V. S. Vadi, H. Schneider, *The New Frontiers of Cultural Law: Intangible Heritage Disputes*, Transnational Dispute Management (TDM) Vol. 11, Iss. 2, (March 2014), p.2.

²²¹ *Ibid.*, p.4.

²²² J. A. R. Nafziger, *Op. Cit.*, p.171, quoting P. M. Bator, *The International Trade in Art*, p.37 (1982).

²²³ T. Scovazzi, *Op. Cit.*, p.19-20.

²²⁴ A. C. Quatremère Quincy, *Lettres sur le Préjudice Qu'Occasionneroient aux Arts et à la Science, le Déplacement des Monuments de l'Art de l'Italie, le Démembrement de ses Ecoles, et la Spoliation de ses Collections, Galeries, Musées, etc.*, (Rome, 1815), available at https://archive.org/stream/lettressurleprej00quat/lettressurleprej00quat_djvu.txt.

as it will be further discussed in Chapter I.5, the rationale behind these legal measures (purely 'cultural' and 'progress-oriented' or rather economic and political) still remains to be ascertained. Cultural heritage has in fact both a material value (determined, by the highly valuable materials it is made of, such as gold or silver) and an attributed one, which might be determined by the larger context of the heritage (for instance, its function in the touristic industry), the rarity of the object, its aesthetic qualities and/or its historical and archeological importance.²²⁵ The quest for a balance between these different elements has proved extremely difficult, nourishing some debates on the public/private purpose of cultural heritage and on its nature as a commodity.²²⁶

The need to protect and preserve cultural heritage started to gain credit at the international level through scholar contribution on the laws of war. Emmerich de Vattel wrote indeed in the 18th century that, during a war, those who destroy monuments representing cultural heritage, when they do not serve the enemy's purpose at war, should be declared enemies of the human kind ("*ennemi du genre humain*").²²⁷ De Vattel himself stressed nonetheless that, were operations of war or sieges to require it, the destruction of cultural heritage would have been legitimate.²²⁸ In the 20th century, General Eisenhower supported this view, expressing his preference for the destruction of "*famous building[s]*" against the possibility to save his soldiers' life.²²⁹ Dissenting opinions on this primacy of military strategy on cultural heritage protection have been however strongly voiced.²³⁰ In the 19th century, a 'Copernican revolution' took place both in humanitarian law in general and with specific regard to cultural heritage.

The laws of war, immemorial and born of confrontation between armed forces on the battlefield, have remained customary in nature until the 19th century.²³¹ The adoption in 1864 of the *Geneva Convention for the amelioration of the condition of wounded and sick in armed forces in the field*, was to be the cornerstone of treaty-based international humanitarian law.²³² Almost concurrently, the adoption in 1863 during the American Civil War of the *Lieber Code*, which concerned the conduct during armed conflicts and contained rules on public property,²³³ private property,²³⁴ prohibited pillage²³⁵ and recognized the need for special care to avoid damage to precious civilian objects,²³⁶ strengthened the process of 'formalization' of international humanitarian law with specific regard to cultural heritage. This led later to the

²²⁵ C. Forrest, *Op. Cit.*, p.5-6.

²²⁶ *Id.*

²²⁷ E. de Vattel, *Le Droit des Gens ou Principes de la Loi Naturelle Appliqués à la Conduite et aux Affaires des Nations et des Souverains*, Livre III, (London : 1758), p.168-169.

²²⁸ *Id.*

²²⁹ D.D. Eisenhower, quoted in T. Scovazzi, *Op. Cit.*, p17.

²³⁰ For instance, H. Nicolson, *Marginal Comment*, The Spectator Archive, (24 February 1944), p. 10, available at <http://archive.spectator.co.uk/article/25th-february-1944/10/marginal-comment>, pointing out that "[t]he irreplaceable is more important than the replaceable, and the loss of even the most valued human life is ultimately less disastrous than the loss of something which in no circumstance can ever be created again."

²³¹ J. Kellenberger, *Foreword*, in J.-M. Henckaerts, L. Doswald-Beck, *Customary International Humanitarian Law – Volume I: Rules*, International Committee of the Red Cross, (Cambridge University Press: 2005, UK), p.xv.

²³² *Id.*

²³³ J.-M. Henckaerts, L. Doswald-Beck, *Op. Cit.*, p.178.

²³⁴ *Ibid.*, p.179.

²³⁵ *Ibid.*, p.182.

²³⁶ *Ibid.*, p.128.

adoption of the *Hague Convention respecting the Laws and Customs of War on Land*, adopted and revised respectively by the First and Second Peace Conferences of 1899 and 1907, and the 1907 *Hague Convention concerning Bombardment by Naval Forces in Time of War*, which all contained rules on acts of destruction, pillage, looting and confiscation of works of art and other items of public and private cultural property during armed conflicts.²³⁷ But only after the two World Wars, with the adoption of the Charter of the United Nations, of the Universal Declaration of Human Rights in 1948 and of the 1949 Geneva Conventions, the times were ripe for the elaboration of general principles on the protection of cultural heritage in times of conflict,²³⁸ and in time of peace.

The creation of UNESCO in 1945 has marked a turning point for international cultural heritage law.²³⁹ As an agency of the United Nations, UNESCO has been created to “*contribute to peace and security by promoting collaboration among the nations through education, science and culture in order to further universal respect for justice, for the rule of law and for the human rights and fundamental freedoms which are affirmed for the peoples of the world, without distinction of race, sex, language or religion, by the Charter of the United Nations.*”²⁴⁰ In 1954, the *Convention for the Protection of Cultural Property in the Event of Armed Conflict* (1954 Hague Convention) was adopted under the aegis of UNESCO. The Convention strikes a balance between cultural property protection and military needs.²⁴¹ Thanks also to its Protocols, the Convention has created a system which distinguishes between the general respect of cultural property,²⁴² a regime of special protection and further restraint of military conduct with regard to special cultural property,²⁴³ and a regime of enhanced protection for “*cultural heritage of the greatest importance for humanity.*”²⁴⁴ Together with its Executive Regulations and its Protocols, the Conventions represents a ‘codification’ of the rules on the protection of immovable and movable cultural heritage during armed conflict.²⁴⁵ Perhaps more importantly, the Convention recognizes in its Preamble that protection of cultural heritage property “*cannot be effective unless both national and international measures have been taken to organize it in time of peace.*”²⁴⁶

And indeed, the adoption of other UNESCO’s conventions on cultural heritage in time of peace has followed. Among the most relevant, one should certainly mention the 1970 *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of*

²³⁷ M. Frigo, *Op. Cit.*, p.367.

²³⁸ F. Francioni, *Au-Delà des Traités: l’Émergence d’un Nouveau Droit Coutumier pour la Protection du Patrimoine Culturel*, EUI Working Papers Law 2008/05, p.5, available at <http://cadmus.eui.eu/bitstream/handle/1814/7992/LAW-2008-05.pdf?sequence=1>.

²³⁹ *Ibid.*, p.2.

²⁴⁰ Article I.1, Purposes and Functions, of the *Constitution of the United Nations Educational, Scientific and Cultural Organization*, Adopted in London on 16 November 1946.

²⁴¹ T. Scovazzi, *Op. Cit.*, p.20-26.

²⁴² Article 4 of the 1954 Hague Convention.

²⁴³ Article 8 and 11 of the 1954 Hague Convention.

²⁴⁴ Article 10 and 13 of the *Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict*, adopted on 26 March 1999, entered into force on 9 March 2004.

²⁴⁵ E. Clément, *Le Réexamen de la Convention de La Haye de 1954 pour la Protection des Biens Culturels en Cas de Conflit Armé*, in N. Al-Nauimi, R. Meese, *International Legal Issues Arising Under the United Nations Decade of International Law*, Proceedings of the Qatar International Law Conference’94, (Martinus Nijhoff Publishers: 1995, The Hague/London/Boston), p.134.

²⁴⁶ Preamble of the 1954 Hague Convention.

Ownership of Cultural property,²⁴⁷ 1972 *Convention on the Protection of Natural and Cultural Heritage* (1972 World Heritage Convention),²⁴⁸ the 2001 *Convention on the Protection of the Underwater Cultural Heritage*,²⁴⁹ the 2003 *Convention for the Safeguarding of Intangible Cultural Heritage*²⁵⁰ and the 2005 *Convention on the Protection and Promotion of the Diversity of Cultural Expressions*.²⁵¹ The set of UNESCO's conventions should be completed with non-binding declarations, recommendations and specific agreement concluded and adopted by this agency.²⁵² In this general framework, the 1972 World Heritage Convention has played a preeminent role. In this Convention, the concept of a shared responsibility of the international community for the protection of cultural heritage has found its utmost expression.²⁵³ Also, the protection under a single international legal instrument of both natural and cultural heritage, at a time when culture and nature were dealt with separately, has been regarded as a major step forward.²⁵⁴ Despite these positive elements, the 1972 World Heritage Convention and UNESCO altogether face several challenges. The contended lack of impartiality of expert opinions and decision making, the politicization of the World Heritage Committee and UNESCO's financial crisis have been identified as critical points.²⁵⁵ The cutting of financial contribution by the United States in 2011, following the admission of Palestinians as full members of the Organization, and the United States consequent loss of voting rights in 2013,²⁵⁶ have been one of the principal causes of this crisis. All these observations make it difficult to assess the role and actions of UNESCO at the international level. The Organization's (alleged failure to) contribute to the building of peace, sustainable development and intercultural dialogue, as spelled out in its mission statement, has been heavily criticized.²⁵⁷ This failure has been attributed to the lack of responsible actions by its Member States, whereas UNESCO Secretariat has apparently striven to fulfill these goals with their support.²⁵⁸

At the same time, its standard-setting activity, one of its main constitutional functions,²⁵⁹ has been assessed positively, together with the creation of a forum for amicable

²⁴⁷ *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*, *Op. Cit.*

²⁴⁸ *Convention Concerning the Protection of the World Cultural and Natural Heritage*, *Op. Cit.*

²⁴⁹ *Convention on the Protection of the Underwater Cultural Heritage*, signed on 2 November 2001, entered into force on 2 January 2009.

²⁵⁰ *Convention for the Safeguarding of the Intangible Cultural Heritage*, *Op. Cit.*

²⁵¹ *Convention on the Protection and Promotion of the Diversity of Cultural Expressions*, signed on 20 October 2005, entered into force 18 March 2007.

²⁵² J. A. R. Nafziger, *Op. Cit.*, p.167-168.

²⁵³ E. Clément, *Op. Cit.*, p.138.

²⁵⁴ C. Cameron, M. Rössler, *Many Voices, One Vision: The Early Years of the World Heritage Convention*, (Ashgate: 2013, UK/US), p.27.

²⁵⁵ L. Meskell, *UNESCO's World Heritage Convention at 40 – Challenging the Economic and Political Order of International Heritage Conservation*, *Current Anthropology* Vol.54, No.4 (August 2013), p.484, available at <http://www.jstor.org/stable/10.1086/671136>.

²⁵⁶ A. J. Rubin, *U.S. Loses Voting Rights at Unesco*, *The New York Times*, (8 November 2013), available at http://www.nytimes.com/2013/11/09/us/politics/us-loses-voting-rights-at-unesco.html?_r=0.

²⁵⁷ B. ter Haar, *Conditions for Success – NATO as an Example for UNESCO*, *The Academic Council of the United Nations System*, Informational Memorandum No.3, (2012), available at <http://acuns.org/wp-content/uploads/2012/11/ACUNS-Newsletter.3.2012.web.pdf>.

²⁵⁸ *Id.*

²⁵⁹ K. Matsuura, *Foreword*, in A. A. Yusuf (Ed.), *Op. Cit.*, p.11.

resolution of disputes on the recovery of cultural property.²⁶⁰ In any event, while the impact of more recent conventions still remains to be seen, the work of the United Nations on cultural heritage is not limited to UNESCO's action. As a matter of fact, the World Intellectual Property Organization (WIPO), established to encourage creative activity,²⁶¹ and whose primary goal is "to promote the protection of intellectual property throughout the world through cooperation among States and, where appropriate, in collaboration with any other international organization,"²⁶² has also focused on cultural heritage. Several treaties administered by WIPO are relevant to cultural heritage. On this vein, the work of the WIPO *Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore*, which met for the first time in April 2001, is particularly relevant.²⁶³ Although both WIPO's role and administered treaties will be further discussed in the following chapters of this work, in this context it is appropriate to recall that WIPO hold strong ties with the International Council of Museums (ICOM), and through its Alternative Dispute Resolution Services, the Organization provides a dispute resolution forum for art and cultural heritage disputes, among others.²⁶⁴

Outside UNESCO, other international legal instruments specifically dealing with cultural heritage, have been adopted. As for those instruments focusing directly on cultural heritage, it is worth recalling the 1976 Organization of American States' *Convention on the Protection of the Archeological, Historical, and Artistic Heritage of the American Nations*, the 1992 Council of Europe's *Convention on the Protection of the Archeological Heritage*, and the 2005 *Framework Convention on the Value of Cultural Heritage for Society*, adopted by the Council of Europe, and the 1995 *UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects*. Although efforts to negotiate at the multilateral level have produced several conventions, bilateral agreements have also been adopted. These agreements have often been concluded between cultural heritage 'exporting' States and cultural heritage 'importing' ones, such as the agreement between Italy and Switzerland²⁶⁵ or the one between Mexico and the United States.²⁶⁶ Discussing the swinging between multilateralism and bilateralism in respect of underwater cultural heritage, bilateralism has been suggested as a better solution to create binding rules.²⁶⁷ However, from a general international law perspective, it has been contended that the preference for bilateral or multilateral treaties is not driven, often, by an

²⁶⁰ M. Vicien-Milburn, A. García Márquez, A. Fouchard Papaefstratiou, *UNESCO's Role in the Resolution of Disputes on the Recovery of Cultural Property*, in V. S. Vadi, H. Schneider, *Op. Cit.*.

²⁶¹ *Preamble of the Convention Establishing the World Intellectual Property Organization*, adopted on 14 July 1967, as amended on 28 September 1979.

²⁶² Article 3 (i) of the *Convention Establishing the World Intellectual Property Organization*, *Op. Cit.*

²⁶³ W. B. Wendland, *Intellectual Property and the Protection of Traditional Knowledge and Cultural Expressions*, in B. T. Hoffman (Ed.), *Art and Cultural Heritage – Law, Policy and Practice*, (Cambridge University Press: 2006, USA), p.327.

²⁶⁴ WIPO, *WIPO Alternative Dispute Resolution (ADR) for Art and Cultural Heritage*, available at <http://www.wipo.int/amc/en/center/specific-sectors/art/>.

²⁶⁵ *Accordo tra il Consiglio federale Svizzero e il Governo della Repubblica italiana sull'importazione e il rimpatrio di beni culturali*, concluso il 20 ottobre 2006, entrato in vigore mediante scambio di note il 27 aprile 2008.

²⁶⁶ *Treaty of Co-Operation between the United States of America and the United Mexican States Providing for the Recovery and Return of Stolen Archeological, Historical and Cultural Properties*, signed on 17 July 1970, entered into force on 24 March 1971.

²⁶⁷ M. Risvas, *Multilateral and Bilateral Approaches in the Protection of Underwater Cultural Heritage*, in V. S. Vadi, H. Schneider, *Art and Heritage Disputes in International and Comparative Law*, *Transnational Dispute Management (TDM)* 5 2013.

informed choice, and ideologies and values attached to one type of regulation (universalists vs. unilateralists, globalism vs. sovereignty, etc.) could be better served by the other.²⁶⁸

Other non-cultural heritage-specific international treaties and conventions have added to this general framework. The contribution of international humanitarian law to the current regime of international cultural heritage has already been discussed. Before the 1954 *Convention for the Protection of Cultural Property in the Event of Armed Conflict* and its subsequent protocols, the Hague Conventions on the war on land of 1899²⁶⁹ and 1907²⁷⁰ already prohibited certain conducts, such as pillage and destruction of enemy's property and contained specific rules on buildings related to art, science and religion and cultural objects. On the same line, the 1977 Protocol I to the 1949 Geneva Convention on civilian protection explicitly prohibits acts of hostility against historic monuments and places of worship constituting cultural or spiritual heritage.²⁷¹ The development of human rights has also added to international cultural heritage law, although from a specific perspective. The relation between human rights and cultural heritage with special attention to the human right to culture will be discussed in detail in Chapter I.3 of this work. It seems nevertheless appropriate to highlight already that human rights issues related to cultural heritage are numerous, but human rights and cultural heritage law seem to deal with similar problems from a different, almost 'unilateral' perspective. While UNESCO or the International Center for the Study of the Preservation and Restoration of Cultural Property (ICCROM) focus on matters of cultural heritage, human rights institutions' work in the field, it has been contended, has been "*derivative*" and based on the notion of cultural rights.²⁷² Scholars have also discussed the effects of human rights, international cultural heritage law and international environmental law on the notion of 'common goods' and to a move away from a State-based idea of international law.²⁷³ Despite these reflections, the idea that States are still central entities in international law and in the promotion or frustration of the protection of cultural heritage appears unchallenged.²⁷⁴ The potential for integration and reciprocal contribution of cultural heritage and human rights appears nonetheless great and this is even

²⁶⁸ G. Blum, *Bilateralism, Multilateralism, and the Architecture of International Law*, Harvard International Law Journal Vol.49, No.2 Summer 2008, available at http://www.harvardilj.org/wp-content/uploads/2010/09/HILJ_49-2_Blum.pdf.

²⁶⁹ *Convention with Respect to the Laws and Customs of War on Land*, adopted on 29 July 1899, entered into force on 4 September 1900.

²⁷⁰ *Convention Respecting the Laws and Customs of War on Land*, adopted on 18 October 1907, entered into force on 26 January 1910.

²⁷¹ *Convention Relative to the Protection of Civilian Persons in Time of War (IV Geneva Convention)*, adopted on 12 August 1949, entered into force on 21 October 1950; *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, adopted on 8 June 1977, entered into force on 7 December 1978.

²⁷² J. Gilbert, *Custodians of the Land: Indigenous People, Human Rights and Cultural Integrity*, in M. Langfield, W. Logan, M. C. Craith (Eds.), *Cultural Diversity, Heritage and Human Rights – Intersections in Theory and Practice*, (Routledge: 2010, OXON/USA/Canada), p.41.

²⁷³ F. Lenzerini, A. F. Vrdoljak (Eds.), *International Law for Common Goods – Normative Perspectives on Human Rights, Culture and Nature*, (Hart Publishing: 2014, Oxford).

²⁷⁴ A. F. Vrdoljak, *Challenges for International Cultural Heritage Law*, in W. Logan, M. N. Craith, U. Krockel (Eds.), *Blackwell Companion to the New Heritage Studies*, (New York: J. Wiley and Sons, 2015), p.2-3, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2518026.

more so in the light of the link between cultural heritage and sustainable development,²⁷⁵ and cultural heritage and international environmental law.²⁷⁶

On this line, even international treaties and agreements mainly concerned with international economic law have featured relevant rules on cultural heritage. A significant example of regional integration is the European Union (EU), the result of the (ongoing) process of integration formally started in the 1950s with the creation of the three original communities: the European Coal and Steel Community (ECSC), the European Atomic Energy Community (EURATOM), and the European Economic Community (EEC).²⁷⁷ The EU has several competences on a diverse range of areas, including culture. This latter area is among those where the EU can take action to support, coordinate or supplement Member States action, while these latter retain competence in the area. Hence, under Articles 2 (5) and 6 of the Treaty on the Functioning of the European Union (TFEU), the EU cannot harmonize EU Member States laws on culture, but it can pass legally binding acts constraining Member States as for their substance.²⁷⁸ This entails a significant degree of power of the EU in the cultural policy area, among other areas.²⁷⁹ As a reflection of this provision, under Article 13 of the TFEU, in implementing and formulating the Union's policies, the Union and its Member States undertake the obligation to respect legislative and administrative provisions and customs of the Member States with regard to, *inter alia*, religious rites, cultural traditions and regional heritage. Also, the European intellectual property architecture, still under construction,²⁸⁰ could provide a strong instrument of integration in terms of recognition and protection of cultural expressions. Further, under Article 167 of the TFEU (Title XIII, significantly entitled "Culture"; ex-Article 151 TEC), the Union has to contribute to the flowering of the cultures of its Member States, respecting national and regional diversity and bringing the common cultural heritage to the fore, fostering at the same time cooperation between Member States, and with third countries and international organizations. From the perspective of economic integration, customs union and the internal market, the TFEU reaffirms under its Articles 34 and 35 (ex-Articles 28 and 29 of the TEC) that quantitative restrictions on imports and exports, and all measures having equivalent effect, are prohibited among Member States. Nonetheless, under Article 36 of the TFEU (ex-Article 30 of the TEC), certain prohibitions or restrictions of imports, exports or goods in transit can be adopted if

²⁷⁵ For instance, the Rio+20 Conference outcome document stressed this link, United Nations, GA Res. 66/288, 27 July 2012.

²⁷⁶ S. Gruber, *The Impact of Climate Change on Cultural Heritage Sites: Environmental Law and Adaptation*, Carbon and Climate Law Review Vol.2, (2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1285741; D. Shelton, A. Kiss, *Judicial Handbook on Environmental Law*, (United Nations Environment Program: 2005, UK), p.109 and ss.; L. Guruswamy, J. C. Roberts, C. Drywater, *Protecting the Cultural and Natural Heritage: Common Ground*, Tulsa Law Journal Vol.34, No.4, (1999), available at <https://lawweb.colorado.edu/profiles/pubpdfs/guruswamy/GuruswamyTLJ.pdf>.

²⁷⁷ See C. Dordi, A. Malatesta, *La Politica Economica e Monetaria nel Progetto di Costituzione Europea*, Diritto Pubblico, Comparato ed Europeo, (2003), p.1796.

²⁷⁸ P. Craig, G. de Búrca, *EU Law : Text, Cases and Materials*, (Oxford University Press : 2011, U.K.), p.85-86.

²⁷⁹ *Id.*

²⁸⁰ L. Manderieux, *A More Unitary European IP Architecture*, in A. Jolly, *The Handbook of European Intellectual Property Management – Developing, Managing and Protecting Your Company's Intellectual Property*, (Kogan Page: 2012, UK).

justified on specific grounds, including on grounds of “*the protection of national treasures possessing artistic, historic and archeological value.*”²⁸¹

This need to integrate trade liberalization with the protection and promotion of important societal values (such as culture and cultural heritage) was also perceived at the World Trade Organization (WTO). This concern was addressed differently in the three main agreements administered by the WTO, concerning trade in goods (General Agreement on Tariffs and Trade (GATT 1994), trade in services (General Agreement on Trade in Services (GATS)) and intellectual property (Agreement on Trade-Related Aspects of Intellectual Property Rights). With regard to the GATT 1994, Article XIX sets forth General Exceptions to the obligations of the Agreement.²⁸² Under this provision, where certain specific conditions spelled out in the Article’s so-called chapeau are met, WTO Member States are allowed to adopt measures inconsistent with the obligations under the Agreement, among others, where these measures are “(f) imposed for the protection of national treasures of artistic, historic or archeological value.” Nevertheless, the GATT does not contain any provision to preserve cultural diversity. More importantly, the GATS does not contain any reference to culture or cultural heritage in its General Exceptions provision (Article XIV), while the significant impact of liberalization of trade in services on intangible cultural heritage seems clear. To solve this situation, UNESCO *Convention on the Diversity of Cultural Expressions* was adopted in 2005. Its Article 6 sets forth a ‘cultural exception’ to free trade norms, allowing States (in the general spirit of the Convention) to defend local cultures through control on the importation of foreign cultural products.²⁸³ The ‘cultural exception’ was transposed at the WTO by the EU²⁸⁴ and introduced in the *Schedules of Commitments and Lists of Article II Exemptions* for services.²⁸⁵ Finally, although the TRIPS Agreement has a significant bearing on traditional knowledge, traditional culture and cultural heritage, it does not contain *per se* any explicit reference to them.²⁸⁶ Nevertheless, the TRIPS Agreement seems to address issues such as the protection of folklore through the incorporation of Article 15 (4) of the *Berne Convention for the Protection of Literary and Artistic Works* (Berne Convention),²⁸⁷ although inadequately.²⁸⁸ This issues will be discussed in depth in Chapter I.4 and in the third part of this work.

II.2.B. International Cultural Heritage Law: Open Questions and Challenges

²⁸¹ *Id.*

²⁸² P. Van den Bossche, *The Law and Policy of the World Trade Organization –Text, Cases and Materials*, (Cambridge University Press: 2008, U.K.), p.615-617.

²⁸³ L. Lixinski, *Intangible Cultural Heritage in International Law*, (Oxford University Press: 2013, U.K.), p.59-60.

²⁸⁴ At the time it was the European Communities the one negotiating at the WTO.

²⁸⁵ *Ibid.*, p.61.

²⁸⁶ S. Frankel, *Attempts to Protect Indigenous Culture Through Free Trade Agreements*, in C. B. Graber, K. Kuprecht, J. C. Lai, *International Trade in Indigenous Cultural Heritage – Legal and Policy Issues*, (Edward Elgar Publishing: 2012, U.K./U.S.A), p.133.

²⁸⁷ *Berne Convention for the Protection of Literary and Artistic Works*, adopted on 9 September 1886, as revised at Paris on 24 July 1971, entered into force on 5 December 1887.

²⁸⁸ S. Frankel, *Op. Cit.*, p.126, footnote 39.

All the above considerations show that international cultural heritage law is a complex and fragmented branch of international law, where different approaches prevail at the national, regional and international level.²⁸⁹ Its mixed nature, comprised of public and private law at the same time, makes the conceptualization of an international cultural heritage law regime even more difficult. This double nature is reflected in the previously mentioned discussion on whether the term ‘cultural heritage’ should be preferred to ‘cultural property.’ While ‘heritage’ signals something to be protected for the enjoyment of present and future generations, ‘property’ indicates ownership.²⁹⁰ Further, the individual and non-governmental actors in the global cultural heritage system are several and diverse.²⁹¹ In the *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg* case,²⁹² the Republic of Cyprus and the Church of Cyprus brought a suit against an individual (Mrs. Golberg) in the Southern District of Indiana for the recovery of mosaics, which had been lost following the 1974 Turkish invasion of the island. Although the case formally involved only one State, the Republic of Cyprus, it concerned the effects of the Turkish occupation of Northern Cyprus, and involved the Church of Cyprus (as a party to the dispute), and several individuals with different affiliations. The Church of Cyprus was awarded possession of four mosaics by the district court, and the U.S. Court of Appeal affirmed this decision. The nature and dynamics of international relations based on cultural heritage represent a second element worth of attention. Culture and cultural heritage bring new elements on the table of international relations. A tangle of different motives push countries to engage in cultural and cultural heritage negotiations: they are moved not only by cultural motives, but also by strong economic interests and political reality. Tangible and intangible cultural heritage can significantly contribute in many ways to the economic development of a country,²⁹³ and this relevant contribution has already been recognized by international organizations such as WIPO or UNESCO.²⁹⁴ On this line, some developing countries and least-developed countries have been active in the protection and promotion of tangible and intangible cultural heritage, and have pushed hard for the restitution of tangible cultural heritage stolen or taken by other countries. Namibia,²⁹⁵

²⁸⁹ A. Chechi, *The Settlement of International Cultural Heritage Disputes*, (Oxford University Press: 2014, U.K.), p.296.

²⁹⁰ L. V. Prott, P. J. O. Keefe, *Op. Cit.*, p.301-311.

²⁹¹ These actors have been identified as following: Private dealers, auction houses and collectors; museums and art galleries; anthropologists and archaeologist; indigenous and minority ethnic groups; artists; historic preservationists, archivists and historians; criminals and criminal organizations, J. A. R. Nafziger, *Op. Cit.*, p.147.

²⁹² *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg*, 917 F.2d 278 (7th Cir 1990).

²⁹³ For instance, G. Brooks, *Heritage as a Driver for Development – Its Contribution to Sustainable Tourism in Contemporary Society*, ICOMOS, Paris, (2011), available at http://openarchive.icomos.org/1207/1/III-1-Article1_Brooks.pdf.

²⁹⁴ UNESCOCAT, *Contribution of Intangible Cultural Heritage to Sustainable Development*, Symposium, (2012), material available at http://www.unesco.de/fileadmin/medien/Dokumente/Kultur/IKE/GutePraxis_Montseny_ContribucioPClaDS_EN.pdf; WIPO, *Guide on Surveying the Economic Contribution of the Copyright-Based Industries*, (United Nations: 2002, Geneva), available at http://www.wipo.int/edocs/pubdocs/en/copyright/893/wipo_pub_893.pdf; UNESCO, *Creative Industries Boost Economies and Development, Shows UN Report*, (UNESCOPRESS: Paris, 2013), available at <http://www.unesco.org/new/en/media-services/in-focus-articles/creative-industries-boost-economies-and-development-shows-un-report/>.

²⁹⁵ A. L. Bandle, A. Chechi, M.-A. J. Renold, *Case 20 Skulls – Namibia and Charité Universitätsmedizin Berlin*, Platform ArThemis, Art Law Centre, University of Geneva, available at <https://plone.unige.ch/art-adr/cases-affaires/20-skulls-of-colonial-victims-2013-namibia-and-charite-universitatsmedizin-berlin>.

Cameroon,²⁹⁶ Iran,²⁹⁷ Cambodia²⁹⁸ and Peru²⁹⁹ are just a few of the many countries which have filed successful claims for the restitution of cultural heritage. Others, such as Colombia, have not pursued such claims, generating both criticism and reflections on the state of the art of international law on cultural heritage restitution claims.³⁰⁰

These reflections help elucidate and further ponder on prospects and challenges of international cultural heritage law. A first reflection goes to the real effectiveness of the international cultural heritage protection regime. The overall framework stemming from international specialized conventions has allegedly not been as effective as it should have been.³⁰¹ The recent nature of this branch of international law, the lack of funding to help countries protect cultural heritage and the lack of support from some European countries for a non-Eurocentric perspective on cultural heritage provide some explanations for this lack of effectiveness.³⁰² Others have pointed to the “*infancy*” of the branch as the main reason for its “*embryonic features*,” if compared to other branches.³⁰³ On this matter, one could perhaps assert that the developing path of international cultural heritage law could simply be different from that of other branches of international law such as investment law, trade law or human rights, regardless of their ‘maturity.’ Clearly, the effectiveness of every regime depends and relies primarily on its main actors, in this case states. However, States do not necessarily recognize the interest (public, economic, etc.) they could have in protecting cultural heritage. There is a large debate on the euro-centric nature and vision of culture and cultural heritage,³⁰⁴ which could simply be a reflection of the euro-centric foundation of international law in general.³⁰⁵ There has not been a lack of criticism on the Euro-centric nature of legislative, top-down approaches to the protection of cultural heritage.³⁰⁶ Also, at the

²⁹⁶ A. Chechi, A. L. Bandle, M.-A. J. Renold, *Case Afo-A-Kom – Furman Gallery and Kom People*, Platform ArThemis, Art Law Centre, University of Geneva, available at <https://plone.unige.ch/art-adr/cases-affaires/afo-a-kom-2013-furman-gallery-and-kom-people>.

²⁹⁷ A. Chechi, R. Contel, M.-A. J. Renold, *Case Jiroft Collection – Iran v. The Barakat Galleries Ltd.*, Platform ArThemis, Art Law Centre, University of Geneva, available at <https://plone.unige.ch/art-adr/cases-affaires/jiroft-collection-2013-iran-v-barakat-galleries>.

²⁹⁸ E. Velioglu, A. L. Bandle, M.-A. J. Renold, *Case Khmer Statue – Cambodia and Sotheby’s and the United States*, Platform ArThemis, Art Law Centre, University of Geneva, available at <https://plone.unige.ch/art-adr/cases-affaires/khmer-statu-2013-cambodia-and-sotheby2019s-and-the-united-states>.

²⁹⁹ A. Chechi, L. Aufseesser, M.-A. J. Renold, *Case macho Picchu Collection – Peru and Yale University*, Platform ArThemis, Art Law Centre, University of Geneva, available at <https://plone.unige.ch/art-adr/cases-affaires/machu-picchu-collection-2013-peru-and-yale-university>.

³⁰⁰ A. J. Rengifo Lozano, *La Defensa del Patrimonio Cultural*, UN Periódico, Universidad Nacional de Colombia, 11 August 2012, available at <http://www.unperiodico.unal.edu.co/dper/article/la-defensa-del-patrimonio-cultural.html>.

³⁰¹ J. A. R. Nafziger, *Op. Cit.*, p.163.

³⁰² *Id.*

³⁰³ V. S. Vadi, *Culture Clash: Investor’s Rights v. Cultural Heritage in International Investment Law and Arbitration*, Society of International Economic Law (SIEL), 3rd Biennial Global Conference (2012), p.3, available at <file:///C:/Users/Samsung/Downloads/SSRN-id2087823.pdf>.

³⁰⁴ For instance, with regard to traditional knowledge, folklore and genetic resources, WIPO, *WIPO Indigenous Panel on the Role of the Public Domain Concept: Experiences in the Fields of Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions: Experiences from Canada*, Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, Seventeenth Session, Geneva 6-10 December 2010, available at http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_17/wipo_grtkf_ic_17_inf_5_a.pdf.

³⁰⁵ J. Crawford, *Op. Cit.*, p.5.

³⁰⁶ N. Ndlovu, *Legislation as an Instrument in South African Heritage Management: Is It Effective?*, Conservation and Management of Architectural Sites Vol.13, No.1, (2011), p.31.

enforcement stage of cultural heritage law, the interaction of different legal orders (public/private, domestic/international, soft law/mandatory law) might be used to elude the effective protection of cultural heritage.³⁰⁷ Instruments such as the Convention on the Protection of Underwater Cultural Heritage expressly cut across such diverse international law branches as cultural heritage and the law of the sea.³⁰⁸ One could wonder whether a unitary, single approach to the protection of cultural heritage internationally is the one allowing to reap the greatest benefits. Recent developments do not allow to make any safe forecast.

A second, relevant element of international cultural heritage law is the lack of an international tribunal specialized in cultural heritage disputes. A lot has been written on the proliferation of international tribunals and dispute settlement mechanisms in international law in general.³⁰⁹ While some scholars have analyzed both pros and cons of an international cultural heritage specialized tribunal,³¹⁰ others have focused on the advantages of international arbitration and alternative dispute resolution (ADR) methods for these disputes.³¹¹ The criticism on the effectiveness of the cultural heritage protection regime and on its complexity nourish doubts even on the desirability of a specialized international court. Some cases in front of the International Court of Justice (ICJ) involving cultural heritage exemplify the intricacy of international cultural heritage disputes. The first ICJ *Preah Vihear Temple (Cambodia /Thailand)* case,³¹² concerned the sovereignty over the Temple of Preah Vihear, while the second revolved around the subsequent request for the interpretation of the ICJ judgment, which had upheld the submissions of Cambodia on its sovereignty over the Temple. The question of the restitution of the Temple was however incidental to that of the delimitation of national boundaries.³¹³ Cultural justifications are often used to support

³⁰⁷ F. Francioni, *Plurality and Interaction of Legal Orders in the Enforcement of Cultural Heritage Law*, in F. Francioni, J. Gordley (Eds.), *Enforcing International Cultural Heritage Law*, (Oxford University Press: 2013, U.K.), p.9.

³⁰⁸ C. Forrest, *A New International Regime for the Protection of Underwater Cultural Heritage*, *International and Comparative Law Quarterly* Vol.51, No.3, (2002), p.512, available at <file:///C:/Users/Samsung/Downloads/SSRN-id1407825.pdf>.

³⁰⁹ For some recent contribution on this subject see for instance, J. Viñuales, P.-M. Dupuy, *The Challenge of Proliferation: Legal and Normative Debates About International Adjudication*, in C. Romano, K. Alter, Y. Shany (Eds.), *The Oxford Handbook of International Adjudication*, (Oxford University Press: 2014, U.K.); L. Boisson de Chazournes, C. Romano, R. Mackenzie (Eds.), *International Organizations and International Dispute Settlement: Trends and Prospects*, (Brill Academic Publishers: 2002, Leiden/Boston/Tokyo); T. Buergenthal, *Proliferation of International Courts and Tribunals: Is It Good or Bad?*, *Leiden Journal of International Law* Vol.14, Iss.2, (2001).

³¹⁰ A. Chechi, *Evaluating the Establishment of an International Cultural Heritage Court*, *Art Antiquity and Law* Vol.XVIII, Issue 1, (2013); A. P. Prutny, *Toward Establishing an International Tribunal for the Settlement of Cultural Property Disputes: How to Keep Greece from Losing its Marbles*, *Georgetown Law Journal*, (1983-1984), 1155.

³¹¹ M. Cornu, M.-A. J. Renold, *New Developments in the Restitution of Cultural Property: Alternative Means of Dispute Resolution*, *International Journal of Cultural Property* No.17, (2010), 1-31; M.-A. J. Renold, *Arbitration and Mediation as Alternative Dispute Resolution Mechanisms in Disputes Relating to the Restitution of Cultural Property*, in J. Anderson (Ed.), *Crossing Cultures – Conflict, Migration and Convergence*, (Melbourne University Press: 2009, Melbourne); E.I. Gegas, *International Arbitration and the Resolution of Cultural Property Disputes: Navigating the Stormy Waters Surrounding Cultural Property*, *Ohio State Journal of Dispute Resolution*, (1997-1998), 129.

³¹² *Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the Temple Preah Vihear (Cambodia v. Thailand)*, Judgment, I.C.J. Reports 2013, p.281; *Case Concerning the Temple of Preah Vihear (Cambodia v. Thailand)*, Judgment, I. C. J. Reports 1962 p.6.

³¹³ A. Chechi, *The Settlement of International Cultural Heritage Disputes, Op. Cit.*, p.148.

territorial claims, together with other justifications,³¹⁴ thus entangling inextricably with other branches of international law. This is in fact what has happened in the recent *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)* case,³¹⁵ where the ICJ analyzed the question of whether State immunity from jurisdiction and execution applied to State properties used for bilateral cultural exchange and cooperation activities between Germany and Italy. The ICJ responded positively to this question, stressing that co-operation in the fields of research, culture and education was a governmental purpose, entirely non-commercial, and fell within Germany's sovereign functions.³¹⁶ However, it is worth noting that the basis of the case were humanitarian law violation claims dating back to the Second World War. Hence, although the case was directly stemming from international humanitarian law violations, it had relevant consequences for the legal recognition of the role of culture. Other ICJ cases, such as *Certain Property (Liechtenstein v. Germany)*,³¹⁷ could have been potentially relevant to cultural heritage law, but never reached the merits phase.

Thirdly, overall, the logic behind the different international conventions on cultural heritage might not be completely unitary and clear. Sometimes, the protection and preservation of cultural heritage require its subtraction from the country of origin, where dangerous natural or human-induced events threaten it. In these case, it is not clear whether the primary value promoted by international conventions is the protection and preservation of cultural heritage at the expense of the country of origin, or the maintenance of cultural heritage in the possession of the country of origin to the detriment of conservation. There seems to be no clear answer to whether international cultural heritage law favors an international conservationist view (the former) or is in favor of national possession (the latter). Internationalism or nationalism, “*destructive retention*” and “*covetous neglect*”?³¹⁸ This question still awaits a response.

With all these issues on the table, it is difficult to make any forecast on future developments. Much will probably depend on the interface between international cultural heritage law and other branches of international law. Among these, international investment law, with its rapid development and its current “*crise de croissance*,”³¹⁹ appears to offer significant food for thought on several facets and issues related to cultural heritage. This is even more so, if one takes into account that international investment law, like international cultural heritage law, has a mixed public-private nature.³²⁰ In investment arbitral cases such as *Compañía de Desarrollo de Santa Elena S.A. v. Republic of Costa Rica*³²¹ or *Southern Pacific*

³¹⁴ B. T. Sumner, *Territorial Disputes at the International Court of Justice*, Duke Law Journal Vol.53, (2004), p.1779,1785-1786, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=665304.

³¹⁵ *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, Judgment, I.C.J. Reports 2012, p.99.

³¹⁶ *Ibid.*, para.119.

³¹⁷ *Certain Property (Liechtenstein v. Germany)*, Preliminary Objections, Judgment, I.C.J. Reports 2005, p.6.

³¹⁸ J. H. Merryman, *Two Ways of Thinking About Cultural Property*, American Journal of International Law, (1986), p.847.

³¹⁹ C. P. Sauvart, *Foreword*, in A. K. Bjorklund, *Yearbook on International Investment Law & Policy 2012-2013*, (Oxford University Press: 2014, Oxford), p.xxxv.

³²⁰ A. Mills, *The Public-Private Dualities of International Investment Law and Arbitration*, in C. Brown, K. Miles (Eds.), *Evolution in Investment Treaty and Arbitration*, (Cambridge University Press: 2011, U.K.), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1739102.

³²¹ *Compañía de Desarrollo de Santa Elena S.A. v. Republic of Costa Rica*, Final Award, *Op.Cit.*

Properties (Middle East) Limited v. Arab Republic of Egypt,³²² investments had been made in or near sites subsequently inscribed on the World Heritage List. The investment arbitral tribunals adopted almost contrasting stances on whether the nature of the sites had to influence the amount of compensation due for related measures in violation of foreign investors' rights. On the other hand, in *Parkerings-Compagniet AS v. Republic of Lithuania*,³²³ the investment affected a site already inscribed on the World Heritage List. In *Glamis Gold, Ltd v. United States of America*,³²⁴ the arbitral tribunal was faced with the question of a California's desert tribe cultural rights. These cases will all be discussed in detail in the second and third part of this work. Here it is worth stressing that investment law has a direct bearing on cultural heritage law and policy, and their relationship could provide significant insights on current challenges to cultural heritage protection and preservation, both from a public and private law perspective, and a tangible and intangible heritage one.

II.2.C. The Multifaceted Legal Nature of Cultural Heritage and its Problems

As already spelled out at the beginning of this research thesis, this work adopts the standpoint of international law. This work will pay special attention to the relationship between international investment law and disputes and tangible and intangible cultural heritage, as qualified as such mainly but not only under international law. On this point, two considerations are necessary.

First, as already showed, given the work of intergovernmental organizations on cultural heritage and the existence of a diverse body of conventions and legal instruments on cultural heritage, many different 'qualifications' exist for cultural heritage. All might be relevant under international law, depending on the specific circumstances of cases at hand or the relevant rules applicable in each situation. For instance, beyond UNESCO or WIPO, other United Nations agencies such as the *Food and Agricultural Organization* (FAO) have focused on subjects such as indigenous communities or ecosystems biodiversity.³²⁵ Although the specific work of FAO in these fields goes beyond the goal of this research, the qualification of certain 'agri-cultural systems' as 'agricultural heritage systems' under the *Globally Important Agricultural Heritage Systems* (GIAHS) program started in 2002 by FAO might have some relevance.³²⁶

Second, it is worth stressing that when appropriate, reference will be made also to national legislations. In fact, beyond the negative impact that national measures (including laws and administrative regulations) might have on other subjects' rights (such as foreign investors), the qualification of certain monuments or cultural expressions as cultural heritage,

³²² *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Award on the Merits, 10 May 1992.

³²³ *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/08, Award, 11 September 2007.

³²⁴ *Glamis Gold Ltd v. United States of America*, UNCITRAL, Award, 8 June 2009.

³²⁵ As showed by some of the 'priorities' of the Food and Agricultural Organization, FAO, *Themes*, available at <http://www.fao.org/themes/en/>.

³²⁶ FAO, *Globally Important Agricultural Heritage Systems*, available at <http://www.fao.org/giahs/en/>.

thus worthy of special protection and preservation, might entail significant consequences for international law. In *Certain German Interests in Polish Upper Silesia*, the PCIJ found that for international law and the Court itself municipal laws are ‘*facts which express the will and constitute the activities of States, in the same manner as do legal decisions or administrative measures.*’³²⁷ The *International Tribunal for the Law of the Sea* (ITLOS) also confirmed that laws and decisions of (municipal courts of) States are to be regarded as ‘*relevant facts.*’³²⁸ Hence, although it is to be regarded as a ‘fact’, the qualification of a city as ‘*ville ou pays d’art et d’histoire*’, which involves a special protection of certain cities as cultural heritage in France,³²⁹ might be a relevant indication for any international judge or arbitrator of the will of the State to place special care in the management and administration of certain areas considered of great cultural importance, beyond any UNESCO qualification. Similarly, whether a specific object is declared of special artistic or historical interest through a national law, with the consequent application of special rules for the management, sale or export of such an object, might be of relevance for an international tribunal dealing with related issues.³³⁰ On this line, specific measures such as the one mentioned might be considered, depending on the circumstances, in the framework of general national policies on culture or cultural heritage in order to ascertain their scope and goals. Thus, national laws and measures on cultural heritage will be taken into account whenever necessary and appropriate, even from the standpoint of international law.

These and other qualifications will be taken into considerations whenever appropriate.

³²⁷ *Certain German Interests in Polish Upper Silesia (Merits)*, *Op. Cit.*, p.19.

³²⁸ *The “Monte Confurco” Case (Seychelles v. France)*, ITLOS, Judgment, 18 December 2000, para.72.

³²⁹ Ministère Français de la Culture et de la Communication, *Villes et Pays d’Art et d’Histoire – “Un Label, un Réseau”*, available at <http://www.vpah.culture.fr/label/label.htm>.

³³⁰ For instance, *Case of Beyeler v. Italy*, ECHR, App. No. 33202/96, Judgment, 5 January 2000, with regard to the Italian law ‘*Legge 1 Giugno 1939, N. 1089 Tutela delle Cose d’Interesse Artistico o Storico.*’

Chapter II.3.The Tangible and Intangible Aspects of Cultural Heritage

II.3.A. The Different Dimensions of Cultural Heritage

As the every same idea of culture is vague, broad and omnipresent on human existence, cultural heritage also, as a specific cultural expression or the outcome of certain cultural values attached by human beings, can take different forms and manifest itself in different places. Accordingly, international law on cultural heritage commonly distinguishes between tangible cultural heritage, natural cultural heritage (which is subsumed in the tangible one under the UNESCO regime) and intangible cultural heritage. As further discussed below, this treble distinction is a tricky one. Indeed, tangible cultural heritage does not refer also to goods which incorporate or have a strong cultural value for a certain community. Conversely, this notion commonly refers to monuments, buildings, places etc. which represent cultural heritage, while natural heritage refers to natural places which have a significant cultural value for humans and intangible cultural heritage generally includes practices, traditions and goods.

This common distinction between the different forms of cultural heritage will be maintained in this work. Nonetheless, it seems important to highlight that this distinction might not hold true for certain forms of cultural heritage: that is to say that sometimes tangible, natural and intangible cultural heritage are so strongly related that it is not possible to sever these different concepts in practice if an effective legal protection is to be afforded. As a case in point, the basic need to follow traditions or to perform traditional practices for livelihood are often protected by human rights. These rights allow peoples or minorities or indigenous communities to perform such activities in specifically identified places and environments. Hence, human rights such as freedom of religion or the right to culture, which might entail the right of certain peoples or minorities to perform traditional rites in specific places to which they attach social relevance, transpose and connect intangible cultural heritage to sacred natural places (tangible natural heritage). Although it is not be excluded that the human impact on such sites might be detrimental, more often the protection and preservation of cultural heritage require the adoption of measures encompassing tangible, natural and intangible cultural heritage altogether.

II.3.B. What Relation for Cultural Heritage and the Environment? The Notion of Natural Heritage

In 2015, according to the International union for the Conservation of Nature (IUCN), an environmental organization with both government and non-governmental organization

members,³³¹ natural sites represented 22% of all sites inscribed on the World Heritage List (including s.c. 'mixed' sites, both cultural and natural).³³² As pointed in a recent study, the conservation 37% of all natural and mixed sites of the World Heritage List generate significant concerns or is in a critical state.³³³

As already indicated, under Article 2 of the World Heritage Convention, natural heritage generally includes '*natural features*' (which might consist of physical and biological formations or groups of them, where they have an outstanding universal value from an aesthetic or scientific point of view), '*geological and physiographical formations and precisely delineated areas*' (where these are the habitat of threatened species of animals and plants which have an outstanding universal value from the point of view of science or conservation), and '*natural sites or precisely delineated areas*' (where these have an outstanding universal value for science, conservation or in terms of natural beauty).³³⁴ Basically, the World Heritage Convention requires two elements in order for natural heritage to fall under the scope of the Convention: the existence of an outstanding universal value and its relevance for aesthetics, science, conservation or natural beauty reasons.³³⁵

The fact that a single convention has addressed both cultural and natural heritage at the same time has earned the World Heritage Convention the appraisal of the academic community for its ground-breaking approach.³³⁶ Scholars have pointed that the Preamble of the 1972 World Heritage Convention refers to both cultural and natural heritage as a '*world heritage of mankind as a whole*': hence, together with other conventions or international legal regimes, the World Heritage Convention established a '*common responsibility*', that is shared obligations between different States toward the protection of environmental resources, would apply.³³⁷ It is also worth noting that, beyond the specific concept of natural heritage, there seems to be a two-way relationship between cultural heritage and the environment: cultural heritage treaties might indeed contribute to environmental protection, while environmental treaties might at the same time protect and promote cultural heritage.³³⁸

Indeed, natural heritage – and, more generally, the environment – are often affected by the same problems and factors that put in danger other forms of cultural heritage. This is not to exclude however that certain specific factors might affect more heavily natural heritage. For instance, climate change, with the increased frequency of catastrophic events, the changing temperatures and precipitation patterns, poses threats to all type of cultural heritage, but significantly affects environmental resources and the human impact on the

³³¹ IUCN, *About IUCN*, available at <https://www.iucn.org/about/>.

³³² IUCN, *List of Natural and Mixed World Heritage Sites*, available at https://www.iucn.org/about/work/programmes/wcpa_worldheritage/about/list_of_natural_sites/.

³³³ IUCN, *IUCN World Heritage Outlook 2014 – A Conservation Assessment of All Natural World Heritage Sites*, (IUCN: 2014, Gland-Switzerland) p.12, available at <https://portals.iucn.org/library/efiles/documents/2014-039.pdf>.

³³⁴ Article 2 of the *Convention Concerning the Protection of the World Cultural and Natural Heritage*, *Op. Cit.*

³³⁵ D. E. Fisher, *Freshwater, Habitat and Ecosystem*, in S. Alam, Md. J. H. Bhuiyan, T. M. R. Chowdhury, E. J. Techera (Eds.), *Routledge Handbook of International Environmental Law*, (Routledge: 2013, London/New York), p.237.

³³⁶ J. Blake, *International Cultural Heritage Law*, (Oxford University Press: 2015, U.K.), p.114.

³³⁷ P. Sands, J. Peel, A. Fabra, R. Mackenzie, *Principles of International Environmental Law*, (Cambridge University Press: 2012, U.K.), p.234.

³³⁸ J. Blake, *International Cultural Heritage Law*, *Op. Cit.*, p.115-116.

environment.³³⁹ These considerations allow to conclude that sometimes natural heritage needs specific actions and solutions (i.e. not necessarily common to cultural heritage) to be devised for its protection and preservation.

II.3.C. Cultural Heritage and its Problematic 'Intangible' Dimension: Defining and Identifying Intangible Cultural Heritage – A Possible Task?

To be more specific, according to the 2003 UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage, intangible cultural heritage comprises '*practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artifacts and cultural spaces associated therewith – that communities, groups and, in some cases, individuals, recognize as part of their cultural heritage*'.³⁴⁰ The 2003 UNESCO Convention has been the first legally binding multilateral instrument for the safeguarding of intangible cultural heritage.³⁴¹ Several countries have led the way towards its adoption. The Convention refers however to '*practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artifacts and cultural spaces associated therewith*.' This latter point highlights the possibility for intangible cultural heritage to be gathered and recorded in appropriate inventories, in order to be preserved.³⁴² However, this seems to subordinate the protection and preservation of cultural heritage with an intangible form to the material form of objects which can 'fix' or 'incorporate' it. This approach is the outcome of a long process of reflection along different initiatives which preceded the 2003 UNESCO Convention and, namely, in the program of '*Proclamation of Masterpieces of the Oral and Intangible Cultural Heritage of Humanity*', which started in 1998 and should now be superseded and subsumed in the Convention itself. Under this program, the UNESCO proclaimed every two years forms of popular and traditional expressions, or even cultural spaces.³⁴³ Some have expressed the view that, although currently we have two Conventions, one for tangible heritage and one for intangible heritage, given the '*inseparable and necessary links*' between tangible and intangible heritage, there should have been only one Convention covering both types of heritage.³⁴⁴ Others limited

³³⁹ United Nations University UNU-FLORES, *Climate Impact on Natural Heritage and on Environmental Resources: The Need for an Integrated Management Approach*, Institute for Integrated Management of Material Fluxes and of Resources, 31 May 2013, Dresden, available at <https://flores.unu.edu/climate-impact-on-natural-heritage-and-on-environmental-resources-the-need-for-an-integrated-management-approach/>.

³⁴⁰ Article 2.1 of the UNESCO *Convention on the Safeguarding of the Intangible Cultural Heritage*.

³⁴¹ B. Srivinas, *The UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage*, in J. A. R. Nafziger, T. Scovazzi (Eds.), *Le Patrimoine Culturel de l'Humanité / The Cultural Heritage of Humanity*, Centre for Studies and Research in International Law and International Relations - Académie de Droit international de La Haye, (Brill / Nijhoff: 2008, Leiden/ Boston), p.529.

³⁴² UNESCO, *What Is Intangible Cultural Heritage?*, p.10, available at <http://www.unesco.org/culture/ich/doc/src/01851-EN.pdf>.

³⁴³ B. Srivinas, *Op. Cit.*, p.534.

³⁴⁴ H. Stovel, *The World Heritage Convention and the Convention for Intangible Cultural Heritage: Implications for Protection of Living Heritage at the Local Level*, in *Utaki in Okinawa and Sacred Spaces in Asia: Community Development and Cultural Heritage*, Okinawa International Forum 2004, published by the Japanese Foundation, Tokyo, (2004), p.130.

themselves to highlight that although tangible and intangible heritage are very different, they are two sides of the same coin, carrying meaning and memory for the humanity.³⁴⁵ Whatever the merits and weaknesses of this position, it certainly captures the basic concept that the recording and inventorying of intangible cultural heritage makes it 'tangible' and fixed, although ever changing and evolving in theory. In an apparently contrary stance, other scholars have stressed that while the 'philosophical rationale' of the 2003 UNESCO Convention seems appropriate, its 'operational part', which is structured on the model of the 1972 World Heritage Convention, seems inadequate to safeguard intangible cultural heritage.³⁴⁶ This scholarly opinion, together with others, highlights the necessity of a concomitant indirect application of international human rights law to strengthen the protection of this heritage.³⁴⁷ Here it seems sufficient to point that, although relevant, the human rights dimension of culture and cultural heritage is still an expanding regime, the effects and limits of which are still to be seen.

The 2003 UNESCO Convention also sets forth that intangible cultural heritage is '*transmitted from generation to generation*' and '*is constantly recreated*.'³⁴⁸ This peculiar element, which seems inherent to intangible cultural heritage expressions, poses problems in terms of protection and preservation of a specific intangible cultural heritage.³⁴⁹ While the Convention provides with some illustrative domains in which intangible cultural heritage is manifested,³⁵⁰ it stresses also that for its purposes '*consideration will be given solely to such intangible cultural heritage as is compatible with existing human rights instruments, as well as with the requirements of mutual respect among communities, groups and individuals, and of sustainable development*.' This clarification is particularly relevant if one bears in mind that while some practices, such as female circumcision and genital mutilation, are strongly based on social and cultural backgrounds,³⁵¹ and could be considered intangible cultural heritage, they might be contrary to basic human rights. Discriminations against women based on cultural and religious practices might represent another example of intangible cultural heritage.³⁵²

In order to safeguard intangible cultural heritage, the 2003 UNESCO Convention entrusts States parties with the responsibility '*to ensure the safeguarding of the intangible cultural heritage present in its territory*' and, with the participation of communities, groups

³⁴⁵ M. Bouchenaki, *The Interdependency of the Tangible and Intangible Cultural Heritage*, Keynote Address, ICOMOS 14th General Assembly and Scientific Symposium, p.4, available at <http://www.icomos.org/victoriafalls2003/papers/2%20-%20Allocution%20Bouchenaki.pdf>.

³⁴⁶ F. Lenzerini, *Intangible Cultural Heritage: The Living Culture of Peoples*, European Journal of International Law Vol.22, Issue 2, (2011), available at <http://ejil.oxfordjournals.org/content/22/1/101.full>.

³⁴⁷ Id.

³⁴⁸ Article 2.1 of the *Convention for the Safeguarding of the Intangible Cultural Heritage*, *Op. Cit.*

³⁴⁹ B. Srivinas, *Op. Cit.*, p.536.

³⁵⁰ Article 2.2 of the *Convention for the Safeguarding of the Intangible Cultural Heritage*, *Op. Cit.*

³⁵¹ World Health Organization, *Twelfth World Health Assembly*, A12/P&B/28, 27 May 1959, p.8, available at http://apps.who.int/iris/bitstream/10665/110843/1/WHA12_PB-28_eng.pdf?ua=1.

³⁵² V. M. Moghadam, M. Bagheritari, *Cultures, Conventions, and the Human Rights of Women: Examining the Convention for Safeguarding Intangible Cultural Heritage, and the Declaration on Cultural Diversity*, SHS Papers in Women's Studies/Gender Research No.1, (2005), p.4, available at http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/SHS/pdf/Cultures_Conventions_HR_Women.pdf; R. Kurin, *Safeguarding Intangible Cultural Heritage in the 2003 UNESCO Convention: A Critical Appraisal*, Museum International Vol.56, No.1-2, (2004), p.70.

and non-governmental organizations, to ‘*identify and define the various elements of the intangible cultural heritage*’ present in their territories.³⁵³ To this end, States Parties have to draw up, in a flexible way, inventories of intangible cultural heritage present on their territory.³⁵⁴ On this line, one of the main differences between the two conventions on tangible and intangible heritage is that while the 1972 World Heritage Convention covers heritage which has ‘*outstanding universal value*,’³⁵⁵ the 2003 UNESCO Convention foresees a ‘*representative list of the intangible cultural heritage of humanity*’³⁵⁶ and a ‘*list of intangible cultural heritage in need of urgent safeguarding*.’³⁵⁷ Despite this difference, some have supported the idea that the 2003 UNESCO Convention might bring some form of elitism and protect mainstream culture too (as the 1972 Convention), basically entrusting States Parties with the task of implementing the Convention at the domestic level and to create inventories, and hence favoring ‘mainstream’ culture at the expense of ‘subaltern’ culture, and namely, indigenous communities, groups and individuals.³⁵⁸

II.3.D. Intangible Cultural Heritage and Intellectual Property

The 2003 UNESCO Convention recognizes the existence of other international law regimes which directly protect or affect intangible cultural heritage. Nevertheless, the Convention explicitly refers only to some regimes. Nothing in the Convention shall be interpreted as ‘*affecting the rights and obligations of States Parties deriving from any international instrument relating to intellectual property rights or to the use of biological and ecological resources to which they are parties*.’³⁵⁹ As further discussed in this chapter, other regimes of international economic law, such as international trade in goods and services, that is the other two ‘pillars’ of the World Trade Organizations together with intellectual property, have a significant impact on intangible cultural heritage expressions. These branches of international law have not been taken into consideration in the 2003 UNESCO Convention, while they have been the focal point of other UNESCO Conventions, such as the 2005 UNESCO *Convention on the Protection and Promotion of the Diversity of Cultural Expressions*.³⁶⁰

The link between intellectual property and intangible cultural heritage has been at the center of several actions on the international level. At WIPO, an *Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore* (IGC) has been set with the specific purpose of dealing with intellectual property and cultural heritage issues. Established in 2000, the Committee is the forum where Members discuss of intellectual

³⁵³ Article 11 of the *Convention for the Safeguarding of the Intangible Cultural Heritage*.

³⁵⁴ Article 12.1, *Ibid*.

³⁵⁵ Preamble and Articles 1, 2, 8, 11, 12, 15 and 19 of the *Convention Concerning the Protection of the World Cultural and Natural Heritage*, *Op. Cit*.

³⁵⁶ Article 16 of the *Convention for the Safeguarding of the Intangible Cultural Heritage*, *Op. Cit*.

³⁵⁷ Article 17, *Ibid*.

³⁵⁸ B. Srivinas, *Op. Cit.*, p.551-556.

³⁵⁹ Article 3.b) of the *Convention for the Safeguarding of the Intangible Cultural Heritage*, *Op. Cit*.

³⁶⁰ See Chapter ‘1.3.F. Cultural Heritage and International Trade’ of this work.

property, genetic resources, traditional cultural expressions and benefit sharing issues.³⁶¹ Further, in 2009, the IGC was entrusted with the responsibility to start formal negotiations in order to adopt or conclude international legal instruments (recommendations or formal treaties) to ensure effective protection of genetic resources and traditional cultural knowledge and expressions.³⁶² Although the WIPO IGC was established 'only' in 2000, it has been concerned with relevant questions such as intellectual property rights on collective or communal traditional knowledge and expressions, which are to some extent part of public domain.³⁶³ Since under the international regulation of copyright, contemporary adaptations or arrangements of traditional materials might be sufficiently original to qualify as a protected copyright work, the difficulty to know what constitutes an independent creation from an IP perspective has been just one of several issues on IP and cultural heritage.³⁶⁴ Further, these types of question go so far as to touch the very foundation of our culture. Some scholars have eminently stressed that, to some extent, also our culture has been built upon the possibility to share and 'build upon' prior culture.³⁶⁵ These considerations make it easy to understand why, although the WIPO IGC has been established only lately, the connection of intellectual property and traditional cultural expressions was already in the limelight in the 1960s, when developing countries began to be concerned about folklore and traditional expressions being subject to exploitation and misuse.³⁶⁶

The significant contribution of WIPO to the subject of intangible cultural heritage should not mislead on the differences between WIPO and UNESCO respective works. While at UNESCO debates centered on the cultural 'heritage' protection of traditions, at WIPO they focused on the ownership of intellectual property related to traditional knowledge.³⁶⁷ On this vein, the possibility to protect intangible cultural heritage through the regime created by the UNESCO or through intellectual property, have been long debated. Before the adoption of the 2003 UNESCO Convention, eminent scholars stressed the difference between intellectual property and the moral, economic and social mission of UNESCO in respect of the protection of intangible cultural heritage.³⁶⁸ Also, some supported the view that where intellectual property focuses on the end product of the creative process, intangible cultural heritage refers to the process itself,³⁶⁹ and that while UNESCO might tend to protect cultural heritage of a universal outstanding value, intellectual property law allows a commercial utilization of this

³⁶¹ WIPO, *The WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore*, Background Brief No.2, p.1, available http://www.wipo.int/export/sites/www/tk/en/resources/pdf/tk_brief2.pdf.

³⁶² WIPO, *Traditional Knowledge*, available at <http://www.wipo.int/tk/en/>.

³⁶³ W. B. Wendlad, *Op. Cit.*, p.327.

³⁶⁴ *Ibid.*, p.328.

³⁶⁵ L. Lessig, *Free Culture*, (The Penguin Press: 2004, New York), p.23-30, available at <http://www.free-culture.cc/freeculture.pdf>.

³⁶⁶ *Id.*

³⁶⁷ C. Hottin, *Du Patrimoine Immatériel dans les Politiques Patrimoniales*, in M. Cornu, J. Fromageau, C. Hottin (Eds.), *Droit et Patrimoine Culturel Immatériel*, (L'Harmattan : 2013, Paris), p.13.

³⁶⁸ UNESCO, *Final Report – International Round Table on 'Intangible Cultural Heritage – Working Definitions'* 14-17 March 2001 Turin, Italy, p.2, available at <http://www.unesco.org/culture/ich/doc/src/00077-EN.pdf>.

³⁶⁹ L. Lixinski, *Op.Cit.*, p.8.

heritage.³⁷⁰ This debate goes at the heart of the protection and preservation of intangible cultural heritage and touches upon the utilization of its economic value. As further discussed below, although it might be true that some intellectual property rights, such as copyright and related rights, might protect the final product of a creative process involving traditional knowledge or folklore, other intellectual property rights such as geographical indications, collective marks and certification marks focus as much on the process itself as on the final product qualities.

As the considerations above show, one common approach on IP and cultural heritage looks at intellectual property rights from a 'general' perspective, grouping different intellectual property rights together. This is understandable: intellectual property law is often considered as an harmonious and consistent branch of law. However, taking into consideration the extreme specificity of each and every intellectual property right, and of the different nature, rationale and regulation of each of them, here the idea that a right-specific approach might be more useful for further reflection on the issues at hand is supported. This is not to ignore that even the 'same' intellectual property right might have a different content and scope across different legal systems.³⁷¹ Nevertheless, due also to the adoption of several international conventions and agreements on intellectual property rights, some principles common to certain forms of intellectual property protection seem to exist at the international level. Hence, instead of discussing about intellectual property and cultural heritage, some specific reflections on patents, trademarks, geographical indications and other forms of intellectual property and their relevance for cultural heritage will follow.

Beyond the material document which is issued, upon application, by a government or a regional office acting for several countries, the grant of a patent allows the patent owner to exclude other people from the exploitation of the patented inventions in a specific territory.³⁷² The debate over patent protection of traditional knowledge has focused on medicinal plants, agricultural methods and genetic resources.³⁷³ Although the criteria for patentability can vary, generally, to qualify for patent protection, an invention must consist of a patentable subject matter, it must be industrially applicable (i.e. useful), it must be new (i.e. novelty element), there must have been an inventive step in its creation (i.e. non-obviousness) and certain elements must be present in the disclosure of the invention which is contained in the patent application.³⁷⁴ The lack of novelty should be sufficient to exclude the possibility to patent traditional knowledge.³⁷⁵ However, in some countries such as the United States, undocumented knowledge held only in foreign countries does not form the state of the relevant prior art and hence, traditional knowledge might be considered 'new,' with some

³⁷⁰ UNESCO, *Final Report – International Round Table on 'Intangible Cultural Heritage – Working Definitions'*, *Op. Cit.*, p.8, available at <http://www.unesco.org/culture/ich/doc/src/00077-EN.pdf>.

³⁷¹ D. Moura Vicente, *La Propriété Intellectuelle en Droit International Privé*, Académie de Droit International de La Haye, (Adagp : 2009, Paris), p.17-18.

³⁷² WIPO, *WIPO Intellectual Property Handbook*, WIPO Publication No.489 E (2008), p.17, available at <http://www.wipo.int/about-ip/en/iprm/>.

³⁷³ J. Blake, *International Cultural Heritage Law*, *Op. Cit.*, p.235.

³⁷⁴ WIPO, *WIPO Intellectual Property Handbook*, *Op. Cit.*, p.18.

³⁷⁵ M. Dewan, *Inside Views: The Realities of Traditional Knowledge and Patents in India*, Intellectual Property Watch, 27.09.2010, available at <http://www.ip-watch.org/2010/09/27/the-realities-of-traditional-knowledge-and-patents/>.

harm caused to the communities to which this traditional knowledge originally pertains.³⁷⁶ Taking into account the commercial interest and private appropriation of patents, some have regarded patents as an ineffective tool for the protection of intangible cultural heritage.³⁷⁷

Trade secrets are secret information which do not involve a government registration process, and are thus undisclosed or confidential.³⁷⁸ Some have highlighted the potential of trade secrets for a successful protection of traditional knowledge, supporting this view with the example of Ecuador, which, in a pilot project together with an NGO, has allowed the protection of indigenous communities' traditional knowledge through trade secrets.³⁷⁹ This project, supported by the Inter-American development Bank, foresees the possibility for the indigenous community holding the traditional knowledge-trade secret to disclose it to companies, through appropriate contracts which should guarantee an adequate benefit-sharing.³⁸⁰ One should not overlook that, although this model might be successful, it clearly goes beyond the traditional logic behind trade secrets.

The intellectual property rights which might seem to be more appropriate for the protection of geographical indications (GIs) and collective and certification marks. The term 'geographical indications' is used here with a general meaning, to designate names and symbols which indicate a certain geographical origin of a given product, beyond the possibility for the name or symbol to indicate the quality of a given product because of its geographical origin ('appellations of origin') or the mere indication of provenance of a product ('indication of source').³⁸¹ Some good examples of geographical indications are 'Champagne', 'Chianti' or 'Tequila'.³⁸² Although there exist great differences in the way geographical indications are conceived by different legal systems, changing the balance between the intervention of the State through the setting of specific rules to be complied with in order for an enterprise to avail itself of a GI and the private initiative,³⁸³ GIs might prove helpful to protect cultural heritage. Indeed, the need to follow specific techniques and procedures for the production of certain GI-products might help preserve intangible cultural heritage, both in terms of the process and the final product. Nonetheless, against this idea, some have significantly stressed how GIs do not provide for a shield against market pressure and the subsequent change of certain production methods and how some GIs have been 'artificially' created.³⁸⁴ These contentions hold true, but seem valid for any system of protection of intangible cultural heritage, including the UNESCO regimes and thus, they do not

³⁷⁶ G. Dutfield, *Intellectual Property, Biogenetic Resources and Traditional Knowledge*, (Earthscan: 2004, U.K./U.S.A.), p.50.

³⁷⁷ *Ibid.*, p.50.

³⁷⁸ J. Pooley, *Trade Secrets: The Other IP Right*, WIPO Magazine, (June 2013), http://www.wipo.int/wipo_magazine/en/2013/03/article_0001.html.

³⁷⁹ S. Jain, R. Sharma, S. Adhikari, G. Gandhinagar, *Moulding Traditional Knowledge Within Trade Secrets*, Law Mantra Online Journal, (26 November 2013), available at <http://lawmantra.co.in/moulding-traditional-knowledge-within-trade-secrets-by-shriya-jain/>.

³⁸⁰ G. Dutfield, *Intellectual Property, Biogenetic Resources and Traditional Knowledge*, *Op. Cit.*, p.105-106.

³⁸¹ WIPO, *WIPO Intellectual Property Handbook*, *Op. Cit.*, p.121.

³⁸² *Ibid.*, p.120.

³⁸³ See M. Ferrari, *La Dimensione Proprietaria delle Indicazioni Geografiche*, (Editoriale Scientifica: 2015, Università di Trento-Facoltà di Giurisprudenza).

³⁸⁴ T. Broude, *Taking "Trade and Culture" Seriously: Geographical Indications and Cultural Protection in WTO Law*, University of Pennsylvania Journal of International Economic Law Vol. 26, Iss.4, (2005), available at <http://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1220&context=jil>.

appear to undermine the understanding of GIs as potential instrument for the preservation of intangible cultural heritage is maintained. As previously mentioned, other distinctive signs such as certification marks and collective marks might also prove relevant to intangible cultural heritage. While marks normally serve to identify individual enterprises as the origin of marked goods or services, collective and certification marks may be used by certain enterprises whose products and services comply with certain requirements fixed in specific regulations concerning the use of the relevant mark.³⁸⁵ The main difference between certification marks and collective marks is that the latter might be used only by enterprises which are also members of the association owning the collective mark, while to use the certification marks only compliance with set standards is needed.³⁸⁶ Relevant marks which might help preserve traditional knowledge are for instance the collective mark ‘Melinda’, used for apples in Valle di Non and Valle di Sole (Italy), or the certification mark “Woolmark”, setting quality standards for wool clothes.³⁸⁷ It is not uncommon that some products might be protected by different means of protection such as GIs and collective or certification marks at the same time: ‘Parmigiano Reggiano’ is an appellation of origin in Italy and a ‘Protected Designation of Origin’ (PDO) in the EU for a cheese produced in specific provinces of Italy, and the name (both the name on the cheese and the one on the label used on the packaging) is protected by a collective mark.³⁸⁸ ‘Rioja’ is a qualified appellation of origin in Spain and a registered PDO in the EU for a wine produced in specific regions of Spain, while two logos including the mentioned name are protected by a collective mark and an individual mark.³⁸⁹

Intellectual property rights might be applied also to plant varieties. Although, Members to the TRIPS Agreement have an obligation to provide for the protection of plant varieties either by patents or by an effective *sui generis* system or any combination of these,³⁹⁰ there

³⁸⁵ WIPO, *WIPO Intellectual Property Handbook, Op. Cit.*, p.69.

³⁸⁶ *Id.*

³⁸⁷ WIPO, *Making a Mark – An Introduction to Trademarks for Small and Medium-Sized Enterprises*, Intellectual Property for Business Series No.1, (WIPO Publications: 2006, Geneva), p.16, available at http://www.wipo.int/edocs/pubdocs/en/sme/900/wipo_pub_900.pdf.

³⁸⁸ WIPO, *Geographical Indications – An Introduction*, (WIPO Publications: Geneva), p.33, available at http://www.wipo.int/edocs/pubdocs/en/geographical/952/wipo_pub_952.pdf.

³⁸⁹ *Id.*

³⁹⁰ Article 27.3.(b) – Patentable Subject Matter of the TRIPS Agreement reads as follows:

“1. Subject to the provisions of paragraphs 2 and 3, patents shall be available for any inventions, whether products or processes, in all fields of technology, provided that they are new, involve an inventive step and are capable of industrial application. Subject to paragraph 4 of Article 65, paragraph 8 of Article 70 and paragraph 3 of this Article, patents shall be available and patent rights enjoyable without discrimination as to the place of invention, the field of technology and whether products are imported or locally produced.

2. Members may exclude from patentability inventions, the prevention within their territory of the commercial exploitation of which is necessary to protect ordre public or morality, including to protect human, animal or plant life or health or to avoid serious prejudice to the environment, provided that such exclusion is not made merely because the exploitation is prohibited by their law.

3. Members may also exclude from patentability:

(a) diagnostic, therapeutic and surgical methods for the treatment of humans or animals;

(b) plants and animals other than micro-organisms, and essentially biological processes for the production of plants or animals other than non-biological and microbiological processes. However, Members shall provide for the protection of plant varieties either by patents or by an effective *sui generis* system or by any combination thereof. The provisions of this subparagraph shall be reviewed four years after the date of entry into force of the WTO Agreement.”

exist a specific international mechanism for plant varieties protection: the *International Convention for the Protection of New Varieties of Plants* (UPOV Convention). This Convention, which established the International Union for the Protection of New Varieties of Plants (UPOV), was adopted in 1961 and entered into force in 1968.³⁹¹ Three Protocols have been added to the Convention, the last of which dates 1991, with the results that while some States are parties to both the Convention and the 1991 Protocol, some are parties only to one or the other.³⁹² Novelty is one of the key elements for a plant variety to be eligible for protection under the UPOV Convention. The novelty requirement is considered met where '*at the date of filing of the application for a breeder's right, propagating or harvested material of the variety has not been sold or otherwise disposed of to others, by or with the consent of the breeder, for purposes of exploitation of the variety.*'³⁹³ Hence, since to be new a plant variety need simply not be offered for sale or marketed in the source country, with the agreement of the breeder or his successor in title,³⁹⁴ one could wonder whether instances of biopiracy might be justified under the UPOV Convention. The problems related to biopiracy will be dealt with more in detail in the next chapter.

A specific part of this work is dedicated to international investment law and intangible cultural heritage.³⁹⁵ Notwithstanding, it seems appropriate to stress already at this stage that often intellectual property is a covered investment under many international investment agreements. As a consequence, where intellectual property falls under the definition of protected investment of an IIA, and in turn it protects certain forms or manifestation of intangible cultural heritage, international investment law might have a say on the relation between IP and intangible heritage. Investors' rights might add up to the protection of intangible heritage, or they might apparently impinge on intangible heritage protection and preservation.

II.3.E. The Cultural Dimension of Biological Resources: A Possible Compromise Between Scientific Research and Indigenous Communities' Values?

Some of the already-mentioned questions of private appropriation, use and/or exploitation of collective or communal traditional knowledge are related to 'biopiracy'. Although at the international level an appropriate, formal definition of biopiracy is missing,³⁹⁶ biopiracy generally refers to '*the appropriation of the knowledge and genetic resources of farming and indigenous communities by individuals and institutions that seek exclusive*

³⁹¹ G. Dutfield, U. Suthersanen, *Op. Cit.*, p.186.

³⁹² L. Manderieux, *La Disciplina delle Nuove Varietà Vegetali e la Sicurezza e Qualità degli Alimenti*, in C. Ricci (Ed.), *La Tutela Multilivello del Diritto alla Sicurezza e Qualità degli Alimenti*, (Giuffrè Editore: 2012, Milano), p.150.

³⁹³ Article 6 (1) of the *International Convention for the Protection of New Varieties of Plants*, adopted on 2 September 1961, entered into force on 24 April 1998.

³⁹⁴ G. Dutfield, U. Suthersanen, *Op. Cit.*, p.187-188.

³⁹⁵ See Part III of this work.

³⁹⁶ D. F. Robinson, *Confronting Biopiracy – Challenges, Cases and International Debates*, (Taylor & Francis: 2010, UK/U.S.A.), Introduction.

monopoly control (patents or intellectual property) over these resources and knowledge.³⁹⁷ In order to counter such a phenomenon, in 2010 the *Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from Their Utilization to the Convention on Biological Diversity* was adopted in 2010 and entered into force in 2014.³⁹⁸ The *Convention on Biological Diversity* entered into force on 29 December 1993,³⁹⁹ and its main goals are the conservation of biodiversity, the sustainable use of genetic resources and a fair and equitable sharing of the benefits deriving from their utilization and exploitation.⁴⁰⁰ Genetic resources, organisms (or parts of organisms), populations or biotic components of ecosystems with actual or potential use for humanity are considered biological resources under the Convention.⁴⁰¹ The language of the provisions makes clear that this is just an open list. The problem of access to and benefit-sharing of genetic resources was specifically addressed in Article 15 of CBD, which stipulates that each Contracting Party shall facilitate access to genetic resources (*'for environmentally sound uses'*), while other Contracting Parties shall allow 'full participation' of their scientific research to Contracting Parties which provided genetic resources and, when possible, shall conduct this research within their territory.⁴⁰² It is worth noting that, under Article 15, there has apparently been a change of paradigm since genetic resources which were once considered a common heritage, are now regarded as fully falling under the sovereign rights of the specific State where they are located.⁴⁰³ Although it seems that Article 15 does not appear to grant States a 'property rights' over genetic resources,⁴⁰⁴ this Article might be in contradiction with the concept of cultural heritage of humanity.

It was specifically for the practical challenges related to access to and benefit sharing of the utilization of genetic resources that the Nagoya Protocol was later negotiated.⁴⁰⁵ Under Article 15 of the Nagoya Protocol, Contracting Parties are obliged to adopt legislative, administrative or policy measures for the access and use of genetic resources within their jurisdiction.⁴⁰⁶ Specifically, they shall ensure that mutually agreed terms have been concluded and that an informed consent exists prior to the access to genetic resources.⁴⁰⁷ Also,

³⁹⁷ ETC Group, *Patents & Bioiracy*, available at <http://www.etcgroup.org/issues/patents-biopiracy>.

³⁹⁸ *Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from Their Utilization to the Convention on Biological Diversity*, adopted on 29 October 2010, entered into force on 12 October 2014.

³⁹⁹ *Convention on Biological Diversity*, adopted on 5 June 1995, entered into force on 29 December 1993.

⁴⁰⁰ IISD, *A Brief Introduction to the Convention on Biological Diversity (CBD)*, 02.18.2000, available at <http://www.iisd.ca/biodiv/cbdintro.html>.

⁴⁰¹ Article 2 of the of the *Convention on Biological Diversity*, *Op. Cit.*

⁴⁰² Article 15, *Ibid.*

⁴⁰³ T. Greiber, S. P. Moreno, M. Åhrén, J. N. Carrasco, E. C. Kamau, J. C. Medaglia, M. J. Oliva, F. Perron-Welch, in cooperation with N. Ali, C. Williams, *An Explanatory Guide to the Nagoya Protocol on Access and Benefit-Sharing*, IUCN Environmental Policy and Law Paper No.83, p.6, available at https://cmsdata.iucn.org/downloads/an_explanatory_guide_to_the_nagoya_protocol.pdf.

⁴⁰⁴ L. Glowka, F. Burhenne-Guilmin, H. Synge, in collaboration with J. A. McNeely, L. Gündling, *A Guide to the Convention on Biological Diversity*, IUCN Environmental Law and Policy paper No.30, p.76, available at <https://portals.iucn.org/library/efiles/documents/EPLP-no.030.pdf>.

⁴⁰⁵ T. Greiber et al., *Op. Cit.*, p.18.

⁴⁰⁶ Article 15.1 of the *Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from Their Utilization to the Convention on Biological Diversity*, *Op. Cit.*

⁴⁰⁷ *Id.*

'appropriate, effective and proportionate' measures shall be taken to address situations of non-compliance with the above-mentioned measures.⁴⁰⁸

The Nagoya Protocol does not overlook the issues related to traditional knowledge associated with genetic resources. Namely, Articles 7, 12 and 16 are dedicated to these questions. Article 7 obliges Parties to take measures to ensure the consent and involvement of indigenous and local communities and the establishment of mutually agreed terms, in the case where their traditional knowledge associated with genetic resources is accessed. Article 12, *inter alia*, sets forth the loose obligation for Parties to take into consideration indigenous and local communities' customary laws and implement mechanisms to inform potential users of traditional knowledge associated with genetic resources about their obligations. Finally, Article 16 sets forth the same conditions stipulated in Article 15 of the Protocol, this time in respect of traditional knowledge associated with genetic resources rather than genetic resources themselves.

From a cultural heritage perspective, the CBD and its Nagoya Protocol have a limited application, concerning only one specific form of cultural heritage (traditional knowledge), which, by the way, is not defined or identified in either of the two instruments, and only when it is associated with genetic resources. It is worth stressing that, even taking a more general perspective, there has been some criticism on the Convention and its Protocol. Namely, scientists have been concerned about the high bureaucratic steps to be taken for disease monitoring and for scientific research.⁴⁰⁹ Also, the Nagoya protocol has been regarded as a further instance of fragmentation of the regulation on the use of genetic resources, which involves already several other problems (such as intellectual property, food security and environmental issues).⁴¹⁰

II.3.F. Trade and Culture or the Cultural Transfer Inherent in International Economic Exchanges

International trade is one important element to be taken into account when approaching cultural heritage. The relationship between trade and cultural heritage is a complex one. While the relationship between licit and illicit trade and tangible cultural heritage⁴¹¹ goes beyond the scope of this thesis, the one between international trade in goods

⁴⁰⁸ Article 15.2 of the *Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from Their Utilization to the Convention on Biological Diversity*, *Op. Cit.*

⁴⁰⁹ D. Cressey, *Biopiracy Ban Stirs Red-Tape Fears*, *Nature*, (30 September 2014), available at <http://www.nature.com/news/biopiracy-ban-stirs-red-tape-fears-1.16028>.

⁴¹⁰ C. Richerzhagen, *The Nagoya Protocol: Fragmentation or Consolidation?*, *Resources* 3(1), German Development Institute/Deutsches Institut für Entwicklungspolitik, (2014), available at <https://www.die-gdi.de/en/others-publications/article/the-nagoya-protocol-fragmentation-or-consolidation/>.

⁴¹¹ For further studies on this topic see B. Hauser-Schäublin, L. Prott (Eds.), *Cultural Property and Contested Ownership The Trafficking of Artefacts and the Quest for Restitution*, (Routledge: 2016, London / New York); C. Armbrüster, P. Beauvais, J. Chedouki, M. Cornu, E. Fortis, M. Frigo, J. Fromageau, A. Maget-Dominice, V. Negri, M.-A. J. Renold, C. Wallaert, *Study on Preventing and Fighting Illicit Trafficking in Cultural Goods in the European Union*, CECOJI-CNRS – UMR 6224, Final Report, (October 2011).

and services specifically centers the point. On this line, certain products such as rice, tequila, sake, vodka, traditional tapestries, represent cultural products which, at the same time and depending on the context, are also intangible cultural heritage, for the techniques and production methods and the social, historical and cultural values that they incorporate.

During the Uruguay Round (1986-1994) of trade negotiation, some new items were put on the table adding to the negotiation of a new General Agreement on Tariff and Trade (the future GATT 1996) and, namely, the General Agreement on Trade in Services (GATS) and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). These negotiations led to the creation of the WTO. The WTO Agreement has provided for the first time a formal international trade organization charter and structure.⁴¹² The GATS has proven to be extremely relevant to the current discussion since it theoretically covers international trade of services as varied as telecommunications, banking and cultural products (such as movies, music and entertainment media in general). The term 'theoretically' is necessary since the GATS is much more flexible than the GATT with regard to obligations imposed.⁴¹³ Indeed, while for the 'single undertaking' rule, all WTO Members are parties to the GATS,⁴¹⁴ under the GATS Members assume obligations on individual services sectors and includes in its own Schedule of Commitments limitations and conditions to market access for services.⁴¹⁵ It is worth stressing that, although the United States were initially the State putting on the table of negotiations the issue of trade in services during the Uruguay Round, developing countries soon became full participants in the service negotiations.⁴¹⁶

While great attention has been paid to the intersection between trade in services and cultural industries, such as movies, music, etc., cultural industries might well include intangible cultural heritage were for instance a movie fixes or records some traditional expressions or folklore. Without delving too much into this issue, here it will be sufficient to consider that the position of some countries such as Canada or the European Union (or, better said, of France) on cultural industries, led to the adoption of the 2005 UNESCO *Convention on Protection and Promotion of the Diversity of Cultural Expressions*.⁴¹⁷ The legal rationale of this Convention has been commonly understood as one against liberalization of trade in services and clashing with the WTO's one.⁴¹⁸ Also, it has been stressed that, while at the WTO there has been an agreement to disagree on the issue of trade and culture, the 2005 UNESCO

⁴¹² J. H. Jackson, *The Jurisprudence of GATT and the WTO*, (Cambridge University Press: 2000, U.K.), p.376.

⁴¹³ R. Adlung, M. Roy, *Turning Hills Into Mountains? Current Commitments Under the GATS and Prospects for Change*, WTO Economic Research and Statistic Division Staff Working Paper ERSD-2005-01, (March 2005), p.5.

⁴¹⁴ Originally, the idea of a 'single undertaking' came out at the beginning of the Uruguay Round in 1986 to prevent parties to select the agreements they wanted to be a party to and to 'harvest' early outcomes from the negotiations unless all parties agreed. Later, when the WTO was to be created, the 'single undertaking' became the gateway to WTO membership: no WTO Contracting Party could become a WTO founding Member without accepting all Uruguay Round agreements altogether, P. Low, *WTO Decision-Making for the Future*, WTO Economic Research and Statistics Division Staff Working Paper ERSD-2011-05, (May 2005) p.4.

⁴¹⁵ See Part III – Specific Commitments of the General Agreement on Trade in Services.

⁴¹⁶ J. P. Singh, *Culture or Commerce? A Comparative Assessment of International Interactions and Developing Countries at UNESCO, WTO and Beyond*, *International Studies Perspectives* 8, (2007), p.40.

⁴¹⁷ *Ibid.*, p.41.

⁴¹⁸ *Id.*; J. Wouters, B. de Meester, *The UNESCO Convention on Cultural Diversity and WTO Law: A Case Study in Fragmentation of International Law*, *Journal of World Trade* 42, Iss.1, (2008); T. L. S. Voon, *UNESCO and the WTO: A Clash of Cultures?*, *International and Comparative Law Quarterly* 55, Iss.3, (2006).

Convention might have unpredictable effects on WTO Members, which are also UNESCO Members and find themselves entangled in disputes involving trade and culture.⁴¹⁹

Researchers have highlighted that trade in cultural goods heavily impacts values and perceptions of importing countries, and that in turns generate considerable concerns civil society and policy makers.⁴²⁰ The regulation of trade in cultural goods, whether it takes place under preferential agreements or not, is relevant also for foreign direct investments in culture and cultural heritage. There is conclusive evidence on the strong connection between trade regulation, and namely preferential tariffs, and foreign direct investments flows.⁴²¹ Also, trade barriers might also stimulate foreign direct investments: while current trade barriers might drive FDIs so that companies can avoid tariff-barriers by producing directly within the States/markets they are interested in (the s.c. *tariff-jumping* FDIs), the fear of future protectionist measures and tariff rise might also be the reason behind certain FDIs (s.c. *quid pro quo* FDI).⁴²² Hence, in order to fully understand the flow, impact and regulation of FDIs in culture and cultural heritage, one should also consider the regulation of international trade. This appears even more important when one refers to cultural goods and services, which incorporate relevant values and which can be considered cultural heritage expressions.

⁴¹⁹ V. Hughes, *Foreword*, in T. Voon, *Cultural Products and the World Trade Organization*, (Cambridge University Press: 2007, UK/US).

⁴²⁰ A.-C. Disdier, S. H. T. Tai, L. Fontagné, T. Mayer, *Bilateral Trade of Cultural Goods*, CEPII Working Paper no.2007-20 November, p.26-27, available at http://www.cepii.fr/pdf_pub/wp/2007/wp2007-20.pdf.

⁴²¹ E. J. Blanchard, *Foreign Direct Investment, Endogenous Tariffs, and Preferential Trade Agreements*, The B.E. Journal of Economic Analysis & Policy Vol.7, Iss.1, (2007), available at http://faculty.tuck.dartmouth.edu/images/uploads/faculty/emily-blanchard/as_published_greenmfn.pdf.

⁴²² R. Blackhurst, A. Otten, *Trade and Foreign Direct Investment*, World Trade Organization Secretariat – WTO News – 1996 Press releases, (16 October 1996, available at https://www.wto.org/english/news_e/pres96_e/pr057_e.htm).

Chapter II.4. The Human Right to Culture Between International Conventions, Case Law and Legal Doctrine

II.4.A. The Multifaceted Nature of the Human Right to Culture in International Law

As previously mentioned, human rights provide one possible legal framework to approach culture and cultural heritage. The human right to culture or cultural rights are one important component of the more general body of human rights, and to some extent, they are an integral part of international cultural heritage law. Nonetheless, the relationship between human rights, culture and cultural heritage bears some problems and the problem of finding a definition for culture and cultural heritage applies *tout court* to cultural rights. As a consequence, one first questions relates to whether there exists any difference between the 'human right to culture' (hence in the singular form) and 'cultural rights' (in the plural one). Here, these two expressions will be used interchangeably. This approach is premised on the idea that even using the singular term, the human right to culture features a multiplicity of contents and necessarily constitutes the 'umbrella' for many other rights in practice. These brief considerations show already that the relationship between culture and human rights is a complex one. Accordingly, in this context attention is to be given not only to 'cultural rights,' that is rights which empower or entitle an individual to access and perform its own culture and therefore protect it. As it will be showed later in this chapter, there are instances where attention to the cultural context in the case at hand has driven international human rights tribunals to give a specific interpretation to human rights. Hence, as far as culturally-oriented interpretations of human rights are possible, every single right might potentially be a 'cultural' one. This is not to deny that culture and human rights might also collide: the exercise of human right might be detrimental to cultural heritage (for instance, where natural heritage is to be preserved and no human activity can be allowed therein) and certain practices which can be identified as cultural heritage (such as female infibulation) are certainly contrary to human rights. Also, this is not to exclude that human rights, in general, might have an impact on culture and cultural heritage and that the recognition of human rights for the society as a whole. Granting respect for human rights might allow people who have high stakes in culture and cultural heritage to be empowered in order to take action to protect their interests and prevent harmful situations.⁴²³

The above-mentioned open questions have not prevented the human right to culture to be recognized under international law. The 1948 *Universal Declaration of Human Rights* already contained certain explicit provisions on the human right to culture. The Declaration

⁴²³ For such an argument in the context of the protection of the environment, K. Roth, *The Dynamics of Human Rights and the Environment*, Joan B. Kroc Institute for Peace and Justice - University of San Diego - Distinguished Lecture Series, Delivered on the 20th September 2007, p.26-27, available at http://digital.sandiego.edu/cgi/viewcontent.cgi?article=1017&context=lecture_series.

has been hailed as one of the greatest achievements of the United Nations.⁴²⁴ It was meant to precede another convention which, due to ideological conflicts and formal differences of a world already polarized between east and west, was later divided in two different treaties approved in 1966: the *International Covenant on Civil and Political Rights* (ICCPR) and the *International Covenant on Economic, Social and Cultural Rights* (ICESCR).⁴²⁵ It has been pointed that, as a declaration voted in the UN General Assembly, the Universal Declaration, despite being the most cited human rights instrument, lacks the formal authority of a treaty which binds its parties under international law.⁴²⁶ Nevertheless, some eminent scholars, recognizing the absence of legal obligations under the Universal Declaration, expressed the view that it has a legal value since it contains an ‘*authoritative interpretation*’ of human rights and fundamental freedoms which are imperfect but nonetheless binding obligations for Members of the United Nations.⁴²⁷ Some have gone as far as labeling it as an educational tool for every individual and organ of every society to observe and implement human rights worldwide.⁴²⁸

Under Article 22 of the Universal Declaration of Human Rights, everyone has the right to the realization, inter alia, of the cultural rights ‘*indispensable for his dignity and the free development of his personality.*’ Under Article 27 of the same Declaration, everyone has the right to take part in the cultural life of the community, the arts and scientific advancement, included the benefits thereof, and has also a right to the protection of his moral and material interests resulting from any scientific, literary and artistic production he has authored. Articles 22 and 27 have been two greatly debated provisions. Article 22 appears to subordinate the realization of economic, social and cultural rights to the ‘*organization and resources of each State.*’ This resource-contingent element has been replicated later in the ICESCR: while indeed the limitation of the available resources is mentioned in the ICESCR, it is not mentioned in the ICCPR.⁴²⁹ Article 27 appears to strike a balance between participation and common sharing of the cultural life, arts and scientific progress of the community and the protection of an author’s moral and material interests in his creations. This latter Article, which is the primary provision of the Universal Declaration relating to intellectual property,⁴³⁰ links the protection of intellectual property rights to human rights protection. Scholars have long discussed whether there is a proper distinction between human rights and intellectual property rights based on the text of this provision.⁴³¹ On this line, it is worth

⁴²⁴ H. Lauterpacht, *International Law and Human Rights*, (1950), quoted in P. Alston, R. Goodman, *International Human Rights*, (Oxford University Press: 2012, U.K.), p.152.

⁴²⁵ P. Alston, R. Goodman, *Op. Cit.*, p. 142.

⁴²⁶ *Id.*

⁴²⁷ H. Lauterpacht, *International Law and Human Rights*, (1950), quoted in P. Alston, R. Goodman, *Op. Cit.*, p.152-153.

⁴²⁸ J. Morsink, *The Universal Declaration of Human Rights – Origins, Drafting and Intent*, (University of Pennsylvania Press: 1999, Philadelphia), p.331.

⁴²⁹ P. Alston, R. Goodman, *Op. Cit.*, p.316.

⁴³⁰ G. Dutfield, U. Suthersanen, *Op. Cit.*, p.216-217.

⁴³¹ M. Green, *Drafting History of the Article 15 (1) (c) of the International Covenant on Economic, Social and Cultural Rights*, United Nations Economic and Social Council, Committee on Economic, Social and Cultural Rights, Twenty-Fourth Session Geneva 13 November - 1 December 2000 Item 3 of the provisional agenda, E/C.12/2000/15 9 October 2000, p.3, available at [http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/872a8f7775c9823cc1256999005c3088/\\$FILE/G0044899.pdf](http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/872a8f7775c9823cc1256999005c3088/$FILE/G0044899.pdf).

recalling that other Articles, such as Article 17 on the right to property and Article 12 on the right to individual dignity, might provide a further basis for the protection of intellectual property rights. Indeed, regional human rights courts have interpreted similar provisions in other human rights treaties as providing for the protection of intellectual property rights.⁴³² The ECofHR has established in several judgments that intellectual property rights such as patents, copyright and trademarks are protected under the right to property.⁴³³

One significant premise on the ICESCR, is that when the Covenant sets forth the '*right of everyone to an adequate standard of living for himself and his family*' and '*the right of everyone to be free from hunger,*' it stresses the need to make full use and dissemination of technical and scientific knowledge.⁴³⁴ Under Article 15 of the ICESCR:

- '1. *The States Parties to the present Covenant recognize the right of everyone:*
 - (a) *To take part in cultural life;*
 - (b) *To enjoy the benefits of scientific progress and its applications;*
 - (c) *To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.*
2. *The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture.*
3. *The States Parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity.*
4. *The States Parties to the present Covenant recognize the benefits to be derived from the encouragement and development of international contacts and co-operation in the scientific and cultural fields.'*

Clearly, Article 15 tries to strike a balance between the cultural interest of the community and of the individual to take part of community's cultural life, and the interest of the individual to the protection of the moral and material interests of its cultural and scientific creations. Although this latter provision appears more detailed, the connection with

⁴³² See L. Sermet, *The European Convention on Human Rights and Property Rights*, Human Rights Files, No. 11 rev., (Council of Europe Publishing: 1998, Strasbourg Cedex), available at [http://www.echr.coe.int/LibraryDocs/DG2/HRFILES/DG2-EN-HRFILES-11\(1998\).pdf](http://www.echr.coe.int/LibraryDocs/DG2/HRFILES/DG2-EN-HRFILES-11(1998).pdf), discussing the consideration of intellectual property as 'property' protected under Article 1 of Protocol No.1 to the ECHR in the ECofHR case-law; L. R. Helfer, *The New Innovation Frontier? Intellectual Property and the European Court of Human Rights*, Harvard International Law Journal Vol.49, N.1 Winter 2008, available at <http://www.pijip-impact.org/wp-content/uploads/2013/01/The-New-Innovation-Frontier-Intellectual-Property-and-the-Europe.pdf>, discussing the case-law of the ECofHR consideration of intellectual property rights through the lenses of fundamental rights and the right to property; P. Torremans, *Copyright (and Other Intellectual Property Rights) as a Human Right*, in P. Torremans (Ed.), *Intellectual Property and Human Rights*, (Kluwer Law International: 2008, The Netherlands), discussing both the conflict and positive interaction between human rights and intellectual property rights and .

⁴³³ For patents, see *Smith Kline and French Laboratories Ltd. v. The Netherlands*, European Commission of Human Rights, App. No.12633/87, Decision on Admissibility, 04 October 1990; for copyright see *Melnychuk v. Ukraine*, ECtHR, Second Section, App. No.28743/03, Decision on Admissibility, 05 July 2005; for trademarks see *Anheuser-Busch Inc. v. Portugal*, ECtHR, Grand Chamber, App. No.73049/01, Judgment, 11 January 2007.

⁴³⁴ Article 11 of the *International Covenant on Economic, Social and Cultural Rights*, adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entered into force on 3 January 1976.

previously-mentioned relevant provisions of the Universal Declaration seems crystal clear. Nonetheless, during the debates over the inclusion and drafting of such a provision, which were based on the work and proposals from UNESCO, many delegates wanted to avoid precisely a resemblance with Article 27 of the UDHR.⁴³⁵ Interestingly, in one of its general comments, the UN Committee on Economic, Social and Cultural Rights has clarified that the moral and material interests of an author in his scientific, literary or artistic production is a human right deriving from the inherent dignity of all persons, which has to be distinguished from 'most' (but not all) legal entitlements recognized in intellectual property systems.⁴³⁶ Some have contended that in most legal systems intellectual property rights have a strong constitutional basis rooted in fundamental rights, while the real problem is that corporate ownership of intellectual property rights is over-emphasized while the human rights vested on creators are under-emphasized.⁴³⁷ To the contrary, for the centenary of the Berne Union (established under Article 1 of the *Berne Convention for the Protection of Literary and Artistic Works*), Member States declared explicitly that copyright is based on human rights.⁴³⁸

The ICCPR also contains relevant provisions on cultural rights. In its Preamble, the State Parties recognize:

'...that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights, ...'

As a corollary of this, Articles 1.1 and 27 refer to cultural rights. Under Article 1.1:

'1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.'

Article 27 reads as follows:

'In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.'

⁴³⁵ M. Green, *Op. Cit.*, p.6.

⁴³⁶ United Nations Economic and Social Council - Committee on Economic, Social and Cultural Rights, *General Comment 17, The Right of Everyone to Benefit from the Protection of the Moral and Material Interests Resulting from Any Scientific, Literary or Artistic Production of Which He or She is Author (Article 15 , Paragraph 1 (c), of the Covenant)*, Thirty-Fifth Session Geneva 7-25 November 2005, E/C.12/GC/17 (2006), available at <https://www1.umn.edu/humanrts/gencomm/escgencom17.html>.

⁴³⁷ G. Dutfield, U. Suthersanen, *Op. Cit.*, p.219.

⁴³⁸ WIPO, International Union for the Protection of Literary and Artistic Works, *Information on the Commemorations of the Centenary of the Berne Convention*, Executive Committee Twenty-Seventh Session Geneva June 22 to 30 1987, Memorandum Prepared by the International Bureau, p.3, available at http://www.wipo.int/mdocsarchives/B_EC_XXVII_87/B_EC_XXVII_3_F_E_S.pdf.

A reading of these provisions shows that the ICCPR makes reference to cultural rights from the specific perspective of minorities or of groups seeking and/or deserving self-determination. Other international instruments such as the 1982 *Declaration on Race and Racial Prejudice* or the 1993 *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities* (notably in its Articles 1 and 2) have adopted the same perspective of the ICCPR when referring to cultural rights.

Other international legal instruments contain relevant provisions on cultural rights. Among the most relevant, the UNESCO has played a relevant role in the promotion of the human right to culture. Under the aegis of the UNESCO, Article 1 of the *Declaration of Principles of International Cultural Cooperation* stresses the need to protect and preserve the dignity and value of each culture and the right and duty of each people to develop its culture.⁴³⁹ Although it was called 'declaration', thus stressing the significance of the principles enunciated therein, the Declaration has received little attention by legal scholars and practitioners and has not been recalled in the subsequent UNESCO Conventions on tangible and intangible cultural heritage and on cultural diversity.⁴⁴⁰ The Declaration might have been the starting point an enhanced position for the UNESCO as a forum for the elaboration of model agreements and best practices on cultural cooperation, but its potential has not been fully taken advantage of.⁴⁴¹ Also, it is worth noting that under Principle 2 of the *Mexico City Declaration on Cultural Policy*, again under the aegis of UNESCO, the assertion of cultural identity is, inter alia, one important element contributing to the liberation of peoples. Also, under Article 1 of the *United Nations Declaration on the Right to Development*, 'cultural development' is also mentioned as one condition for the full realization of all human rights and fundamental freedoms.⁴⁴²

At the regional level, several conventions have contributed to the advancement of human rights protection. The 1950 *European Convention for the Protection of Human Rights and Fundamental Freedoms* (ECHR) was the first regional convention on human rights at the regional level. Many other regional regimes in other parts of the world followed and, among them, those created by the 1969 *American Convention on Human Rights* (ACHR) and the 1981 *African Charter on Human and Peoples' Rights* (ACHPR) stand out. The different approaches that these regional regimes have adopted with regard to the human right to culture will be further discussed below.

II.4.B. The Human Right to Culture and the European Convention of Human Rights: The Pros and Cons of the European Approach

⁴³⁹ Article 1 of the *Declaration of the Principles of International Cultural Cooperation*, proclaimed by UNESCO at its fourteenth session held in Paris on 4 November 1966.

⁴⁴⁰ J. Wouters, M. Vidal, *UNESCO and the Promotion of Cultural Exchange and Cultural Diversity*, in A. A. Yusuf, *Op. Cit.*, p.152-153.

⁴⁴¹ *Ibid.*, p.154.

⁴⁴² UN General Assembly, *Declaration on the Right to Development*, A/RES/41/128, 4 December 1986, 97th Plenary Meeting, available at <http://www.un.org/documents/ga/res/41/a41r128.htm>.

The ECHR does not explicitly protect cultural rights as such. Despite this, the regime created by the Convention was perfected by the creation of the European Court of Human Rights (ECtHR) in 1959 to rule on States and individual applications alleging violations of the rights protected under the Convention.⁴⁴³ The Court has effectively protected cultural rights through a dynamic interpretation of the right to respect for private and family life (Article 8), freedom of thought, conscience and religion (Article 9), freedom of expression (Article 10), and right to education (Article 2 of Protocol No.1) under the Convention.⁴⁴⁴ A brief analysis of the jurisprudence of the Court on cultural rights sheds light on the variety and complexity of issues related to cultural rights.

In *Müller and Others v. Switzerland*, a Swiss court had sentenced a painter on the grounds that his paintings consisted of obscene material.⁴⁴⁵ Upon appeal, the Swiss appellate court found that Müller's paintings aroused repugnance and disgust.⁴⁴⁶ The Criminal Cassation Division of the Swiss Federal Court also dismissed the claims, noting that the paintings in question showed an orgy of unnatural sexual practices (sodomy, bestiality, petting), stressing that a work is to be considered obscene if it causes moral offense to a person of ordinary sensitivity.⁴⁴⁷ Eventually, the painter recovered his paintings, which had been initially seized, but together with other applicants involved in the case, he filed a case with the ECtHR. According to the ECtHR Chamber, Article 10 of the ECHR (Freedom of Expression) includes freedom of artistic expression and affords individuals '*the opportunity to take part in the public exchange of cultural, political and social information and ideas of all kinds.*'⁴⁴⁸ While the State has an obligation not to encroach unduly on individuals' freedom of expression, one of the essential foundations of a democratic society, the applicants in the case at hand had suffered an interference by the public authorities.⁴⁴⁹ Notwithstanding that, the Court considered that the conviction ordered by Swiss courts in the case was intended to protect morals, and given the nature of the paintings in question, the Swiss courts had been entitled to impose a fine as a necessary measure for the protection of morals.⁴⁵⁰ For these reasons, the disputed measure (the applicants' conviction) did not infringe Article 10 of the Convention.⁴⁵¹ For similar reasons, since in the Contracting States confiscation is normally allowed where items have been lawfully adjudged illicit or dangerous to the general interest, the confiscation of the paintings did not infringe either Article 10 of the Convention.⁴⁵²

In *Karataş v. Turkey*, the applicant was a Turkish national of Kurdish origin who had been prosecuted for writing an anthology of poems allegedly disseminating propaganda

⁴⁴³ Council of Europe, *European Court of Human Rights (ECtHR)*, available at http://www.coe.int/t/democracy/migration/bodies/echr_en.asp.

⁴⁴⁴ European Court of Human Rights Research Division, *Cultural Rights in the Case-Law of the European Court of Human Rights*, (Council of Europe/European Court of Human Rights: 2011), p.4, available at http://www.echr.coe.int/Documents/Research_report_cultural_rights_ENG.pdf.

⁴⁴⁵ *Müller and Others v. Switzerland*, Chamber, ECtHR, App. No.10737784, Judgment, 24 May 1988, paras.12-14.

⁴⁴⁶ *Ibid.*, para.16.

⁴⁴⁷ *Ibid.*, para.18.

⁴⁴⁸ *Ibid.*, para.27.

⁴⁴⁹ *Ibid.*, para.33.

⁴⁵⁰ *Ibid.*, para.36-37.

⁴⁵¹ *Id.*

⁴⁵² *Ibid.*, paras.42-44.

against the (unity of the) State.⁴⁵³ In front of the Turkish courts, the applicant denied charges stressing that the passages of his poems in question reflected in no way his own opinions.⁴⁵⁴ In front of the ECtHR, there appeared to be a common agreement that the applicant's conviction amounted to an interference with the exercise of his right to freedom of expression.⁴⁵⁵ The Court acknowledged that some passages of the poems were very aggressive in tone and called for the use of violence, but took into consideration their artistic nature and of limited impact (no mass media had been used).⁴⁵⁶ Also, the applicant's conviction had been the result of its separatist propaganda rather than its incitation to violence.⁴⁵⁷ Taking into account in particular the nature and severity of the penalty imposed, the Court found the conviction to violate Article 10 of the Convention since it was disproportionate to the aim pursued and not necessary for a democratic society.⁴⁵⁸ The Court also found a violation of Article 6 (1) of the Convention and granted the applicant just satisfaction under Article 41 of the Convention.⁴⁵⁹ This case is relevant for at least two elements. First, the Court seem to adopt a different standard from the one of *Müller and Others v. Switzerland*. A similar approach should have led to a different conclusion, taking into account that the unity of the State is an issue of *ordre public* and thus might justify measures such as those at issue. Second, the applicant argued in the proceedings that he was not expressing his personal opinion: such an argument, together with the specific content of the relevant poems, recalls the idea of an individual expressing not a personal view but an entire community's culture.

The *Akdaş v. Turkey* case featured an interesting conflict between different cultural values and the recognition by the Court of a particular form of intangible cultural heritage. The publication of the Turkish translation of an erotic novel by Guillaume Apollinaire was at issue in this case.⁴⁶⁰ Following this publication, Turkish authorities had sentenced the publisher of the Turkish version of the above-mentioned book to a heavy fine on the grounds of obscene and immoral publication, a fine which had been confirmed by the Turkish Cassation Court⁴⁶¹. The applicant claimed a violation of Article 10 of the Convention.⁴⁶² The Court, considering that all parties agreed on the existence of an interference by the State, stressed that the question of morality requires States to take into consideration the existence, within a single State, of various cultural, religious, civil or philosophical communities.⁴⁶³ Also, the Court considered that it exists a '*European literary heritage*' and that the public of a given language (in the case at hand, Turkish) could not be prevented from having access to a work that is part of such heritage.⁴⁶⁴ Hence, the Court found a violation of Article 10 (2), on the

⁴⁵³ *Karataş v. Turkey*, ECtHR, App. No.23168/94, Judgment, 8 July 1999, paras.8-9.

⁴⁵⁴ *Ibid.*, para.11.

⁴⁵⁵ *Ibid.*, para.36.

⁴⁵⁶ *Ibid.*, para.52.

⁴⁵⁷ *Id.*

⁴⁵⁸ *Ibid.*, paras.53-54.

⁴⁵⁹ *Ibid.*, para.63, 64-75.

⁴⁶⁰ *Akdaş v. Turkey*, ECtHR, App. No.41056/04, Judgment, 16 February 2010, para.5.

⁴⁶¹ *Ibid.*, paras.8-17.

⁴⁶² *Ibid.*, para.22.

⁴⁶³ *Ibid.*, paras.22, 27.

⁴⁶⁴ *Ibid.*, para.30.

grounds that the State interference with the freedom of expression was not necessary in a democratic society.⁴⁶⁵

The Court has also had the occasion to highlight that the cultural specificity of certain groups or minorities might inform certain human rights and give them a specific content. In *Chapman v. The United Kingdom*, the applicant and her family were gypsies (of British nationality) traveling around the U.K. with their caravans.⁴⁶⁶ Although they were on a waiting list for a permanent site to live in, they were never offered one.⁴⁶⁷ In 1985, they bought a piece of land with the intention of living on it with a mobile home.⁴⁶⁸ They could not do that since public authorities refused the planning permission, considering an inappropriate use for the land, and a further application for planning permissions, and were ordered to move to other sites specifically destined to caravans and gypsies.⁴⁶⁹ The applicant submitted that measures threatening her occupation of her land in caravans affected not only her home, but also her private and family life under Article 8 of the Convention as a Gypsy with a traditional lifestyle of living in mobile homes which allow traveling.⁴⁷⁰ The Courts considered that the applicant's occupation of her caravan is an integral part of her ethnic identity as a Gypsy.⁴⁷¹ Measures affecting the applicant's stationing of her caravan therefore have an impact going beyond the right to respect for her home.⁴⁷² They also affect the ability to maintain her identity as a gypsy and to lead to her private and family life in accordance with that tradition.⁴⁷³ Further, the Court recognized the existence of an emerging international consensus amongst the contracting States of the Council of Europe on the special needs of minorities and an obligation to protect their security, identity and lifestyle.⁴⁷⁴ This would be functional for the preservation of cultural diversity as a value to the whole community.⁴⁷⁵ Accordingly, Article 8 of the Convention entails positive obligations for the State to facilitate Gypsy way of life.⁴⁷⁶ The Court added that national authorities had to consider that since no alternative accommodation was available for gypsies, the interference was more serious than where such accommodation was available.⁴⁷⁷ The more suitable the alternative accommodation is, the less serious is the interference constituted by moving the applicant from his or her existing accommodation.⁴⁷⁸ The Court took into specific account that the requirements for a site to be suitable for planning permission is very relevant and the Court had no information as to the efforts the applicant had made to find alternative sites.⁴⁷⁹ The Court was not persuaded that there were no alternatives available to the applicant besides remaining in occupation on land

⁴⁶⁵ *Ibid.*, paras.31-32.

⁴⁶⁶ *Chapman v. The United Kingdom*, ECtHR, App. No.27238/95, Judgment, 18 January 2001, para.10.

⁴⁶⁷ *Ibid.*, para.11.

⁴⁶⁸ *Ibid.*, para.12.

⁴⁶⁹ *Ibid.*, paras.12-18.

⁴⁷⁰ *Ibid.*, para.71.

⁴⁷¹ *Ibid.*, para.73.

⁴⁷² *Id.*

⁴⁷³ *Id.*

⁴⁷⁴ *Ibid.*, para.93.

⁴⁷⁵ *Id.*

⁴⁷⁶ *Ibid.*, para.96.

⁴⁷⁷ *Ibid.*, para.103.

⁴⁷⁸ *Id.*

⁴⁷⁹ *Ibid.*, para.112.

without planning permission: Article 8 does not necessarily go as far as to allow individual preferences as to their place of residence to override the general interest.⁴⁸⁰ If the applicant's problem arises from lack of money, this unfortunate position is similar to many others who cannot reside in the most desired sites.⁴⁸¹ The U.K. authorities reached their decisions after weighing in the balance the various competing interests and the Court was not in a position to revise the merits of those decisions, which were based on reasons which were relevant and sufficient, for the purposes of Article 8, to justify the interferences with the exercise of the applicant's rights.⁴⁸² The Court concluded that there had not been any violation of Article 8 of the Convention, of Article 1 Protocol 1, of Article 6 (1) and of Article 14 of the Convention.⁴⁸³

Further cases show the politically sensitive questions related to cultural rights, and the overlapping of cultural rights with other human rights and freedoms such as freedom of religion or right to property. In *Cyprus v. Turkey*, the Court was faced with human rights issues arising out of the Turkish military operations in northern Cyprus in 1974 and the proclamation of the Turkish Republic of Northern Cyprus (TRNC) in 1983 and the following enactment of the TRNC Constitution in 1985.⁴⁸⁴ In this case, which stands out for the rarity of inter-state disputes in front of the ECtHR,⁴⁸⁵ Cyprus claimed the violation of several rights.⁴⁸⁶ For what is relevant here, the applicant Government claimed a violation of the right to manifest one's own religion under Article 9 of the Convention.⁴⁸⁷ This violation was due to the interference with the concerned population's right under Article 9 of the Convention reflected in the TRNC policy of limiting its freedom of movement and thereby restricting access to places of worship.⁴⁸⁸ The Court considered that there had been a violation of Article 9 of the Convention,⁴⁸⁹ which is relevant to preserve and maintain the identity of minorities and local communities, in this case Greeks and Greek-Cypriots, as indicated along the judgment.

In *Kozacioğlu v. Turkey*, the applicant claimed a violation of Article 1 of Protocol 1 of the Convention on the grounds that his property (a historical building) had been expropriated but the compensation paid was not sufficient since it did not take into account the specific historical value and architectural features of the building.⁴⁹⁰ The Court focused on the compensation terms under the relevant domestic legislation since, according to these terms, it would have been possible to establish whether the contested measure (expropriation) respected the requisite of fair balance and whether it imposed a disproportionate burden on the applicant.⁴⁹¹ In this connection, the Court had previously held that the taking of property without payment of an amount reasonably related to its value normally constitutes a

⁴⁸⁰ *Ibid.*, para.113.

⁴⁸¹ *Id.*

⁴⁸² *Ibid.*, para.114.

⁴⁸³ *Ibid.*, para.115, 120, 125, 130.

⁴⁸⁴ *Cyprus v. Turkey*, ECtHR, App. No.25781/94, Judgment, 10 May 2001, paras.13-14.

⁴⁸⁵ P. Lemmens, W. Vandenhole (Eds.), *Protocol No.14 and the Reform of the European Court of Human Rights*, (Intersentia: 2005, Antwerpen/Oxford), p.141.

⁴⁸⁶ *Cyprus v. Turkey*, *Op. Cit.*, para.18.

⁴⁸⁷ *Ibid.*, para.241.

⁴⁸⁸ *Ibid.*, para.242.

⁴⁸⁹ *Ibid.*, para.246.

⁴⁹⁰ *Kozacioğlu v. Turkey*, ECtHR, App. No.2334/03, Judgment, 19 February 2009, paras.9-27, 47.

⁴⁹¹ *Ibid.*, para.64.

disproportionate interference.⁴⁹² Article 1 of Protocol No. 1 does not however guarantee a right to full compensation in all circumstances.⁴⁹³ Legitimate objectives of public interest may call for less than reimbursement of the full market value of the expropriated property: in the Court's view, the protection of the historical and cultural heritage is one such objective.⁴⁹⁴ Since however, neither the rarity of the expropriated building nor its architectural or historical features were taken into consideration in calculating the amount of expropriation compensation, the requirement of proportionality between the deprivation of property and the public interest pursued was not satisfied and Article 1 of Protocol No.1 had been violated.⁴⁹⁵

This jurisprudence shows how relevant the contribution of the ECtHR has been for cultural rights, regardless of the absence of these rights in the ECHR. This latter should not be confused with the *Charter of Fundamental Rights of the European Union* which, in turn, does refer to cultural rights. The Charter, which became legally binding when the Treaty of Lisbon entered into force in December 2009, is addressed to the institutions and bodies of the EU with due regard for the principle of subsidiarity and to States and national authorities when they are implementing EU law.⁴⁹⁶ The Charter refers to culture and cultural rights in different ways, thus adding to the protection of cultural rights already provided by the ECtHR. In its Preamble, the Charter clarifies that the action of the Union wishes to develop and respect of common values in the Union, '*while respecting the diversity of the cultures and traditions of the peoples of Europe as well as the national identities of the Member States...*'. Under Article 22 (Cultural, Religious and Linguistic Diversity):

'The Union shall respect cultural, religious and linguistic diversity.'

Also, under Article 25, the Charter establishes that:

'The Union recognizes and respects the rights of the elderly to lead a life of dignity and independence and to participate in social and cultural life.'

The Charter has rapidly gained legal importance, as the growing number of EU Courts quoting it shows,⁴⁹⁷ and future, significant developments on cultural rights are expected.

⁴⁹² *Id.*

⁴⁹³ *Id.*

⁴⁹⁴ *Id.*

⁴⁹⁵ *Ibid.*, paras.65-73.

⁴⁹⁶ European Commission, *EU Charter of Fundamental Rights*, available at http://ec.europa.eu/justice/fundamental-rights/charter/index_en.htm.

⁴⁹⁷ European Commission – Directorate-General for Justice and Consumers, *2014 Report on the Application of the EU Charter of Fundamental Rights*, (European Union: 2015, Luxembourg), p.6, available at http://ec.europa.eu/justice/fundamental-rights/files/2014_annual_charter_report_en.pdf.

II.4.C. The Human Right to Culture and the American Convention on Human Rights: The Role of Culture Among States, Indigenous Communities and Multinational Corporations

Both the *American Convention on Human Rights* (ACHR) and the *African Charter on Human and Peoples' Rights* (ACHPR) explicitly mention and recognize cultural rights. The American Convention stresses already in its Preamble that '*in accordance with the Universal Declaration of Human Rights, the ideal of free man enjoying freedom from fear and want can be achieved only if conditions are created whereby everyone may enjoy his economic, social, and cultural rights, as well as his civil and political rights.*' Further, the ACHR recognizes cultural rights along a series of diverse provisions. Under Article 16, Freedom of Association, the ACHR sets forth the right of everyone to associate freely, *inter alia*, for cultural purposes. While it generally recognizes economic, social and cultural rights under its Chapter III, under Article 26, on progressive development, State Parties to the ACHR undertake to adopt measures necessary to achieve progressively the full realization of the rights implicit in, *inter alia*, the cultural standards set forth in the Charter of the *Organization of American States* as amended by the *Protocol of Buenos Aires*. Finally, under Article 42, the ACHR establishes that:

'the State Parties shall transmit to the Commission a copy of each of the reports and studies that they submit annually to the Executive Committees of the Inter-American Economic and Social Council and the Inter-American Council for Education, Science and Culture, in their respective fields, so that the Commission may watch over the promotion of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires.'

Although interesting, these provisions do not provide cultural rights with any detailed content and meaning. Consequently, the *Inter-American Court of Human Rights* (IACHR) has been confronted with the difficult task of filling this gap. A particularly relevant case, which has extensively drawn also on previous case law, is *Sawhoyamaxa Indigenous Community v. Paraguay*.⁴⁹⁸ In this case, the Shawoyamaxa Community claimed that Paraguay had violated several rights and, namely, the right to life (Under Article 4 ACHR), the right to humane treatment (under Article 5 ACHR), the right to property (under Article 21 ACHR), the right to a fair trial (Article 8 ACHR), the right to judicial protection (under Article 25 ACHR), and the general State Parties obligation to respect rights (under Article 1 (1) ACHR) and to adopt domestic law or measures thereof (Article 2 ACHR).⁴⁹⁹ The central claim in the case was that Paraguay had not ensured the ancestral property right of the Shawhoyamaxa Community and its members, inasmuch as their claim for territorial rights was pending since 1991 and it had

⁴⁹⁸ *Sawhoyamaxa Indigenous Community v. Paraguay*, IACHR, Judgment, Merits, Reparations and Costs, 29 March 2006, Series C No.145.

⁴⁹⁹ *Ibid.*, para.2.

not been satisfactorily resolved yet.⁵⁰⁰ Accordingly, this had barred the Community and its members from title to and possession of their lands, and had kept them in a state of nutritional, medical and health vulnerability, which constantly threatened their survival and integrity.⁵⁰¹ Following the s.c. War of the Triple Alliance (1864-1870) which saw Paraguay opposed to Argentina, Brazil and Uruguay, and the subsequent s.c. Guerra del Chaco (1933-1936) between Paraguay and Bolivia, in order to repay its huge debt Paraguay started selling some portions of its territory to foreign (UK) companies keeping the original inhabitants of these lands (at the time exclusively Indians) in full ignorance of the facts.⁵⁰² Following these land-transfers, some restrictions for indigenous people to access their traditional land were imposed,⁵⁰³ and the indigenous Community which traditionally lived of fishing, hunting, gathering and land roaming, had to change their way of living and become sedentary.⁵⁰⁴ The lands claimed by the indigenous Community where those they traditionally occupied and were part of their traditional habitat: they were necessary for the indigenous Community to continue with their subsistence activities and to ensure their short and mid-term survival, as well as the beginning of a long-term process of development of alternative activities which would have allowed their subsistence to become sustainable.⁵⁰⁵ In reaching its conclusion that the right to property under Article 21 ACHR had been violated, the Court reasoned that:

*'[...] the close ties the members of indigenous communities have with their traditional lands and their natural resources associated with their culture thereof, as well as the incorporeal elements deriving therefrom, must be secured under Article 21 of the American Convention. The culture of the members of indigenous communities reflects a particular way of life, of being, seeing, and acting in the world, the starting point of which is their close relation with their traditional lands and natural resources, not only because they are the main means of survival, but also because they form part of their worldview, of their religiousness, and consequently, of their cultural identity.'*⁵⁰⁶

The Court concluded that Paraguay had violated Article 21 of the American Convention to the detriment of the members of the Sawhoyamaya Community, in relation to Articles 1(1) and 2 therein.⁵⁰⁷ When assessing whether there had been a violation of the human right to life under Article 4 of the American Convention, the Court considered that Paraguay had not adopted the necessary measures to allow the indigenous Community to abandon the inadequate conditions that endangered their right to life.⁵⁰⁸ The Court had stressed that the right to life, which forms part of the essential nucleus of the American convention and as such cannot be suspended in cases of war, public danger or any other threat to the independence or security of a State Party, creates the obligation on the State not only that no person shall be

⁵⁰⁰ *Id.*.

⁵⁰¹ *Id.*.

⁵⁰² *Ibid.*, paras.73(1)-73(3).

⁵⁰³ *Ibid.*, para.73(4).

⁵⁰⁴ *Ibid.*, paras.73(2)-73(5).

⁵⁰⁵ *Ibid.*, paras.73(9)-73(10).

⁵⁰⁶ *Ibid.*, para.118.

⁵⁰⁷ *Ibid.*, para.144.

⁵⁰⁸ *Ibid.*, para.166.

deprived of his life arbitrarily (negative obligation), but also, in the light of its obligation to secure the full and free enjoyment of human rights, the obligation that the State shall adopt all appropriate measures to protect and preserve the right to life (positive obligation).⁵⁰⁹ Hence, the States must adopt any measures that may be necessary, inter alia, to protect the right of not being prevented from access to conditions that may guarantee a decent life, which entails the adoption of positive measures to prevent the breach of such right.⁵¹⁰ As recalled in the Separate Opinion by Judge A. A. Cançado Trindade, the Court had already set forth in the case *Street Children (Villagrán-Morales et al.) v. Guatemala* that:

*'the fundamental right to life includes, not only the right of every human being not to be deprived of his life arbitrarily, but also the right that he will not be prevented from having access to the conditions that guarantee a dignified existence.'*⁵¹¹

Also, in the *Mayagna Awas Tingni Community v. Nicaragua*, the Court held that for members of such indigenous communities the relation to the land are not merely a matter of possession and production but a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations.⁵¹²

As for the ECtHR jurisprudence, also in the case law of the IACHR, the Court has been sensitive to the specific cultural context of disputes and has accordingly given specific contents and meanings to the human rights at hand. In the *Sawhoyamaxa* case, the Court considered that:

*'indigenous communities might have a collective understanding of the concepts of property and possession, in the sense that ownership of the land "is not centered on an individual but rather on the group and its community." This notion of ownership and possession of land does not necessarily conform to the classic concept of property, but deserves equal protection under Article 21 of the American Convention.'*⁵¹³

Further, in the *Case of the Indigenous Community Yakye Axa v. Paraguay*, the Court held that in order to enjoy certain fundamental rights (and among them, cultural rights), the recognition of the legal personality of indigenous communities was a necessary legal mechanism.⁵¹⁴

⁵⁰⁹ *Ibid.*, paras.150-152.

⁵¹⁰ *Ibid.*, para.153.

⁵¹¹ *Street Children (Villagrán-Morales et al.) v. Guatemala*, IACHR, Judgment, Merits, 19 November 1999, Series C No.63, para.144, quoted in the *Separate Opinion by Judge A. A. Cançado Trindade* to the IACHR Judgment in *Sawhoyamaxa Indigenous Community v. Paraguay*, *Op. Cit.*, para.2.

⁵¹² *Mayagna Awas Tingni Community v. Nicaragua*, IACHR, Judgment, Merits, 31 August 2001, Series C No.79, para.149, quoted in the *Separate Opinion by Judge A. A. Cançado Trindade* to the IACHR Judgment in *Sawhoyamaxa Indigenous Community v. Paraguay*, *Op. Cit.*, para.3.

⁵¹³ *Ibid.*, para.120.

⁵¹⁴ IACHR, *Case of the Indigenous Community Yakye Axa v. Paraguay*, Judgment of June 17, 2005, Series C No.125, paras. 82-83.

Quite interestingly, in his *Separate Opinion* to the *Sawhoyamaxa* judgment, Judge A. A. Cançado Trindade points out that

*'[...] the notion of culture, - originating in the Roman colere which means to till, to consider, to care for and to preserve – was originally embodied in agriculture (taking care of the land).'*⁵¹⁵

Further, expressing his support for the judgment in *Sawhoyamaxa* case,

*'the Court has correctly underscored the positive measures to protect and to preserve the underogable right to life, and in ordering reparations (including the return of the ancestral lands), it has borne in mind the pressing need to preserve the cultural identity of the Community in question.'*⁵¹⁶

On these points, the IACHR stated that:

*'the Court cannot decide that Sawhoyamaxa Community's property rights to traditional lands prevail over the right to property of private owners or vice versa, since the Court is not a domestic judicial authority with jurisdiction to decide disputes among private parties. this power is vested exclusively in the Paraguayan State. Nevertheless, the Court has competence to analyze whether the State ensured the human rights of the members of the Sawhoyamaxa Community. [...] The Court finds that the special meaning that these lands have for indigenous peoples, in general, and for the members of the Sawhoyamaxa Community, in particular, implies that the denial of those rights over land involves a detriment to values that are highly significant to the members of those communities, who are at risk of losing or suffering irreparable damage to their lives and identities, and to the cultural heritage of future generations.'*⁵¹⁷

Hence, culture might pervade international human rights conventions in many ways: substantively, as cultural rights are crystallized in their provisions and as an extension of certain human rights which might apply to culture, as for the case of the right to life, and interpretatively, as some human rights might have a different content depending on the context they are applied to. As such, it appears safe to say that each human right might be a 'cultural rights' and culture is a key element potentially impacting linked to human right.

⁵¹⁵ *Separate Opinion by Judge A. A. Cançado Trindade to the IACHR Judgment in Sawhoyamaxa Indigenous Community v. Paraguay, Op. Cit., para.4.*

⁵¹⁶ *Ibid., para.7.*

⁵¹⁷ *Sawhoyamaxa Indigenous Community v. Paraguay, Op. Cit., paras.136, 222.*

II.4.D. The Human Right to Culture and the African Charter on Human and Peoples' Rights: The African Approach to Individualism and Communitarism

The *African Charter of Humana and Peoples Rights* stands out among the other international conventions and treaties on human rights. In fact, as its name indicates, the Charter explicitly recognizes the collective dimension of human rights beyond the individual one. The African Charter explicitly recognizes cultural rights from a community standpoint, together with a holistic approach which strongly connects civil and political rights to economic, social and cultural rights. Indeed, the African Charter has been regarded as innovative and idiosyncratic.⁵¹⁸ Already in its Preamble, the African Charter declares that:

'[c]onsidering that the enjoyment of rights and freedoms also implies the performance of duties on the part of everyone; Convinces that it is henceforth essential to pay a particular attention to the right to development and that civil and political rights cannot be dissociated from economic, social and cultural rights in their conception as well as universality and that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights;...'

Under Article 17 of the African Charter:

- '1. Every individual shall have the right to education.*
- 2. Every individual may freely take part in the cultural life of his community.*
- 3. The promotion and protection of morals and traditional values recognized by the community shall be the duty of the State'*

Also, Article 20.3 of the African Charter, which in its first and second commas recognizes the right to existence and the right for colonized or oppressed peoples the right to free themselves from the bonds of domination, reads as follows:

'3. All peoples shall have the right to assistance of the States parties to the present Charter in their liberation struggle against foreign domination, be it political, economic or cultural.'

Under Article 22 of the African Charter:

- '1. All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind.*
- 2. States shall have the duty, individually or collectively, to ensure the exercise of the right to development.'*

⁵¹⁸ M. Evans, R. Murray (Eds.), *The African Charter on Human and Peoples' Rights – The System in Practice, 1986-2006*, (Cambridge University Press: 2008, U.K.), p. 24-25.

Defining the duties of the individual, Article 29 of the African Charter sets forth that:

'7. To preserve and strengthen positive African cultural values in his relations with other members of the society, in the spirit of tolerance, dialogue and consultation and, in general, to contribute to the promotion of the moral wellbeing of society; [...]

As pointed out, although the Preamble of the African Charter makes clear that one of its goals is the elimination of all forms of discrimination, included those based on sex, the interpretation of the term 'African values' has created certain conceptual counter-circuits and might justify some forms of discrimination in the enjoyment of rights.⁵¹⁹

Finally, under Article 60 of the African Charter:

'The [African] Commission shall draw inspiration from international law on human and peoples' rights, particularly from the provisions of various African instruments on human and peoples' rights, the Charter of the United Nations, the Charter of the Organization of African Unity, the Universal Declaration of Human Rights, other instruments adopted by the United Nations and by African countries in the field of human and peoples' rights as well as from the provisions of various instruments adopted within the Specialized Agencies of the United Nations of which the parties to the present Charter are members.'

The collective rights protected under the African Charter are recognized to sections of populations within nation states, including indigenous peoples and communities.⁵²⁰ It has been eminently stressed how culture and cultural practices and values are key and fundamental to the identification and definition of what indigenous peoples and communities are.⁵²¹ Beyond these considerations, the loss and negative effects that certain activities might produce on natural resources are one of the elements which impacts negatively on indigenous communities' culture, preventing them from maintaining and further develop the livelihood of their own choice and to retain and accordingly developing their culture and identity.⁵²² Future developments on collective cultural rights under the African Charter are fervently expected by scholars around the world and might provide further inspiration for human rights protection under other regional human rights systems.

This analysis of cultural human rights shows that certainly cultural heritage at the international level and international cultural heritage law can be approached from the standpoint of human rights and international human rights instruments. Clearly, as mentioned, this entails an anthropocentric approach and the constant presence of individuals

⁵¹⁹ *Ibid.*, p.464.

⁵²⁰ African Commission on Human and Peoples' Rights (ACHPR) – International Work Group for Indigenous Affairs (IWGA), *Indigenous Peoples in Africa: The Forgotten Peoples? – The African Commission's Work on Indigenous Peoples in Africa*, (Eks/Skolens Trykkeri: 2006, Copenhagen), p.20, available at http://www.achpr.org/files/special-mechanisms/indigenous-populations/achpr_wgip_report_summary_version_eng.pdf.

⁵²¹ *Id.*

⁵²² *Ibid.*, p.18.

(physical or legal persons) for cultural heritage to be taken into consideration. The major advantage of such an approach seems the possibility to conduct a comparative reading of all the different international human rights instruments in order to draw significant lessons. The possibility to ascribe a right to cultural heritage to group or communities rather than individuals is one of them. Further developments are however expected in light of the jurisprudential interpretation given by international human rights tribunals. Whether human rights will be even more integrated into cultural heritage conventions remains to be seen and would arguably be an advancement in the field. This notwithstanding, the triangular relationship between international investment law, human rights and cultural heritage provides interesting insights on human rights themselves. The next part of this work will focus specifically on investment law and cultural heritage, without overlooking the human rights dimension of culture and cultural heritage.

Part III. International Investment Law and Cultural Heritage

Chapter III.1. International Investment Agreements and Cultural Heritage: What Place for Cultural Heritage Rules and Provisions in International investment Agreements?

The *United Nations Conference on Trade and Development* (UNCTAD) has counted up to 2954 international investment agreements and 362 other treaties which contain investment provisions.⁵²³ It is clear that with such a high number of treaties it is not easy to conduct a treaty-by-treaty analysis of each and every provision which might be relevant for cultural heritage. This notwithstanding, certain culture and heritage-related provisions have commanded significant attention from scholars and practitioners alike. The s.c. ‘cultural exemption’ contained in the NAFTA has in fact been a closely studied example of carve out provision regarding culture.⁵²⁴ Article 2106 (*Cultural Industries*) of the NAFTA, refers to Annex 2106 with regard to cultural industries. In turn, under Annex 2106 (*Cultural Industries*):

‘Notwithstanding any other provision of this Agreement, as between Canada and the United States, any measure adopted or maintained with respect to cultural industries, except as specifically provided in Article 302 (Market Access - Tariff Elimination), and any measure of equivalent commercial effect taken in response, shall be governed under this Agreement exclusively in accordance with the provisions of the Canada - United States Free Trade Agreement . The rights and obligations between Canada and any other Party with respect to such measures shall be identical to those applying between Canada and the United States.’

As highlighted by some scholars, the ‘shelf space’ for culture sought by Canada in its 1988 Free Trade Agreement with the United States was later carried into the NAFTA in 1994, thus becoming ‘a “marker”, or symbol, for cultural protection’.⁵²⁵ This provided impetus for Canadian leadership in the negotiation and adoption of the 2005 UNESCO Convention on Cultural Diversity.⁵²⁶ Some have pointed out that this provision concurrently pushed the United States to oppose the negotiation and adoption of this Convention.⁵²⁷ This notwithstanding, and without undermining the importance of such a clause, which applies between Canada and the United States and Canada and Mexico, under Article 2005 of the Canada – United States Free Trade Agreement (summoned in Annex 2106 of the NAFTA):

⁵²³ UNCTAD, *Investment Policy Hub*, available at <http://investmentpolicyhub.unctad.org/IIA>.

⁵²⁴ ‘Carve ou’ provisions should be intended as provisions that exclude specific sectors or policy areas from the coverage of the treaty (the entire treaty or only some obligations under the treaty), APEC/UNCTAD, *International Investment Agreements Negotiators Handbook: APEC/UNCTAD Modules*, APEC Committee on Trade and Investment – Investment Experts Group, (December 2012), p.30.

⁵²⁵ C. Carmody, *Creating “Shelf Space”: NAFTA’s Experience with Cultural Protection and Its Relevance for the WTO*, *Asian Journal of WTO & International Health Law and Policy* Vol.2, (2007), p.289.

⁵²⁶ *Ibid.*, p.290.

⁵²⁷ M. Oustinoff, *Les points clés de la Convention sur la diversité des expressions culturelles*, Hermès, La Revue No.51, (2008/2), p.73.

'1. Cultural industries are exempt from the provisions of this Agreement, except as specifically provided in Article 401 (Tariff Elimination), paragraph 4 of Article 1607 (divestiture of an indirect acquisition) and Articles 2006 and 2007 of this Chapter. [...] 2. Notwithstanding any other provision of this Agreement, a party may take measures of equivalent commercial effect in response to actions that would have been inconsistent with this Agreement but for Paragraph 1.'⁵²⁸

Thus, Paragraph 2 apparently contradicts Paragraph 1: a party complaining about cultural policy measures falling under Article 2005 might legitimately adopt compensatory trade measures at its own discretion and without any formal investigation needed.⁵²⁹ Still, as mentioned, the importance of the cultural exemption in the NAFTA cannot be underestimated and this also considering the 'inspiring' effect that it might have had with regard to other culture-related provisions in international agreements. The impact of this clause in practical terms with regard to foreign investment will be discussed later in this work. Here, it will be sufficient to point out that the NAFTA is not the only international investment agreement containing meaningful provisions touching upon cultural matters.

The *Trans-Pacific Partnership* (TPP), a mega-regional agreement between twelve Parties among advanced and emerging economies, which at the time of writing is still to be ratified, touches upon several subjects including international trade, investment and intellectual property.⁵³⁰ Though it is still not clear whether this Partnership will enter into force, its provisions are telling of the will of the negotiating parties to factor in a certain regulatory space. Its Chapter 29 contains a number of articles which have the purpose of granting Parties room for maneuver in the framework of such an all-encompassing and ambitious treaty. Accordingly, TPP Article 29.1 incorporates, *mutatis mutandis*, Article XX of GATT 1994 and paragraphs (a), (b) and (c) of Article XIV of GATS. As such, Parties to the TPP might adopt measures imposed for the protection of national treasures of artistic, historic or archeological value (GATT Article XX (f)), as far as these measures are consistent with the 'chapeau' of Article XX, even though these measures conflict with specific trade obligations under specific chapter of the Agreement identified in the provision. The same holds true for those measures which are necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of the Agreement (GATT Article XX (d)). As eminently signaled, an evolutionary interpretation of GATT Article XX (f) might justify the inclusion of cultural industries under the scope of this provisions, besides the very specific and strict concept of 'national treasures.'⁵³¹ Though this exception does not seem to apply to the investment obligations stemming from the TTP, any interpretation and application of this

⁵²⁸ Article 2005 (Cultural Industries) of the *Free Trade Agreement Between Canada and the United States of America*, signed on 12 October 1987, entered into force on 1 January 1989.

⁵²⁹ P. Sauv , *Document de r flexion sur: Le traitement des produits et services culturels dans les accords commerciaux*, Deuxi me Concertation Intergouvernementale, Paris, (12 d cembre 2000), p.25, available at http://www.francophonie.org/IMG/pdf/Traitement_des_produits_et_services_cult_-_accords_commerciaux.pdf.

⁵³⁰ D. Lippoldt, *Trading Up – The Trans-Pacific Partnership Agreement (TPP): Promoting Waves of Innovation*, East-West Center Workshop on Mega-Regionalism – New Challenges for Trade and Innovation (2015), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2745528&download=yes.

⁵³¹ P. Van Den Bossche, *Free Trade and Culture – A Study of Relevant WTO Rules and Constraints on National Cultural Policy Measures*, Maastricht Working Papers Faculty of Law 3, (2007), p.53-56.

general exceptions provision might provide insights for the interpretation and implementation of other articles modeled on the general exception provisions of the GATT 1994.

Further, under Article 29.6 of the TPP (*Treaty of Waitangi*):

'1. Provided that such measures are not used as a means of arbitrary or unjustified discrimination against persons of the other Parties or as a disguised restriction on trade in goods, trade in services and investment, nothing in this Agreement shall preclude the adoption by New Zealand of measures it deems necessary to accord more favourable treatment to Maori in respect of matters covered by this Agreement, including in fulfilment of its obligations under the Treaty of Waitangi. [...] 2. The Parties agree that the interpretation of the Treaty of Waitangi, including as to the nature of the rights and obligations arising under it, shall not be subject to the dispute settlement provisions of this Agreement. Chapter 28 (Dispute Settlement) shall otherwise apply to this Article. A panel established under Article 28.7 (Establishment of a Panel) may be requested to determine only whether any measure referred to in paragraph 1 is inconsistent with a Party's rights under this Agreement.'

While this provision seems clear and very specific, the content of Article 29.8 (*Traditional Knowledge and Traditional Cultural Expressions*) appears much more general:

'Subject to each Party's international obligations, each Party may establish appropriate measures to respect, preserve and promote traditional knowledge and traditional cultural expressions.'

Since Article 29.8 makes it clear that traditional knowledge and traditional cultural expressions-related measures may be established only subject to each party's international obligations, the real importance of this provisions still has to be tested in practice. Yet, besides the NAFTA, the TPP is not the only treaty which contains provisions concerning the cultural sector. Canada, a negotiating party of the TPP and, as mentioned, the driving force behind the cultural exception in the NAFTA, is among those few States which include general exceptions provisions in their investment agreements. Under Article 10.6 (*General Exceptions*) of Canada 2004 model investment agreement:

'6. The provisions of this Agreement shall not apply to investments in cultural industries.'

Under Article 1, Canada 2004 model investment agreement makes clear that:

'[...] cultural industries means persons engaged in any of the following activities:
(i) the publication, distribution, or sale of books, magazines, periodicals or newspapers in print or machine readable form but not including the sole activity of printing or typesetting any of the foregoing;
(ii) the production, distribution, sale or exhibition of film or video recordings;

- (iii) the production, distribution, sale or exhibition of audio or video music recordings;*
- (iv) the publication, distribution, sale or exhibition of music in print or machine readable form; or*
- (v) radio communications in which the transmissions are intended for direct reception by the general public, and all radio, television or cable broadcasting undertakings and all satellite programming and broadcast network services.'*

The 2015 Norway model investment agreement is somewhat more articulated. Beyond a general exception provision which covers the adoption or enforcement of measures necessary *'for the protection of national treasures of artistic, historic or archaeological value'* or *'for the protection of the environment'* (Article 24.iv and 24.v), it contains a specific cultural exception (Article 27) which reads as follows:

'The provisions of this Agreement shall not apply to a Party's laws and measures specifically designed to preserve and promote linguistic and cultural diversity, cultural and audiovisual policy, as well as rights and obligations of the Parties under international agreements and national laws and measures relating to copyright and related rights.'

Further, the 2015 Norway model investment agreement includes a specific provision on the right to regulate (Article 12), which might seem more a declaration of principle rather than an 'enforceable' provision:

'Nothing in this Agreement shall be construed to prevent a Party from adopting, maintaining or enforcing any measure otherwise consistent with this Agreement that it considers appropriate to ensure that investment activity is undertaken in a manner sensitive to health, safety, human rights, labour rights, resource management or environmental concerns.'

The above-mentioned articles seem to have a broad scope and application. They make reference to the whole treaty they are included in (i.e. to all the obligations included in the treaty), save for some specific obligations to which these provisions do not apply explicitly. Other treaties include carve out provisions, which exclude the applicability of certain obligations under the treaty they are included in, in certain sectors or to certain policies. As a case in point, in the Annex to the United States-Lithuania BIT, Lithuania lists (in Paragraph 3) a number of exceptions applicable to its national treatment obligation (i.e. sectors in which the national treatment obligation does not apply), including ownership of land of national parks, national reservations, reserves, protective areas of the territory of biosphere monitoring, forestry land, rivers and other water bodies exceeding one hectare in size as well as their protective bank area, and monuments of nature, history, archeology and culture and the surrounding protective areas. It seems safe to say that besides the explicit reference to *'monuments of nature, history, archeology and culture'*, cultural heritage expressions might fall also under other terms of the Annex, such as *'forestry land'* or *'water bodies'*.

This testifies to the wide variety of treaty provisions and terms that might have significant consequences for cultural matters. However, this should not lead to think that the absence of provisions which specifically address specific concerns on cultural property does entail, in and of itself, the exclusion of any relevance *tout court* for cultural property under international investment treaties. First, the overlap between cultural heritage and environmental protection allows to safely assert that those provisions regarding the

environment and environmental protection might be applied to cultural heritage. By way of example, Article 19 (*Environmental Aspects*) of the Energy Charter Treaty might be well applied also to natural heritage:

'(1) In pursuit of sustainable development and taking into account its obligations under those international agreements concerning the environment to which it is party, each Contracting Party shall strive to minimise in an economically efficient manner harmful Environmental Impacts occurring either within or outside its Area from all operations within the Energy Cycle in its Area, taking proper account of safety. In doing so each Contracting Party shall act in a Cost-Effective manner. In its policies and actions each Contracting Party shall strive to take precautionary measures to prevent or minimise environmental degradation. The Contracting Parties agree that the polluter in the Areas of Contracting Parties, should, in principle, bear the cost of pollution, including transboundary pollution, with due regard to the public interest and without distorting Investment in the Energy Cycle or international trade. [...] Contracting Parties shall accordingly: (a) take account of environmental considerations throughout the formulation and implementation of their energy policies; [...].'

The Article goes on listing a number of considerations that ECT Contracting Parties shall make in the formulation and implementation of their energy policies, considerations which might involve some relevance for cultural issues, in a way or the other.

All these examples show *prima facie* that during the negotiation of international investment agreements, non-economic values and concepts, such as culture and cultural heritage, are taken into consideration. It remains to be seen how these provisions are interpreted by international courts and tribunals and applied in practice. Later in this research work, special attention will be given to those provisions that have already been tested by international investment tribunals.

Secondly, under Article 42 of the ICSID Convention, although an arbitral tribunal decides disputes in accordance with the rules of law agreed by the parties, where such an agreement is missing, the tribunal will apply the law of the Contracting State party to the dispute and the rules of international law that may be applicable. Also, the law of the Contracting State might provide a 'door' for international law to be applied, together with those principles of *ordre public international* that an international arbitrator might resort to.⁵³² As investment arbitration cases discussed below prove, the application of, or reference to, national law by international tribunals might be dispositive of important cultural heritage-related issues. Also, and again, for those investment disputes administered by ICSID, under Article 25(4) of the ICSID Convention:

'(4) Any Contracting State may, at the time of ratification, acceptance or approval of this Convention or at any time thereafter, notify the Centre of the class or classes of disputes which it would or would not consider submitting to the jurisdiction of the Centre. The Secretary-General shall forthwith transmit such notification to all

⁵³² P.-M. Dupuy, *Unification Rather than Fragmentation of International Law? The Case of International Investment Law and Human Rights Law*, in P.-M. Dupuy, F. Francioni, E.-U. Petersmann (Eds.), *Human Rights in International Investment Law and Arbitration*, (Oxford University Press: 2009, U.K.), p.25.

Contracting States. Such notification shall not constitute the consent required by paragraph (1).'

In reality, the real potential of this provision seems to be underestimated. This Article allows Contracting States of the ICSID Convention to carve out specific sectors, including culture and cultural heritage, from the application of the Convention, should they wish so, thus excluding that investment disputes against them be submitted to ICSID where foreign investments in these sectors are made. Also, even though no explicit reference to cultural heritage is made, the exclusion of other sectors might indirectly entail exclusion of disputes related involving cultural matters. The declaration from Jamaica which excludes from the jurisdiction of the Center any '[l]egal dispute arising directly out of an investment relating to minerals or other natural resources' might help elucidate this point.⁵³³ Indigenous communities' cultural rights are often linked to natural resources and impacted by resources-related foreign investments and investment disputes. Hence, a declaration excluding disputes arising directly out of investments in natural resources from the jurisdiction of the Center, might exclude also disputes involving cultural rights.

Thirdly, customary law and the principles of civilized nations are a source of international law that might apply to investment agreements. Caution is however necessary for any discussion concerning the possibility to apply international customary law rules in investor-state arbitration. As already mentioned, customary law rules traditionally apply between states, while there is still an open debate on the law applicable to the substance of investor-state disputes and on the question of whether investment treaty obligations are primarily owed to the other treaty-negotiating state (and only as a reflection to its investors in the territory of the other party) or directly to its investors.⁵³⁴ Investment arbitral tribunals have rarely engaged in this discussion and tend to apply *tout court* customary law to investor-state investment disputes. As a result, it is safe to state that international customary rules on cultural property might find a place in investment arbitration, though no final determination in this sense can be made without reference to the specific circumstances of each case.

Fourthly, and lastly, considerations relating to the cultural context in which an investment is made and the investment dispute arises in might be factored in by arbitral investment tribunals through a number of reasonings. By way of example, in *Duke Energy v. Ecuador*, a dispute arising out of a number of contracts related to electrical power generation,⁵³⁵ addressing the existence and alleged violation of the foreign investor's legitimate expectations, the Arbitral Tribunal stated that:

⁵³³ *Notifications Concerning Classes of Disputes Considered Suitable or Unsuitable for Submission to the Centre, Jamaica, Contracting States and Measures Taken by Them for the Purpose of the Convention*, ICSID/8-D, December 2015, available at <https://icsid.worldbank.org/apps/ICSIDWEB/icsiddocs/Documents/ICSID%20Contracting%20States%20and%20Measures%20Taken%20by%20Them%20for%20the%20Purpose%20of%20the%20Convention.pdf>.

⁵³⁴ P. Bhagnani, *Revisiting the Countermeasures Defense in Investor-State Disputes: Approach and Analysis*, *Op. Cit.*, p.443 ff.; A. Roberts, *Triangular Treaties: The Extent and Limits of Investment Treaty Rights*, *Harvard International Law Journal* Vol.56, N.2, (2015); Z. Douglas, *Op.Cit.*

⁵³⁵ *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador*, ICSID Case No.ARB/04/19, Award, 18 August 2008, para.9.

*'The stability of the legal and business environment is directly linked to the investor's justified expectations. The Tribunal acknowledges that such expectations are an important element of fair and equitable treatment. At the same time, it is mindful of their limitations. To be protected, the investor's expectations must be legitimate and reasonable at the time when the investor makes the investment. The assessment of the reasonableness or legitimacy must take into account all circumstances, including not only the facts surrounding the investment, but also the political, socioeconomic, cultural and historical conditions prevailing in the host State. In addition, such expectations must arise from the conditions that the State offered the investor and the latter must have relied upon them when deciding to invest.'*⁵³⁶

These remarks show that culture and cultural heritage might find their way into international investment arbitration in different and unexpected ways. The existence of exception provisions covering cultural heritage treasures and, potentially, cultural industries, shows in itself the possibility of conflicts between the regulation of foreign investments and the furtherance of cultural policies. Where no exception or carve out provisions exist and a conflict arises, other solutions have to be found. Some scholars refer to certain principles of legal logic, such as *lex specialis derogat generalis* or *lex posterior derogate prioris*, which might come in handy⁵³⁷ Some of these principles have also become 'black-letter' law, as in the case of Article 30 of the VCLT which lays down rules relating to the application of successive treaties relating to the same subject-matter. Here, it will be sufficient to point out that coherence and consistency should be sought instead of contradiction, whenever possible.

Such an approach seems particularly relevant if one considers that, as signaled in the introduction of this research work, investment activities are, in one way or the other, fundamental for cultural heritage preservation, conservation and even exploitation. Also, all the considerations and example above show that, though the number of international investment agreements is extremely high and not all these agreements include cultural-related provisions, cultural concerns can be factored in the interpretation and application of international investment agreements. Consequently, one can safely assert that the question of the impact of investment treaties on cultural heritage is far from absent from the international investment law and policy agenda.

⁵³⁶ *Ibid.*, para.340.

⁵³⁷ J. Pauwelyn, *Conflict of Norms in Public International Law – How WTO Law Relates to Other Rules of International Law*, (Cambridge University Press: 2003, U.K.), p.126.

Chapter III.2. International Cultural Heritage Conventions and International Investment Law: What Place for International Investment Law Rules and Provisions in International Cultural Heritage Conventions?

As shown above, a number of provisions touching upon cultural heritage are included in international investment agreements and culture and cultural heritage are present in the international investment law realm in a number of ways. It seems legitimate to wonder whether this is a one-way relationship, where only international investment agreements take cultural matters into consideration, or if international cultural heritage conventions refer to, and duly consider, foreign investments and international investment law.

Though the 1972 UNESCO World Heritage Convention does not explicitly refer to investments, it reflects in its *Preamble* the idea that economic activity can be both a danger and an opportunity for cultural heritage:

'Noting that the cultural heritage and the natural heritage are increasingly threatened with destruction not only by the traditional causes of decay, but also by changing social and economic conditions which aggravate the situation with even more formidable phenomena of damage or destruction [...] [c]onsidering that protection of this heritage at the national level often remains incomplete because of the scale of the resources which it requires and of the insufficient economic, scientific and technological resources of the country where the property to be protected is situated, [...].'

The Convention testifies to the ambivalent effects of economic activities on cultural heritage. Nonetheless, the 1972 Convention does not mention international economic law nor foreign investment in any of its substantive provisions. Conversely, the 2003 UNESCO Convention on intangible cultural heritage shows a certain level of awareness of the impact that (some branches of) international economic law might have on cultural heritage and explicitly addresses in Article 3 its relationship to other international instruments:

'Nothing in this Convention may be interpreted as: [...] (b) affecting the rights and obligations of State Parties deriving from any international instruments relating to intellectual property rights or to the use of biological and ecological resources to which they are parties.'

Though international instruments relating to trade and/or investment may have a significant impact on intangible cultural heritage expressions, as it will be further discussed, the 2003 Convention does not bother to refer to them. This might be seen as the result of *realpolitik* and the practical need to address specific questions one at a time in order to conduct successful negotiations in order to adopt 'binding' international instruments. Said in other words, if during the negotiation of each UNESCO convention the negotiating parties would have had to reach agreement on how to set the relations of the convention at issue with

the entirety of international economic law instruments, negotiations would have been much more difficult and less 'productive'. However, on the other hand, the outcome of this practical approach has been a patchwork of UNESCO conventions, every one of which refers to, and take into considerations, only some specific international economic law instruments. No general approach towards the problems and opportunities provided by international economic law has been adopted. The 2005 UNESCO Convention on cultural diversity allows to confirm this idea. As already pointed out, in its *Preamble* the Convention recognizes the double value, cultural and economic, of cultural activities, goods and services. The Convention was conceived of having in mind the developments in international trade law at the WTO. As such, the Convention was negotiated with a specific objective. Two points are salient. First, intellectual property and international investment law are relevant branches of international economic law which might affect cultural diversity. This notwithstanding, the 2005 Convention refers explicitly only to intellectual property in its *Preamble* and in its Operational Guidelines.⁵³⁸ Secondly, the 2005 Convention addresses the issue of its relationship to other treaties in its Article 20 (*Relationship to other treaties: mutual supportiveness, complementarity and non-subordination*), stipulating that:

'1. Parties recognize that they shall perform in good faith their obligations under this Convention and all other treaties to which they are parties. Accordingly, without subordinating this Convention to any other treaty, (a) they shall foster mutual supportiveness between this Convention and the other treaties to which they are parties; and (b) when interpreting and applying the other treaties to which they are parties or when entering into other international obligations, Parties shall take into account the relevant provisions of this Convention.

2. Nothing in this Convention shall be interpreted as modifying rights and obligations of the Parties under any other treaties to which they are parties.'

The meaning of this Article is still unclear and any judicial or quasi-judicial scrutiny would be welcome. The practical importance of Article 20, which appears to lay down the duty for Contracting Parties to perform their obligations under the Convention and, concurrently, under all other treaties to which they are parties, without setting however any hierarchy or primacy between treaties, remains to be seen. In this sense, any investment dispute involving the 2005 Convention and Article 20 would be welcome at least to clarify its real clout within the Convention.

These examples show that no consistent neither extensive approach on the relationship with international economic rules exist in international cultural law instruments. A broad perspective is missing. This is not surprising and, though partial, this limited approach should be commended already as a step forward towards a better understanding and integration between the two disciplines (international cultural heritage law and international economic law). Indeed, while bilateral economic instruments might address

⁵³⁸ *Convention on the Protection and Promotion of the Diversity of Cultural Expressions – Operational Guidelines on Article 7 Measures to Promote Cultural Expressions*, Approved by the Conference of Parties at its second session (Paris, 15-16 June 2009), third session (14-15 June 2011), fourth session (Paris, 11-13 June 2013) and fifth session (Paris, 10-12 June 2015).

cultural and cultural heritage issues as showed above, a brief assessment of some bilateral agreements concluded by states regarding cultural property shows that international economic law and policy concerns are extremely far from the negotiating parties' concerns. As a case in point, the United States and Italy and the United States and Greece have concluded agreements focusing exclusively on import restrictions of specific cultural property respectively from Italy and Greece.⁵³⁹ If one looks at international economic law from the standpoint of bilateral cultural heritage instruments an unbridgeable crevice looms on the horizon. From this perspective, the modest result of the UNESCO conventions appears as a great achievement and, though with different degrees of 'intensity', the relation between international investment law and international cultural heritage law does not appear as a one-way relationship. There is certainly room for improvement, but current achievements should be underestimated.

⁵³⁹ *Memorandum of Understanding Between the Government of the United States of America and the Government of the Republic of Italy Concerning the Imposition of Import Restrictions on Categories of Archaeological Material Representing the Pre-Classical, Classical and Imperial Roman Periods of Italy*, signed on 19 January 2001, entered into force on 19 January 2001; *Memorandum of Understanding Between the Government of the United States of America and the Government of the Hellenic Republic Concerning the Imposition of Import Restrictions of Categories of Archaeological and Byzantine Ecclesiastical Ethnological Material Through the 15th Century A.D. of the Hellenic Republic*, signed on 17 January 2011, entered into force on 21 November 2011.

Chapter III.3. International Investment Disputes, Culture and Cultural Heritage: What Intersection in Practice?

III.3.A. From 'Classical' Cases of Foreign Investment 'in' Cultural Heritage...

A growing number of international investment disputes have touched upon, involved or affected cultural issues in one way or the other. Diplomatic protection and investor-to-state arbitration have commanded most of the attention among investment dispute settlement methods.⁵⁴⁰ Recently, state-to-state investment disputes settlement has also started to be a closely studied dispute resolution method.⁵⁴¹ Conversely, studies on cultural heritage dispute settlement, in general, seem rarer.⁵⁴² Cultural heritage disputes appear to have attracted more interest with regard to specific problems, such as cultural heritage restitution and cultural property ownership disputes.⁵⁴³ The view that a cultural heritage-specialized international court would not be desirable or viable is supported here.⁵⁴⁴ Nevertheless, the absence of a cultural heritage-specialized international tribunal, or of a cultural heritage-specialized dispute settlement mechanism, makes any study on international investment disputes involving cultural matters even more appealing. Indeed, as further discussed below, international investment dispute settlement methods have proved as an interesting mechanism to resolve cultural disputes. While relevant questions emerging in these disputes under international law will be assessed later in this research, the factual background of

⁵⁴⁰ C. McLachlan, L. Shore, M. Weiniger, *international investment Arbitration – Substantive Principles*, (Oxford University Press: 2008, U.K.); M. E. Schneider, *Investment Disputes – Moving Beyond Arbitration*, in L. Boisson de Chazournes, M. G. Kohen, J. E. Viñuales (Eds.), *Diplomatic and Judicial Means of Dispute Settlement*, (Martinus Nijhoff: 2013, Leiden/Boston); J. E. Viñuales, D. Bentolila, *The Use of Alternative (Non-Judicial) Means to Enforce Investment Awards Against States*, in L. Boisson de Chazournes, M. G. Kohen, J. E. Viñuales (Eds.), *Op. Cit.*; C. Giorgetti (Ed.), *Litigating International Investment Disputes – A Practitioner’s Guide*, (Martinus Nijhoff: 2014, Leiden/Boston); UNCTAD, *Investor-State Dispute Settlement, Op. Cit.*

⁵⁴¹ N. Bernasconi-Osterwalder, *State-State Dispute Settlement in Investment Treaties*, IISD – Best Practices Series, (October 2014); UNCTAD, *Dispute Settlement: State-State*, UNCTAD Series on Issues in International Investment Agreements, (United Nations: 2003, New York/Geneva); C. J. Trevino, *State-to-State Investment Treaty Arbitration and the Interplay with Investor-State Arbitration Under the Same Treaty*, *Journal of International Dispute Settlement* Vol.5, Iss.9, (2013); M. Potestà, *State-to-State Dispute Settlement Pursuant to Bilateral Investment Treaties: Is There Potential?*, in N. Boschiero, T. Scovazzi, C. Pitea, C. Ragni (Eds.), *International Courts and the Development of International Law: essays in Honour of Tullio Treves*, (T.M.C. Asser Press: 2013, The Hague).

⁵⁴² M.-A. J. Renold, A. Chechi, A.-L. Bandle (Eds.), *Resolving Disputes in Cultural Property / La résolution des litiges en matière de biens culturels*, Art Law Centre / Centre du droit de l’art, (Schulthess Éditions Romandes: 2012) ; A. Chechi, *The Settlement of International Cultural Heritage Disputes, Op. Cit.*; J. A. R. Nafziger, R. Kirkwood Paterson, A. Dundes Renteln, *Op Cit.*, p.382 ff..

⁵⁴³ M. Frigo, *Circulation des biens culturels, détermination de la loi applicable et méthodes de règlement des litiges*, Les livres de poche de l’Académie de droit international de La Haye, (Brill/Nijhoff: 2016, La Haye), Chapitre IV; M. Cornu, M.-A. J. Renold, *Op. Cit.*; C. Roodt, *Private International Law, Art and Cultural Heritage*, (Edward Elgar Publishing: 2015, U.S.), p.67 ff. & 250 ff.; L. M. Kaye, M.-C. Jiménez, F. K. Lord IV, *Avoidance and Resolution of Cultural Heritage Disputes: Recovery of Art Looted During the Holocaust*, *Willamette Journal of International Law & Dispute Resolution* 14, (2006); M. Phelan, *International Mediation of Cultural Property Ownership Issues – It’s the Right Thing to Do!*, in S. Hutt (Ed.), D. Tarler (Ass. Ed.), *Yearbook of Cultural Property Law 2009*, (Left Coast Press, Inc.: 2009, U.S.).

⁵⁴⁴ A. Chechi, *The Settlement of International Cultural Heritage Disputes, Op. Cit.*

relevant case law can be already highlighted here as an example of the practical intersection between international investment law obligations and culture-related measures.

The proceedings and result of several investment cases might have a bearing on how cultural policies are devised and implemented. Cases such as *Maffezzini v. Spain* or *Plama v. Bulgaria*, respectively involving an environmental impact assessment⁵⁴⁵ and environmental damages-related claims,⁵⁴⁶ might be pertinent for tangible and intangible cultural and natural heritage. Environmental damages are indeed a real concern for natural heritage, and an environmental impact assessment might take into account cultural heritage elements, as shown by the *Pulp Mills* case before the ICJ.⁵⁴⁷ Similarly, one might draw interesting lessons from *MTD v. Chile*, an investment dispute over the construction and development of a planned community and its alleged impact on the environmental health of the city of Santiago.⁵⁴⁸ In particular, Chile even requested the annulment of the Arbitral Tribunal's Award based, among others, on an alleged failure to state reasons with regard to the Chilean environmental commission rejection of an environmental impact statement for the development project.⁵⁴⁹ No doubt that the Arbitral Tribunal and the *Ad hoc* Annulment Committee reasonings provide relevant insights on investment projects involving cultural property elements, once the necessary distinctions between the environment and cultural property are applied. However, there have been other investment cases featuring mainly, or principally based upon, cultural and natural heritage itself. Hence, though there are numerous general insights and lessons that one might draw from the high number of investment cases potentially relevant for culture and cultural heritage, cases specifically involving heritage deserve special attention.

Quite unexpectedly, those disputes involving foreign investment and cultural property have been among the more important and controversial investment cases of all times. *SPP v. Egypt* has been one investment dispute which has certainly made history, as a turning point for the world of investment arbitration,⁵⁵⁰ and the first investment dispute apparently involving cultural heritage. It was the first case where the possibility for states to include their consent to submit a dispute to an ICSID arbitral tribunal in their national laws was scrutinized. Though this possibility had already been identified by the 'father' of the ICSID Convention,⁵⁵¹ the question was extremely important given its similarity to the question of whether states might express the consent to submit disputes to ICSID arbitral tribunals in bilateral investment treaties.⁵⁵² In this sense, *SPP v. Egypt* is often referred to as 'classic

⁵⁴⁵ *Emilio Agustín Maffezzini v. The Kingdom of Spain*, ICSID Case No.ARB/97/7, Award, 13 November 2000, paras.41, 65 ff.

⁵⁴⁶ *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No.ARB/03/24, Award, 27 August 2008, paras.149, 194 ff.

⁵⁴⁷ *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, I.C.J. Reports 2010, p. 14, paras.203 ff.

⁵⁴⁸ *MTD Equity Sdn. Bhd. And MTD Chile S.A. v. Republic of Chile*, ICSID Case No.ARB/01/7, Award, 25 May 2004, paras.39 ff.

⁵⁴⁹ *MTD Equity Sdn. Bhd. And MTD Chile S.A. v. Republic of Chile*, ICSID Case No.ARB/01/7, Decision on Annulment, 21 March 2007, paras.93 ff.

⁵⁵⁰ J. Paulson, *The Pyramids Case*, in *Collected Courses of the International Academy for Arbitration Law*, Year 2012 Vol.1, (2014), p.1.

⁵⁵¹ A. Broches, *The Convention on the Settlement of Investment Disputes: Some Observations on Jurisdiction*, in A. BROCHES, *Selected Essays – World Bank, ICSID, and Other Subjects of Public and Private International Law*, (Martinus Nijhoff Publishers: 1995, The Netherlands), p.168-169.

⁵⁵² J. Paulson, *Op. Cit.*, p.14.

illustration' on investment arbitration based on states' national legislation.⁵⁵³ Other key questions featured in the arbitral proceedings regarded the relationship between international law and municipal law in investment arbitration,⁵⁵⁴ and whether states' measures affecting companies' rights under contracts may amount to expropriation.⁵⁵⁵

In 1974, *Southern Pacific Properties (Middle East) Limited* ('SPP'), a company in the tourist facilities development business, entered into an agreement with Egypt (the Egyptian Ministry of Tourism and the Egyptian General Organization for Tourism and Hotels, EGOH, a public enterprise controlled at the time by the Minister of Tourism) to create a joint venture incorporated under Egyptian law.⁵⁵⁶ This joint venture had been created with the purpose to develop tourist complexes in the Pyramids area near Cairo and on the Mediterranean coast.⁵⁵⁷ Both SPP and the Egyptian Government had assumed certain obligations under this contract.⁵⁵⁸ In 1974, SPP and EGOH concluded a second agreement, creating the joint venture ('*Egyptian Tourist Development Company*,' ETDC) and providing for the development of the tourist complexes in the Pyramids area and off the Mediterranean coast.⁵⁵⁹ This second agreement contained an arbitration clause referring to the *International Chamber of Commerce* (ICC) Arbitration.⁵⁶⁰ Both parties had signed this agreement, though some of EGOH's obligations were subject to the approval of competent governmental authorities and a feasibility study on the projects.⁵⁶¹ Subsequently, the Minister of Tourism gave its approvals and further agreements on the joint venture (ETDC) were entered into.⁵⁶² In 1977, construction of the tourist complexes began at the Pyramids site: planning for a first hotel and designs for a second one were completed, and numerous lots on which villas and multi-families accommodations were to be built were sold.⁵⁶³ However, in late 1977, the Pyramids Oasis Project started to encounter political opposition in Egypt, and in 1978 the Egyptian Ministry of Information and Culture declared the land surrounding the Pyramids to be '*public property (Antiquity)*' and approval of the Pyramids Oasis Project by some public organizations was withdrawn.⁵⁶⁴ In the same year, the Prime Minister declared by decree the lands for the project *d'utilité publique* and, at the request of EGOH, ETDC was put under judicial trusteeship.⁵⁶⁵ SPP and SPP(ME) started a commercial arbitral proceedings against Egypt, to which proceedings before a French Court of Appeal (*Cour d'Appel*) and the French Cassation

⁵⁵³ M. Sornarajah, *Op. Cit.*, p.304.

⁵⁵⁴ P. Dumberry, *International Investment Contracts*, in T. Gazzini, E. De Brabandere (Eds.), *International Investment Law - The Sources of Rights and Obligations*, (Martinus Nijhoff: 2012, Leiden/Boston), p.226.

⁵⁵⁵ U. Kriebaum, C. Schreuer, *The Concept of Property in Human Rights Law and International Investment Law*, in S. Breitenmoser, B. Ehrenzeller, M. Sassoli, W. Stoffel, B. Wagner Pfeifer (Eds.), *Human Rights, Democracy and the Rule of Law – Liber Amicorum Luzius Wildhaber*, (Nomos: 2007), p.751.

⁵⁵⁶ *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, Award on the Merits, *Op. Cit.*, paras.42-43.

⁵⁵⁷ *Id.*

⁵⁵⁸ *Ibid.*, para.43.

⁵⁵⁹ *Ibid.*, para.46.

⁵⁶⁰ *Ibid.*, paras.46-51.

⁵⁶¹ *Ibid.*, paras.52-53.

⁵⁶² *Ibid.*, paras.59-60.

⁵⁶³ *Ibid.*, paras.55-61.

⁵⁶⁴ *Ibid.*, paras.62-64.

⁵⁶⁵ *Ibid.*, paras.65-66.

Court (*Cour de Cassation*) followed.⁵⁶⁶ Once constituted, the ICSID Investment Arbitral Tribunal concluded that the cancellation of the project by the Egyptian Government was compensable,⁵⁶⁷ and after a thorough assessment of the parties' claims and reasoning on the measure of compensation owed, it established the quantum.⁵⁶⁸

Besides being an historical case, *SPP v. Egypt* epitomizes one possible relation between foreign investments and cultural heritage. The idea of investing next to cultural heritage sites, such as the Pyramids, is not casual. Cultural heritage needs foreign investment in order to be protected and safeguarded, and foreign investors are drawn to invest next to cultural heritage in order to create more attractive tourist development projects. This notwithstanding, other types of 'relations' between the two can be given. In fact, foreign investments can address cultural heritage 'directly.' The case *MHS v. Malaysia* is a good example. In *MHS v. Malaysia*, the Arbitral Tribunal, and subsequently the *Ad hoc* Annulment Committee, had the occasion to elaborate on the notion of protected 'investment'. Some have pointed out that the case has marked a new 'restrictive' stage in the definition of investment and, thus, in the identification of the existence of jurisdiction (or competence, depending on the preferred terminology) of ICSID investment tribunals.⁵⁶⁹ At the same time, *MHS v. Malaysia* has proved an interesting case to reflect on the potential contribution of cultural heritage to host states' development.

MHS, a marine salvage company incorporated under the laws of Malaysia, had entered into a contract with the Government of Malaysia to carry out several operations related to a British vessel sunk off the coast of Malacca (the 'DIANA') in 1817.⁵⁷⁰ MHS had to locate and salvage the cargo of the British vessel and to perform a number of specific operations, including the arrangement for the sale of salvaged porcelains and other valuable items.⁵⁷¹ MHS had also to sustain all the costs of the search and salvage operations (hence sustaining the entire risk of the operation, a 'no finds-no pays' scheme common for salvage contracts).⁵⁷² MHS would have made a profit only if the salvage operations and sale of the salvaged items were successful, and following a specific scheme to calculate the amount to be paid by Malaysia to MHS provided for in the contract.⁵⁷³ This scheme was based on a formula to calculate the payment due to MHS depending on the proceeds of the sales of the salvaged porcelains and items and explicitly allowed Malaysia to withdraw items from the sale provided that the claimant was paid its share of the best attainable value of such items.⁵⁷⁴ In the arbitration proceedings, MHS claimed that it had been paid only US\$1.2 million, i.e. 40% of

⁵⁶⁶ *Ibid.*, paras.67-72.

⁵⁶⁷ *Ibid.*, para.179.

⁵⁶⁸ *Ibid.*, para.257.

⁵⁶⁹ E. Gaillard, *Identify or Define? Reflections on the Evolution of the Concept of Investment in ICSID Practice*, in C. Binder, U. Kriebaum, A. Reinisch, S. Wittich, *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer*, (Oxford University Press: 2009, U.K.), p.415.

⁵⁷⁰ *Malaysian Historical Salvors SDN, BHD v. The Government of Malaysia*, ICSID Case No.ARB/05/2010, Award on Jurisdiction, 17 May 2007, paras.7-9.

⁵⁷¹ In particular, according to the contract, MHS had to: to provide equipment to carry out the salvage operations (a salvage vessel, crew and equipment); to utilize its expertise and skills to salvage; to finance the operation in its entirety; to search for, locate and secure the wreck on the sea floor; to bring the cargo to the surface; to clean, restore, inventorize and photograph the salvaged items; to provide for the safe keeping of the salvaged items; *Id.*

⁵⁷² *Ibid.*, paras.10-11.

⁵⁷³ *Ibid.*, paras.10-11.

⁵⁷⁴ *Id.*

the amount realized from the sale of salvaged items at Christie's, while it was entitled to 70% of the amount realized at the auction.⁵⁷⁵ Moreover, MHS alleged that the respondent had withhold from the sale at Christie's certain salvaged items without paying MHS as per the contract.⁵⁷⁶ When the investment arbitration was initiated by MHS under the U.K.-Malaysia BIT, the dispute was already at an advanced stage: MHS had unsuccessfully initiated a commercial arbitration proceedings under Malaysian law in Kuala Lumpur, and its subsequent applications to challenge and review the award were equally unsuccessful.⁵⁷⁷ Following the appointment of a sole arbitrator by ICSID Secretary-General, the Government of Malaysia filed the ICSID with an objection to its jurisdiction over the dispute. The Center had subsequently suspended the proceedings on the merits.⁵⁷⁸

Malaysia's claim that the ICSID arbitral tribunal did not have jurisdiction was premised on the idea that there existed no 'investment' under the ICSID Convention and the relevant BIT. Failing an investment to exist, no ICSID arbitral tribunal jurisdiction could have been validly constituted.⁵⁷⁹ In its Award on Jurisdiction, the Arbitral Tribunal focused mainly on Malaysia's jurisdictional objections, concluding that it did not have jurisdiction for want of an 'investment' under Article 25 (1) of the ICSID Convention.⁵⁸⁰ Following a request for annulment, the *Ad hoc* Annulment Committee annulled the Award on Jurisdiction declaring that the Arbitral Tribunal had manifestly exceeded its powers.⁵⁸¹ The Arbitral Tribunal had not taken into account the definition of 'investment' under the relevant BIT, by requiring some jurisdictional criteria for the existence of an 'investment', including the contribution to the economic development of the host state, and had not considered, and reached a conclusion running counter to, the *travaux préparatoires* of the ICSID Convention relating to the term 'investment' within the Convention.⁵⁸²

MHS v. Malaysia shows that it is possible to go beyond the common dialectic which sees the host state fully representing the public interest and the foreign investor(s) as bearer(s) of private interests. In some contexts, and given certain conditions, there can be no cultural heritage recuperation, protection or safeguard without foreign investments: without the salvage company engaging in the search, recuperation and restoration of the sunk vessel, these latter activities would have not been possible. High skills and know-how are required for these operations and only a few companies worldwide have the technology to perform them. This dispute also proves the 'dual' nature of the definition of protected 'investment'. A restrictive definition of protected 'investment' is commonly seen as preserving the sovereignty of host states which might public policy measures (such as cultural policies or measures relating to cultural heritage) without fearing foreign investors' arbitral proceedings. Such a restrictive definition might however bar the foreign investor from successfully filing claims against the host state, even though the cultural heritage-centered foreign investment

⁵⁷⁵ *Ibid.*, para.14.

⁵⁷⁶ *Id.*

⁵⁷⁷ *Ibid.*, paras.16-18.

⁵⁷⁸ *Ibid.*, paras.26-28.

⁵⁷⁹ *Ibid.*, para.30.

⁵⁸⁰ *Ibid.*, paras.146, 151.

⁵⁸¹ *Malaysian Historical Salvors SDN, BHD v. The Government of Malaysia*, ICSID Case No.ARB/05/2010, Decision on the Application for Annulment, 16 April 2009, para.80

⁵⁸² *Id.*

might benefit the community as a whole. On this line, the controversy between Mr. Victor Pey Casado and the Fundación Presidente Allende, on the one hand, and Chile on the other hand, might be taken as another case on the use of investment arbitration to satisfy culture-related claims.⁵⁸³

Though *Pey Casado v. Chile* involved a cultural industry rather than cultural heritage in itself, as further discussed below, the case might be compared to *MHS v. Malaysia* for its contribution to the understanding of the definition of protected 'investment'. As it always happens with complex cases, the dispute has attracted attention under several standpoints. At first sight, the dispute might appear as a case of 'justice': the Arbitral Tribunal found that the failure of Chile's judicial system to compensate Mr. Pey Casado after a number of years for the conduct of Chile under the dictatorship of President Pinochet and even after, constituted a denial of justice in violation of the fair and equitable treatment obligation.⁵⁸⁴ In this sense, the case has been compared to human rights cases where the right to a fair and speedy trial has been at stake.⁵⁸⁵ The discussion in the award concerning provisional measures and the application of the reasoning of the ICJ in the *La Grand* case *sic et simpliciter* to (Article 47 of) the ICSID Convention, without taking into consideration textual differences, has also been debated.⁵⁸⁶ Thus, it seems already clear that the *Victor Pey Casado y Fundación Presidente Allende c. Republica de Chile* case has proved extremely relevant for a number of public international law questions that emerged in the arbitral proceedings.

The dispute itself arose from the alleged confiscation by the Chilean Government of the assets pertaining to the company *Consortio Publicitario y Periodístico S.A.* (CPP S.A.) and *Empresa Periodista Clarín Ltda.* (EPC Ltda.), of which the claimants alleged to be owners.⁵⁸⁷ As highlighted by the same Arbitral Tribunal, the dispute between the Parties gave rise to an extremely long arbitration proceedings.⁵⁸⁸ Before the Tribunal, Chile had recognized its obligation to pay compensation for the confiscated assets, but only to those who (according to Chile) were their legitimate owners.⁵⁸⁹ Indeed, the Chilean Government had challenged the jurisdiction of ICSID and of the Arbitral Tribunal on several grounds, contesting the nationality of Mr. Pey Casado, that the assets in dispute did not constitute a 'foreign investment' and that Chile had never given its consent to ICSID arbitration.⁵⁹⁰ Mr. Casado and the Fundación Allende challenged in turn all these allegations.⁵⁹¹ Mr. Pey Casado was born in

⁵⁸³ *Pey Casado y Fundación Presidente Allende c. Republica de Chile*, ICSID Case No.ARB/98/2.

⁵⁸⁴ *Pey Casado y Fundación Presidente Allende c. Republica de Chile*, ICSID Case No.ARB/98/2, Award, 8 May 2008, para.659.

⁵⁸⁵ A. Ehsassi, *Cain and Abel: Congruence and Conflict in the Application of the Denial of Justice Principle*, in S. Schill (Ed.), *International Investment Law and Comparative Public Law*, (Oxford University Press: 2010, U.S.A.), p.229.

⁵⁸⁶ G. Guillaume, *The Use of Precedent by International Judges and Arbitrators*, *Journal of International Dispute Settlement* Vol.2, No.1, (2011), p.22.

⁵⁸⁷ *Ibid.*, para.3.

⁵⁸⁸ *Ibid.*, para.4.

⁵⁸⁹ *Ibid.*, para.17.

⁵⁹⁰ Further arguments by the Chilean Government focused on the non-retroactive effect of the relevant BIT (*Acuerdo entre el Reino de España y la República de Chile para la Protección y Fomento Recíprocos de Inversiones* de 2 de octubre de 1991) with regard to issues happened before its entry into force, on the lack of amiable consultations ('consultas amistosas') between the Fundación Presidente Allende and the Chilean Government, and that the claimants had already resorted to Chilean courts hence renouncing to the possibility to resort to international jurisdiction, *Ibid.*, para.12.

⁵⁹¹ *Ibid.*, para.26.

Spain from Spanish parents, but had fled the country in 1939, after the Spanish republican government had been overthrown, to move to Chile, which had fled again in 1973 after the fall of President Allende.⁵⁹² The dispute was indeed related to the coup d'état which overthrew President Allende, to whom Mr. Pey Casado was very close - before the coup d'état, and through a number of transactions, CPP S.A. had been sold to Mr. Pey Casado.⁵⁹³

In 1973, when President Allende was overthrown, the military regime of General Pinochet persecuted all 'enemies' of the regime and that was why Mr. Pey Casado had to flee the country.⁵⁹⁴ In that same year, military forces under the new regime had arrested employees of the newspaper *El Clarín* (pertaining to Mr. Casados' companies) and had seized its buildings and possessions.⁵⁹⁵ Certain personal real estate and properties, as well as rights and shares pertaining to Mr. Pey Casado, were hence confiscated, without any notification to him or his companies and any possibility of representation for them in the proceedings for the confiscation.⁵⁹⁶ Later, as the result of free elections hold in 1989, Pinochet left the presidency of the country in 1990. Pinochet was later arrested in the United Kingdom following some arrest warrants issued by U.K. magistrates at the request of Spanish courts. This gave rise to a long judiciary battle and an ensuing general scholarly debate on the 'administration' of international criminal law and its relationship to immunity.⁵⁹⁷ Eventually, given his health conditions, Pinochet could go back to Chile. In the meantime, in 1995, Mr. Pey Casado had successfully filed a claim with a Chilean Court for the restitution of the company CPP S.A. and its documents.⁵⁹⁸ In 1997, Mr. Pey Casado filed a request for arbitration with ICSID, and in 1998, Chile promulgated a law on restitution or compensation for confiscated properties that the claimants decided not to resort to in the light of the fork-in-the-road provision contained in the relevant BIT (the 1991 Chile-Spain BIT).⁵⁹⁹ The ICSID Arbitral Tribunal eventually found that a protected 'investment' existed, and that the acquisition and expansion of *El Clarín*, one of the most important newspapers of the country, had contributed to the economic, social and cultural progress of Chile.⁶⁰⁰ On the other side, the Tribunal ruled out some claims for want of jurisdiction.⁶⁰¹ Addressing the merits of the case, it found that by compensating subjects that according to the Arbitral Tribunal were not owners of the confiscated properties and by paralyzing and rejecting Mr. Pey Casado's claims on confiscated properties, Chile had committed a denial of justice and had violated its obligation to afford a

⁵⁹² *Ibid.*, para.81.

⁵⁹³ *Ibid.*, paras.57-68.

⁵⁹⁴ *Ibid.*, paras.70, 266.

⁵⁹⁵ *Id.*

⁵⁹⁶ *Ibid.*, paras.73-74.

⁵⁹⁷ A. Gattini, *Pinochet Cases*, Max Planck Encyclopedia of Public International Law, (2007) available at <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e859>; M. Byers, *The Law and Politics of the Pinochet Case*, Duke Journal of Comparative and International Law Vol.10, (2000); A. Bianchi, *Immunity Versus Human Rights: The Pinochet Case*, European Journal of International Law Vol.10, No.2, (1999).

⁵⁹⁸ *Ibid.*, para.77.

⁵⁹⁹ *Id.*

⁶⁰⁰ *Ibid.*, para.234.

⁶⁰¹ *Ibid.*, paras.587-613, 652.

fair and equitable treatment to the claimants.⁶⁰² For these reasons, the Tribunal ordered Chile to pay compensation and disposed of the costs of the proceedings.⁶⁰³

In the *Pey Casado* case, a number of arbitrators were nominated and subsequently challenged.⁶⁰⁴ As such, this investment dispute might be likened to the *Pinochet* case before the U.K. House of Lords, where one of the Lords was disqualified for his failure to disclose his ties with Amnesty International, an intervener in the proceedings.⁶⁰⁵ After the issuance of the Award, an application for annulment of the Arbitral Tribunal's Award was filed by Chile. The *ad hoc* Committee constituted with this task partially annulled the Award, for the part concerning the damages.⁶⁰⁶ This partial annulment decision notwithstanding, the Parties still appear to disagree to date over the amount of damages to be paid to the claimants.

The case stands out for two reasons relevant to this research work. First, the case shows that investment arbitration can be resorted to as a means to obtain justice where other possibilities appear precluded. These considerations are supported by the reference and comparison that the Arbitral Tribunal made in *Pey Casado v. Chile* with the jurisprudence of the *European Court of Human Rights* following the claimants arguments.⁶⁰⁷ Clearly, *Pey Casado v. Chile* is not the only investment arbitration case featuring an investment tribunal which has referred to human rights court' jurisprudence to clarify specific concepts.⁶⁰⁸ However, this is a case in point to push forward the argument that investment arbitration might be a good dispute settlement method for cultural disputes. Secondly, in the annulment proceedings, *inter alia*, Chile's claim and arguments revolved around a Chilean law which restricted foreign investments in some sectors of the Chilean economy,⁶⁰⁹ and which required the Chilean nationality for the acquisition of media companies (thus including companies in the press business).⁶¹⁰ Similar laws to control key business sectors such as cultural industries and, in particular, cultural industries and media companies, can be found also in other legal systems. Subsequent investment disputes even revolved around foreign investment made in highly regulated cultural industries, as discussed in the next section of this work.

III.3.B. ...To Cases of Foreign Investment 'in' Cultural Industries

As indicated above, a number of foreign investment has 'targeted' cultural industries. Some countries have apparently long been inclined to adopt protectionist policies. Canada, for

⁶⁰² *Ibid.*, para.674.

⁶⁰³ *Ibid.*, paras.675 ff. and 719 ff.

⁶⁰⁴ *Ibid.*, paras.35 ff.

⁶⁰⁵ A. Bianchi, *Op. Cit.*, p.243.

⁶⁰⁶ *Pey Casado y Fundacion Presidente Allende c. Republica de Chile*, Case No.ARB/98/2, Decision on the Application for the Annulment of the Republic of Chile, 18 December 2012.

⁶⁰⁷ *Pey Casado y Fundacion Presidente Allende c. Republica de Chile*, Award, *Op. Cit.*, paras.601 ff., 662 ff.

⁶⁰⁸ M. Pappas, *The International Minimum Standard and Fair and Equitable Treatment*, (Oxford University Press: 2013, U.K.), p.82.

⁶⁰⁹ *Pey Casado y Fundacion Presidente Allende c. Republica de Chile*, Award, *Op. Cit.*, para.60.

⁶¹⁰ *Pey Casado y Fundacion Presidente Allende c. Republica de Chile*, Decision on the Application for the Annulment of the Republic of Chile, *Op. Cit.*, para.142.

instance, has been very active in the regulation of specific sectors, and in particular in cultural industries. This, despite the recognition and strike to Canadian 'protectionism' by the Canadian Supreme Court,⁶¹¹ and in international fora such as the WTO dispute settlement system. Canadian regulations concerning the press sector represent a famous example. Canadian measures prohibiting the importation into Canada of periodicals which did not contained in their country-of-origin edition the same publicity directed at the Canadian market as the Canadian edition, the possibility to apply a specific excise tax to these periodicals and internal postal rates not applied to imported periodicals, have all been challenged by the United States at the WTO.⁶¹² Some commentators have pointed out that the United States preference of the WTO dispute settlement system over NAFTA Chapter 20 (*Institutional Arrangements and Dispute Settlement Procedures*) was obvious. While under the GATT 1994, the U.S. could claim a violation of the national treatment obligation and of the provisions prohibiting quantitative restraints on imports, under the NAFTA the 'cultural industries' exemption excluded the application of the NAFTA to cultural industries.⁶¹³ The WTO dispute settlement mechanism is however reserved to state-to-state disputes, and is not accessible to individuals and companies. This clearly explains why United Parcel Service of America Inc. (UPS), a U.S. company providing courier and other small package delivery together with other services, filed a claim against Canada under the NAFTA with regard to its four wholly owned U.S. subsidiaries and UPS Canada, a company organized under the laws of Ontario in *UPS v. Canada*.⁶¹⁴ These claims were against Canada and Canada Post Corporation, an institution of the Government of Canada operating both under certain exclusive privileges and in the non-monopolistic postal services market in competition with UPS Canada.⁶¹⁵

UPS alleged that Canada and Canada Post had engaged in anticompetitive conduct in the non-monopoly postal services market and Canada had failed to prevent this conduct in violation of the NAFTA.⁶¹⁶ As a consequence, UPS alleged, Canada had violated its national treatment obligation (Article 1102 of the NAFTA), its minimum standard of treatment obligation (Article 1105 of the NAFTA), and its obligations with regard to monopolies and state enterprises (Articles 1502 and 1503 of the NAFTA).⁶¹⁷ It is worth noting that UPS claims were based not only on international investment law, but also on competition law. The Tribunal found that it had jurisdiction over competition law claims only as far as they were associated with claims of violation of investment law,⁶¹⁸ but it excluded that the minimum standard of treatment obligation in the NAFTA extended to anti-competitive practices.⁶¹⁹ Further, the Tribunal found that, to fall under the scope of the NAFTA provisions on

⁶¹¹ A. de Mestral, R. Morgan, *Does Canadian Law Provide Remedies Equivalent to NAFTA Chapter 11 Arbitration?*, Investor-State Arbitration Series Paper No.4, (Centre for International Governance Innovation: 2016), p.8.

⁶¹² *Canada – Certain Measures Concerning Periodicals ('Canada-Periodicals')*, WT/DS31/AB/R, adopted on 30 July 1997, p.1.

⁶¹³ D. A. Gantz, *Dispute Settlement under the NAFTA and the WTO: Choice of Forum Opportunities and Risks for the NAFTA Parties*, American University International Law Review Vol.14, Iss.4, (1999), p.1077-1078.

⁶¹⁴ *United Parcel Service of America Inc. v. Government of Canada*, UNCITRAL, Award on Jurisdiction, 22 November 2002, paras.6-7.

⁶¹⁵ *Ibid.*, paras.8-9.

⁶¹⁶ *Ibid.*, para.10.

⁶¹⁷ *Ibid.*, para.12.

⁶¹⁸ *Ibid.*, para.69.

⁶¹⁹ *Ibid.*, paras.93-99.

competition on the delegation of public authority and the creation of state enterprises, devised for states not to avoid their obligations under the NAFTA,⁶²⁰ the monopoly or enterprise must exercise a 'governmental authority' delegated to it by a State Party.⁶²¹ Following this reasoning, the Tribunal concluded that the decisions of Canada Post relating to the use of its infrastructure by UPS competitors and by Canada Post's competitive services had not been made in the exercise of 'governmental authority' either under the NAFTA Article or under international customary law.⁶²² These decisions were commercial decisions without any governmental character and could be compared to those of a railway company about its sales and purchase.⁶²³ While the long analysis that the Tribunal dedicated to the scope of the cultural exemption in the NAFTA (where the Tribunal found that the cultural exemption applied to the activities at issue in the investment arbitration) will be discussed later in this research work, here it seems sufficient to note that, eventually, the Tribunal rejected as a whole the claim brought by UPS and ordered that the Parties bore the costs equally.⁶²⁴

Though it concerned the radio instead of the press, the investment dispute *Charles Lemire v. Ukraine* similarly revolved around a heavily regulated cultural industry sector.⁶²⁵ Of course, as for other cases, the Arbitral Tribunal was faced with the question of compensable moral damages,⁶²⁶ the impact on Ukraine's overall policy towards investment arbitrations⁶²⁷ and the room for maneuver of host states to regulate cultural matters against foreign investors' rights.⁶²⁸ The dispute arose under the 1996 BIT between the United States of America and Ukraine, and under an agreement between Mr. Lemire and Ukraine for the settlement of a dispute between them which had been recorded as, and within, an ICSID Tribunal award in 2000.⁶²⁹ Mr. Lemire, a national of the United States, was a majority shareholder of CJSC Radiocompany Gala, a music radio station licensed to broadcast on various frequencies in Ukraine, through another company called CJSC Mirakom Ukraina.⁶³⁰ He claimed that Ukraine had prevented him from developing Gala into a full national network radio as of January 2001 and from establishing two other national networks, by failing to take reasonable measures to correct interferences with Gala's 100 FM frequency, and by the enactment of the Law on Television and Radio Broadcasting ('LTR') and the application thereof, which made its investment lose some profits.⁶³¹ All this, in violation of the 2000

⁶²⁰ *Ibid.*, para.70.

⁶²¹ *Ibid.*, para.74.

⁶²² *Ibid.*, para.78.

⁶²³ *Ibid.*, paras.77-78.

⁶²⁴ *Ibid.*, para.189.

⁶²⁵ *Joseph Charles Lemire v. Ukraine*, ICSID Case No.ARB/06/18.

⁶²⁶ I. A. Laird, B. Sabahi, F. G. Sourgens, N. J. Birch, *International investment Law and Arbitration: 2011 in Review*, in K. P. Sauvant (Ed.), *Yearbook on International Investment Law & Policy 2011-2012*, (Oxford University press: 2013, U.K.), p.104.

⁶²⁷ A. Astapov, *General Policy of Ukraine Towards Arbitration*, in Association for International Arbitration (Ed.), *Arbitration in CIS Countries – Current Issues*, (Maklu: 2012, Antwerpen/Apeldoorn/Portland), p.60-61.

⁶²⁸ G. Van Harten, *Sovereign Choices and Sovereign Constraints – Judicial Restraint in Investment Treaty Arbitration*, (Oxford University Press: 2013, U.K.), p.98-99.

⁶²⁹ *Joseph Charles Lemire v. Ukraine*, ICSID Case No.ARB/06/18, *Decision on Jurisdiction and Liability*, 14 January 2010, para.33.

⁶³⁰ *Ibid.*, para.36.

⁶³¹ *Ibid.*, paras.38-39.

agreement/award and of the relevant BIT.⁶³² Besides its 'substantive' contentions, Ukraine raised a number of jurisdictional objections.⁶³³

The Tribunal found that its jurisdiction had been validly constituted,⁶³⁴ and that the dispute arising from the allocation of frequencies and issuance of broadcasting licences was arising '*directly out of an investment.*'⁶³⁵ A distinction had nonetheless to be made between alleged breaches of the settlement agreement/arbitral award and the breaches of the relevant BIT. With regard to the alleged breaches of the settlement agreement, the Tribunal rejected Mr. Lemire's allegation that Ukraine had failed to correct the interferences for radio broadcasting of Gala Radion in Kiev,⁶³⁶ and that Ukraine had violated the settlement agreement/arbitral award with its actions relating to the allocation of new frequencies and broadcasting licenses to Gala.⁶³⁷ Indeed, '*[t]here is often a gap between political decisions and bureaucratic compliance.*'⁶³⁸ Though Mr. Lemire had suffered difficulties and delays in obtaining the frequencies expected under the settlement agreement, and not all of his expectations had been satisfied, Ukraine had not breached any of its obligations stemming from the agreement.⁶³⁹

As for the alleged breaches of the relevant BIT, Mr. Lemire argued that after having made its investment in Gala Radio, his legitimate expectations had been thwarted by Ukraine's conduct in violation of the relevant BIT.⁶⁴⁰ Among other allegations, Mr. Lemire had contended that Ukraine had violated its fair and equitable treatment obligation under the relevant BIT through its systematic denial of applications for frequencies submitted by Gala (and by Energy, another Mr. Lemire's company) and the illegal award of frequencies to companies other than Gala and by other actions.⁶⁴¹ Also, Mr. Lemire had added, the 50% of local music requirement in the *Law on Television and Radio Broadcasting* ('LTR'), justified by Ukraine on public policy grounds, was in violation of the obligation not to impose performance requirements and namely a percentage of locally purchased goods and services.⁶⁴² In response, Ukraine had argued that the LTR had been debated three years before its adoption in 2006 and the 50% Ukrainian music requirements (i.e. 50% of the broadcasted music had to feature an Ukrainian author, composer and/or performer) was not unfair, abrupt nor excessive and in line with European standards.⁶⁴³ Moreover, with specific reference to the alleged violation of the fair and equitable standard obligation, Ukraine argued that when it became an independent State in 1991 its political, economic and legal system were significantly transformed and for some years the country lacked an effective system of government.⁶⁴⁴ Radio and TV, Ukraine added, are commonly considered special sectors

⁶³² *Id.*

⁶³³ *Ibid.*, para.43.

⁶³⁴ *Ibid.*, paras.45-60.

⁶³⁵ *Ibid.*, paras.94-95.

⁶³⁶ *Ibid.*, paras.118-135, 141.

⁶³⁷ *Ibid.*, paras.142,150-154, referring to Article 5.1.4 of the UNIDROIT Principles.

⁶³⁸ *Ibid.*, para.159.

⁶³⁹ *Ibid.*, para.208.

⁶⁴⁰ *Ibid.*, para.212.

⁶⁴¹ *Ibid.*, paras.213 ff.

⁶⁴² *Ibid.*, para.218.

⁶⁴³ *Ibid.*, para.227.

⁶⁴⁴ *Ibid.*, para.239.

subject to special regulations not only because radio frequencies are scarce assets, but also and specifically because of public policy issues such as transparency, political and linguistic pluralism and the protection of minorities.⁶⁴⁵ The exceptional character of media company was reflected by the exception to the national treatment obligation regarding radio broadcasting stations under the Annex to the United States-Ukraine BIT – this proved the sensitivity of the media sector for both Contracting States when the BIT was negotiated.⁶⁴⁶ In its analysis of Ukraine’s administrative procedure for the issuance of licenses, the Arbitral Tribunal found that though some shortcomings existed, since its independence in 1991 Ukraine had improved its institutional framework but some legal imperfections were to be expected.⁶⁴⁷ A case-by-case analysis of the allocated frequencies showed that, for instance, in one tender, the 40% requirement of Ukrainian language to be complied with by radio companies to receive the frequencies had not been duly factored in by the National Council in its allocation.⁶⁴⁸ The Tribunal came to the conclusion that several decisions had violated the fair and equitable treatment standard obligation.⁶⁴⁹ Finally, Mr. Lemire had alleged that by imposing the 50% Ukrainian music requirement, Ukraine through its 2006 LTR had breached article II.6 of the relevant BIT which prohibited a host state to impose performance requirements.⁶⁵⁰ The Tribunal concluded that the performance requirement provision under the relevant BIT was imposed for economic purposes, while Ukraine 50% Ukrainian music requirement regarded mere cultural public policy purposes and thus no violation of the local content rules of the relevant BIT had occurred.⁶⁵¹

Cultural industries are instrumental to the protection and preservation of cultural heritage expressions, such as language, traditions and customs, and are often the target of sensitive public policy measures. As such, while cultural industries-related activities are highly regulated, striking the right compromise between regulatory measures and the fostering of foreign investments and competition might be of paramount importance.

III.3.C. Foreign Investment and Their Impact on the Surrounding Environment

Whenever an investment dispute involves a cultural industry the spectre of restrictive economic purposes disguised as cultural policies emerges, as carefully discussed by the Tribunal in *Charles Lemire v. Ukraine* when reasoning on the non-violation of the relevant BIT by the national content requirement of Ukrainian law with regard to music to be broadcasted. The idea that such a protectionist, hidden motive might be behind certain measures is present also with regard to natural heritage-related measures. The dispute between Metalclad Corporation and Mexico under the NAFTA, involved *inter alia* the creation of a natural reserve

⁶⁴⁵ *Ibid.*, para.241.

⁶⁴⁶ *Ibid.*, para.242.

⁶⁴⁷ *Ibid.*, paras.315-317.

⁶⁴⁸ *Ibid.*, para.384.

⁶⁴⁹ *Ibid.*, para.421.

⁶⁵⁰ *Ibid.*, para.499.

⁶⁵¹ *Ibid.*, paras.510-511.

for cacti. The Tehuacan-Cuicatlan Biosphere Reserve, ‘one of the zones with the highest concentration of columnar cacti in the world,’ inscribed on the UNESCO tentative list in 2012,⁶⁵² proves that these sites might carry a deep cultural significance. In the dispute, Metalclad had claimed that Mexico, through the Government of the Mexican State of San Luis Potosi (‘SLP’) and the Municipality of Guadalupe, had interfered with its development and operation of a hazardous waste landfill and had allegedly violated its obligations to accord fair and equitable treatment and full protection and security obligations (Article 1105) and its obligations with regard to expropriation (Article 1110) under NAFTA.⁶⁵³ Mexico denied all these allegations.⁶⁵⁴

Metalclad was a U.S. company which, through its control of other companies (*Eco-Metalclad Corporation*, which owned 100% of the shares of *Ecosistemas Nacionales, S.A. de C.V.*, which in turn in 1993) purchased a Mexican company (*Confinamiento Tecnico de Residuos Industriales, S.A. de C.V.*, ‘COTERIN’).⁶⁵⁵ Eventually, Metalclad filed a claim to arbitration on behalf of COTERIN.⁶⁵⁶ In 1990, the Federal Government of Mexico had authorized COTERIN to construct and operation a transfer station of hazardous waste in Guadalupe (SLP).⁶⁵⁷ In 1993, a construction permit was issued in 1993 by the National Ecological Institute, an independent agency of the Mexican State and, in the same year, the State of SLP granted COTERIN a state land use permit to construct the landfill.⁶⁵⁸ According to Metalclad, the SLP Governor’s support for the project was secured and it had been reassured by Mexican authorities that all necessary permits for the landfill had been issued with the exception of the federal permit for operation of the landfill.⁶⁵⁹ In the meantime, in 1993, Metalclad had entered into an option agreement to purchase COTERIN, together with the permits to build the hazardous waste landfill and, when in the same year the National Ecological Institute granted COTERIN the federal permit to operate the landfill, Metalclad exercised its option and purchased COTERIN, the landfill site and the associated permits.⁶⁶⁰ Again according to Metalclad, the SLP Governor started a campaign to denounce and prevent the operation fo the landfill shortly after Metalclad’s purchase of COTERIN.⁶⁶¹ While Metalclad asserted that SLP Governor’s support for the project was obtained in 1994 again after some negotiations, the Mexican Government denied it, but after an extension of the federal construction permit by the National Ecological Institute, Metalclad began construction of the landfill.⁶⁶² Construction continued until October 1994, when the Municipality ordered building activities to stop due to the lack of a municipal construction permit.⁶⁶³ Later in 1994, Metalclad resumed construction and applied for a municipal construction permit, obtaining in 1995 an additional federal

⁶⁵² UNESCO Tentative List, *Tehuacan-Cuicatlan Biosphere Reserve*, available at <http://whc.unesco.org/en/tentativelists/5783/>.

⁶⁵³ *Metalclad Corporation v. The United Mexican States*, Award, *Op. Cit.*, para.1.

⁶⁵⁴ *Id.*

⁶⁵⁵ *Ibid.*, para.2.

⁶⁵⁶ *Ibid.*, para.3.

⁶⁵⁷ *Ibid.*, para.28.

⁶⁵⁸ *Ibid.*, para.31.

⁶⁵⁹ *Ibid.*, paras.32-33.

⁶⁶⁰ *Ibid.*, paras.30, 35.

⁶⁶¹ *Ibid.*, para.37.

⁶⁶² *Ibid.*, para.38.

⁶⁶³ *Ibid.*, paras.39-40.

construction permit by the National Ecological Institute for a part of the hazardous waste landfill and a study by the Autonomous University of SLP that, with proper engineering, the site would have been suitable for a hazardous waste landfill.⁶⁶⁴ In 1995, Metalclad completed the construction of the landfill, but the inauguration was impeded by a public protest allegedly organized at least in part by Mexican authorities.⁶⁶⁵ After a negotiation, Metalclad and Mexico entered into an agreement (the 'Convenio') that provided for and allowed operation of the landfill, but also mentioned that an environmental audit of the site had been carried out.⁶⁶⁶ Since some deficiencies were detected by the environmental audit, Metalclad was required to submit an action plan to correct them, and, *inter alia*, Metalclad had to designate 34 hectares of its property as a buffer zone for the conservation of endemic species.⁶⁶⁷ Metalclad further asserted that the SLP had been unsuccessfully invited to participate in the negotiation of the Convenio and that after its public announcement, the Convenio was denounced by SLP Governor.⁶⁶⁸ In 1995, Metalclad's application for the municipal construction permit was denied, together with a later request for reconsideration of the denial.⁶⁶⁹ The Municipality did not provide any sign of consideration for the construction project and the improvement efforts done.⁶⁷⁰ While the parties disagreed as to the necessity of the municipal permit,⁶⁷¹ the Municipality unsuccessfully challenged the Convenio through administrative proceedings and in front of Mexican courts.⁶⁷² In 1996, the National Ecological Institute granted Metalclad an additional permit authorizing the expansion of the landfill capacity but, since the efforts of Metalclad and the State of SLP failed to resolve their conflicts concerning the operation of the landfill, Metalclad initiated the present arbitral proceedings.⁶⁷³ In 1997, when the ICSID arbitration had already started, the Governor of SLP issued an Ecological Decree declaring Natural Area for the protection of rare cactus an area encompassing the one of the landfill.⁶⁷⁴ Metalclad maintained that, since the Ecological Decree permanently precluded the operation of the landfill, this strengthened its claim for expropriation.⁶⁷⁵ The Parties further disagreed on the account that Mexican media gave of Mexican authorities' declarations and intents with the Ecological Decree.⁶⁷⁶ Mexico argued that the Ecological Decree was outside the ICSID Tribunal's jurisdiction, based on its enactment after the filing of the Notice of Intent of Arbitration.⁶⁷⁷ The Tribunal however rejected this contention pointing that issues related to the Ecological Decree were

⁶⁶⁴ *Ibid.*, paras.42-44.

⁶⁶⁵ *Ibid.*, paras.45-46.

⁶⁶⁶ *Ibid.*, paras.47-48.

⁶⁶⁷ *Ibid.*, para.48.

⁶⁶⁸ *Ibid.*, para.49.

⁶⁶⁹ *Ibid.*, para.54.

⁶⁷⁰ *Ibid.*, paras.50-51.

⁶⁷¹ *Ibid.*, paras.52-53.

⁶⁷² *Ibid.*, paras.55-56.

⁶⁷³ *Ibid.*, paras.57-58.

⁶⁷⁴ *Ibid.*, para.59.

⁶⁷⁵ *Id.*

⁶⁷⁶ *Ibid.*, paras.60-64.

⁶⁷⁷ *Ibid.*, para.64.

nevertheless presented by Metalclad in a timely manner and consistently with the principles of fairness and clarity.⁶⁷⁸

The Award was subsequently, partly set aside by a decision of the Supreme Court of British Columbia.⁶⁷⁹ The Supreme Court found that transparency had to be intended as one of the principles of the NAFTA, but no transparency obligation existed as such in the NAFTA.⁶⁸⁰ Moreover, the Tribunal had not adduced any reason for its conclusion that the acts of the State of SLP and the Municipality, which engaged the responsibility of Mexico, were in violation of Article 1105 of NAFTA.⁶⁸¹ With regard to the expropriation claim, as far as the Tribunal had concluded that the conduct at stake constituted an expropriation and had based its reasoning on its conclusion on the fair and equitable treatment obligation, without factoring in the Ecological Decree, this reasoning was 'infected' by the concept of transparency under NAFTA and was also a matter beyond the scope of submission to arbitration.⁶⁸² However, the Supreme Court concluded, no error had been demonstrated in the arbitral procedure as a result of the Tribunal considering the claim based on the Ecological Decree.⁶⁸³ The Arbitral Tribunal conclusion that the issuance of the Ecological Decree was an act tantamount to expropriation was not patently unreasonable.⁶⁸⁴ For these reasons, the Award was partly set aside.⁶⁸⁵ As eminently noted, one would normally think that arbitrators are prone to strike compromises, while judges/courts are more inclined to advance law standards to guide future conduct.⁶⁸⁶ However, in *Metalclad v. Mexico* these roles were reversed. The Arbitral Tribunal imposed a strict international law transparency standard under NAFTA while, quite unexpectedly, the Supreme Court of British Columbia (Justice Tysoe) stroke a compromise excluding the idea of a strict obligation of transparency for Mexico while according to Metalclad part of its money.⁶⁸⁷

Metalclad v. Mexico is also noteworthy as it shows the potential conflicts of interests between foreign investors and local communities. This is of course not always the case, but it may happen that foreign investors' activities and investments have an impact on local communities and, sometimes, on aboriginal communities. On the other hand, it is not to be excluded that members of aboriginal communities or minorities carrying out economic activities across different countries be entitled to the protection afforded by international investment law as 'foreign investors.' In one way or the other, the questions and problems emerging are legally complex. Indeed, though the question of the relationship between States, intended as the modern concept emerging from the 1648 Peace of Westphalia as sovereign and independent,⁶⁸⁸ their nationals and the Aboriginal communities is a longstanding one, it

⁶⁷⁸ *Ibid.*, para.69.

⁶⁷⁹ *The United Mexican States v. Metalclad Corporation*, 2001 BCSC 664.

⁶⁸⁰ *Ibid.*, paras.71-72.

⁶⁸¹ *Ibid.*, para.73.

⁶⁸² *Ibid.*, paras.78-79.

⁶⁸³ *Ibid.*, para.91.

⁶⁸⁴ *Ibid.*, paras.100-104.

⁶⁸⁵ *Ibid.*, paras.133-137.

⁶⁸⁶ W. S. Dodge, *International Decision: Metalclad Corp. v. Mexico*, *American Journal of International Law* Vol.95, (2001), p.915-916.

⁶⁸⁷ *Id.*

⁶⁸⁸ A. S. Hershey, *History of International Law Since the Peace of Westphalia*, *American Journal of International Law* Vol.6, No.1, (1912), p.33.

still appears partly unresolved. *Vito Gallo v. Canada* is just one example of an international case involving aboriginal communities' rights. An example which does not exclude, as mentioned, the possibility for members of those communities to act as foreign investors claiming the respect of some of their rights, as it happened in *Grand River Enterprises Six Nations, Ltd., Et Al. v. United States of America*.⁶⁸⁹ This latter dispute centered on certain measures taken by the United States with regard to the tobacco industry. A first decisions on the objections to jurisdiction had been issued by the Tribunal in 2006, dismissing some of the claimants' claims of violation by the United States of its obligations under the NAFTA.⁶⁹⁰ In the Award rendered in 2011, the Tribunal found that it lacked jurisdiction with regard to three claimants (the Grand River Enterprises, Mr. Kenneth Hill and Mr. Jerry Montour), as they did not have an 'investment' in the United States under the NAFTA.⁶⁹¹ These claimants merely manufactured cigarettes in Canada for export to the United States.⁶⁹² Conversely, though his claims failed on their merits, Mr. Arthur Montour had an 'investment' under the NAFTA since he had a substantial business in the United States, importing cigarettes manufactured by the Grand River company, and he had distributed them to wholesalers and retail outlets on Indian reservations in the United States.⁶⁹³

Since the early 1990's, the individual claimants had engaged in the licensing, manufacture, packaging, production, importation and or sale of tobacco products through various ventures carried on with Indian reservations in the United States or Canada.⁶⁹⁴ They had not engaged in direct retail sales and a significant part of their business apparently concerned cigarettes sold at retail to consumers on Indian reservations in the United States or Canada, though sales in the United States market off reservations had also taken place.⁶⁹⁵ The production of tobacco might be one component of cultural heritage landscapes, as in the case of the UNESCO World Heritage site of Viñales Valley in Cuba, known for its production of tobacco.⁶⁹⁶ Further, the use of tobacco is characteristic of North American Indians and tobacco represents a secret symbol for some Indian tribes.⁶⁹⁷ The claims had their basis in a litigation between U.S. state attorneys and four major U.S. tobacco producers revolving around compensation for the costs that the U.S. States had been incurred in to treat tobacco-related illnesses in the 1990's. This litigation ended with a *Master Settlement Agreement* (MSA), to which a number of States of the U.S. and other tobacco companies progressively adhered to.⁶⁹⁸ The MSA required adhering companies to make cash payments in perpetuity following a specific scheme and extensive restrictions for companies on advertising and marketing practices as well as commitments on fundings of smoking prevention and cessation

⁶⁸⁹ *Grand River Enterprises Six Nations, Ltd., Et Al. v. United States of America*, ICSID/UNCITRAL.

⁶⁹⁰ *Grand River Enterprises Six Nations, Ltd., Et Al. v. United States of America*, ICSID/UNCITRAL, Decision on Objections to Jurisdiction, 20 July 2006, paras.3, 103.

⁶⁹¹ *Ibid.*, para.5.

⁶⁹² *Id.*

⁶⁹³ *Ibid.*, paras.6-7.

⁶⁹⁴ *Grand River Enterprises Six Nations, Ltd., Et Al. v. United States of America*, Decision on Objections to Jurisdiction, *Op. Cit.*, para.6.

⁶⁹⁵ *Id.*

⁶⁹⁶ UNESCO World Heritage List, *Viñales Valley*, available at <http://whc.unesco.org/en/list/840>.

⁶⁹⁷ Cultural Survival, *Bringing Back the Tobacco*, Cultural Survival Quarterly – Living in Two Worlds 35-3, 2011, available at <https://www.culturalsurvival.org/publications/cultural-survival-quarterly/united-states/bringing-back-tobacco>.

⁶⁹⁸ *Ibid.*, paras.7-8.

programs.⁶⁹⁹ The MSA included a key provision intended to encourage other companies to join the MSA regime, which provided for certain exemption from the MSA's payment obligations.⁷⁰⁰ The claimants contended that did not know that they could adhere to the MSA according to this key provision, and they remained a non-participating manufacturer, with the consequent application by participating States of specific legislation which they claimed had draconian effects on their business.⁷⁰¹ However, there existed some proof that their products continued to be sold profitably in a few jurisdictions.⁷⁰² As already anticipated, eventually, Mr. Arthur Montour's claims failed on the merits.

Conversely, in *Glamis Gold v. United States of America*, the investment project impacted indigenous communities' cultural heritage, namely American Indians' cultural property. The investment disputes related to Glamis Gold's rights to mine precious metals in southeastern California and the adverse effects of a number of U.S. measures, allegedly in violation of U.S. obligations under the NAFTA,⁷⁰³ The case proves how relevant heritage inventories are in order to protect and safeguard cultural heritage and the inner danger that every development project carries with regard to undiscovered cultural heritage resources. From 1994 to 2002, Glamis, a Canadian company, had used its mining rights to undertake gold mining activities at Imperial Project, a federal land in southern California, near Native American land and culturally-relevant areas.⁷⁰⁴ In particular, between 1987 and 1994, Glamis conducted an extensive exploration drilling program in the area to locate valuable deposits of gold and silver, and planned to mine these deposits through three open-pit mining techniques and on-site processing of the ore.⁷⁰⁵

The Arbitral Tribunal addressed in the Award the complexity of regulatory measures which applied to mining activities at the U.S. federal, the state and the international level. In particular, at the U.S. federal level, several laws spanning from 1872 to 1976 had clarified that 'mining rights' had to be intended as federally recognized rights in real property,⁷⁰⁶ and one of their main objectives was to strike a balance between the encouragement of mining activities and the attention to the protection of environmental, ecological and archeological values.⁷⁰⁷ In particular, under the 1976 *Federal Land Policy and Management Act*, the U.S. Congress established the California Desert Conservation Area, in the light of its historical, cultural, archeological, environmental and economic resources located near largely populated areas, its fragile ecosystem and its endangered species of wildlife and plants and numerous threatened historic and archaeological sites.⁷⁰⁸ Under the California Desert Conservation Area Plan, 75 Areas of Critical Environmental Concern were identified and, among them, there was the 'Indian Pass,' one mile away from the Glamis Gold's Imperial Project site.⁷⁰⁹ Also, the

⁶⁹⁹ *Ibid.*, para.8.

⁷⁰⁰ *Ibid.*, para.10.

⁷⁰¹ *Ibid.*, paras.12-18.

⁷⁰² *Id.*

⁷⁰³ *Glamis Gold, Ltd. V. United States of America*, Award, *Op. Cit.*, para.1.

⁷⁰⁴ *Ibid.*, para.10.

⁷⁰⁵ *Ibid.*, paras.32-33.

⁷⁰⁶ *Ibid.*, para.s36-37.

⁷⁰⁷ *Ibid.*, paras.41-42.

⁷⁰⁸ *Ibid.*, para.44.

⁷⁰⁹ *Ibid.*, para.52.

vicinity of the Imperial Project had both a significant environmental and cultural value. Two areas north of the Imperial Project had been identified for possible recommendation to the U.S. Congress for permanent wilderness designation and permanent protection and in 1994, the Indian Pass and Picacho Peak (near the Imperial Project) were included in the wilderness areas.⁷¹⁰ Further conditions to carry out mining activities were imposed at the state level by California's legislation.⁷¹¹ Further, in order to assure the protection and safeguard of both tangible and intangible cultural heritage, under the 1966 *National Historic Preservation Act*, before approving any federal fund expenditure or license issuance, federal agencies had to consider the effects of such undertakings on historical properties included in, or eligible for inclusion in, the National Register of Historic Places and the agency had to consult with any Indian tribe or Hawaiian organization that attaches cultural or religious significance to historic properties in the area of potential effects of an undertaking.⁷¹² Several measures were subsequently adopted to ensure compliance with this Act aiming, among others, at the protection of Native American cultural items discovered on federal or tribal lands and the accommodation of the access to, and ceremonial use of, Indian sacred sites by Indian religious practitioners.⁷¹³ Also, in 1976, the *Native American Historical, Cultural and Sacred Sites Act* was enacted in California prohibiting state agencies and private parties operating on public property under a public grant to use or occupy such land in a manner that would cause severe or irreparable damage to any Native American sanctified cemetery, place of worship, religious or ceremonial site, or sacred shrine, with the exception of destruction clearly in the public interest, and created the *Native American Heritage Commission* empowering it to bring action to prevent severe and irreparable damage to, or assure appropriate access for Native Americans to, any of the above-mentioned sacred places.⁷¹⁴ This legislations shows the strict relation existing between tangible and intangible cultural heritage and the impossibility in certain circumstances to protect one and not the other. Lastly, as for the international rules relevant to the dispute, the Arbitral Tribunal referred also to UNESCO recommendations and conventions.⁷¹⁵

The Tribunal acknowledged that one important point of disagreement between the parties in the proceedings regarded the results of the studies and the relative findings concerning cultural heritage. While the United States stressed the uniqueness of the cultural findings in the Imperial Project site and the related quality of the area, Glamis Gold argued that it lacked any uniqueness and that the site was marred by military, rockhound and recreational activities.⁷¹⁶ In reality, a number of cultural and archaeological surveys and inventories carried out in the region had identified some Indian trails and lithic stations.⁷¹⁷ Following the submission of the Imperial Project plan, the U.S. Bureau of Land Management had been already considering the opportunity to require compensation for irreparable

⁷¹⁰ *Ibid.*, paras.65-68.

⁷¹¹ *Ibid.* para.74.

⁷¹² *Ibid.*, paras.77-78.

⁷¹³ *Ibid.*, paras.80-81.

⁷¹⁴ *Ibid.*, para.82.

⁷¹⁵ *Ibid.*, paras.83-84.

⁷¹⁶ *Ibid.*, para.89.

⁷¹⁷ *Ibid.*, para.s93-94.

damage led by some of the operations.⁷¹⁸ In 1996, the Bureau of Land Management established that the project had to be accompanied by some additional environmental and mitigation measures even though it admitted that the construction of the project facilities could have destroyed the identified, and possibly still undiscovered, potentially significant cultural and paleontological resources.⁷¹⁹ Other studies and public hearings followed, unveiling at one point the existence of the Indian ‘Trail of Dreams’, a sacred trail the maintenance and protection of which was at the heart of the Quechuan’s opposition to the development project in the area.⁷²⁰ In 1997, a revised draft environmental impact study/draft environmental impact report was released, finding that the development of the Imperial Project would have had a significant, unavoidable impact on the Quechuan’s ability to travel physically and spiritually along the Trail of Dreams, to conduct religious activities and to use the Indian Pass for traditional educational activities.⁷²¹ Representatives of the Quechuan Indian Tribe met with the U.S. Bureau of Land Management and stressed the importance of the area of the Imperial Project for its cultural value and religious importance, likening it to Jerusalem or Mecca.⁷²² In 2000, the Department of the Interior issued a withdrawal of a territory comprising the Imperial Project area and surrounding public lands from further mineral entry for at least 20 years in order to protect the cultural property in these lands, a withdrawal subject to valid existing mining rights, but still prohibiting Glamis and others to locate new mining claims or mill sites in the area.⁷²³ While from 2003, a number of measures (Senate bills) and regulations were enacted at the California State level regarding mining activities, the development of the Imperial project and Native Americans’ ability to practice their religion and traditions,⁷²⁴ in 2008 the Bureau of Land Management determined that the development of the Imperial project might not have been feasible over time.⁷²⁵

Glamis Gold claimed that the U.S. measures were in violation of U.S. obligations on expropriation and fair and equitable treatment under the NAFTA.⁷²⁶ The United States in turn first advanced two preliminary objections to the jurisdiction of the Arbitral Tribunal: that some of Glamis Gold’s claim were time-barred under the NAFTA,⁷²⁷ and that its claims on expropriation were not ‘ripe’ since Glamis could not assert that it had incurred a loss as a result of California State measures as required under the NAFTA.⁷²⁸ This second preliminary objection appears particularly important in light of the current practice of ‘regulatory chill’, and on the need for Arbitral Tribunal to assess and decide upon current investments disputes (at the time of the proceedings) rather than potential conflicts or damage that State measures (involving cultural policy measures, among others) might generate with regard to foreign investors’ rights. The U.S. objection based on the time-bar rule under the NAFTA was

⁷¹⁸ *Ibid.*, paras.95-96.

⁷¹⁹ *Ibid.*, para.99.

⁷²⁰ *Ibid.*, para.105 ff.

⁷²¹ *Ibid.*, paras.109-110.

⁷²² *Ibid.* para.111.

⁷²³ *Ibid.*, para.152.

⁷²⁴ *Ibid.*, paras.166 ff.

⁷²⁵ *Ibid.*, para.117.

⁷²⁶ *Ibid.*, para.1.

⁷²⁷ *Ibid.*, para.195.

⁷²⁸ *Id.*

rejected.⁷²⁹ The United States' preliminary objection on 'ripeness' essentially revolved around whether the challenged measures by California had harmed Glamis' property interests by the time Glamis submitted its claim to arbitration.⁷³⁰ Hence, the question was whether there had been the effect of an actual confiscation rather than a mere threat of such.⁷³¹ While Glamis' claim that California passed its measures in a way that evidenced that California would, under no conceivable circumstances, let the Imperial Project go forward, was not ripe under the NAFTA, the claim that California measures caused such a significant harm to Glamis Gold's investment as to effect an expropriation on the date of their passage, had been adequately presented in a timely way for adjudication.⁷³² With regard to Glamis Gold's claim of expropriation, the Tribunal rejected the claim that the delay and temporary denial occasioned by the federal government had amounted to an expropriation, since these decisions were of short duration.⁷³³ Concerning Glamis Gold's claims that California's measures effected an expropriation, while Glamis asserted that the Imperial Project had a certain value before the adoption of some specific California measures,⁷³⁴ the Tribunal decided to carry its own analysis of the elements adduced as affecting the value,⁷³⁵ and concluded that the specific measures at issue did not result in a radical diminution in the value of the Imperial Project and rejected the claim that an expropriation had occurred.⁷³⁶ As for Glamis Gold's second main claim of violation of the fair and equitable treatment obligation under the NAFTA, the Tribunal concluded that no violation of this obligation had occurred at the Federal nor at the State level.⁷³⁷ Hence, all Glamis' claims of violations of NAFTA Articles 1105 and 1110 were rejected.⁷³⁸

The multilayered legislation and measures at stake in the case show not only the complexity of norms relating to cultural heritage, but also the 'superposition' of cultural and environmental norms in practice. Indeed, the importance of the Trail of Dreams in the *Glamis Gold* case, proves that in practice material and immaterial, cultural and natural heritage are protected altogether, with no distinction. Also, the values protected are different, spanning from religious to educational importance of the heritage protected. Clearly, any impact on sites, landscapes, monuments and historic cities affects local communities, being them indigenous communities or simply cities or regions' inhabitants. In addition, the need for local communities to live and use to the best certain historical cities or landscapes requires itself foreign investments to improve living conditions of 'living' cultural and natural heritage. Thus, a balance between cultural heritage safeguard and protection on the one hand, and the improvement of living conditions without which no cultural heritage can be truly appreciated and evaluated need be stricken.

⁷²⁹ *Ibid.*, paras.345-350.

⁷³⁰ *Ibid.*, para.335.

⁷³¹ *Id.*

⁷³² *Ibid.*, para.342.

⁷³³ *Ibid.*, para..360.

⁷³⁴ *Ibid.*, para.362.

⁷³⁵ *Ibid.*, para.364.

⁷³⁶ *Ibid.*, paras.366 ff., 534-536.

⁷³⁷ *Ibid.*, paras.787-819.

⁷³⁸ *Ibid.*, paras.835-836.

III.3.D. Foreign Investment and Cultural Heritage Under the UNESCO Conventions

The investment dispute *Parkerings v. Lithuania* is a good example of a dispute emerging from the need for public authorities to strike a compromise between cultural property conservation, in this case a historical city, and the improvement of living conditions. The historic center (old town) of Tallinn is inscribed on the World Heritage List.⁷³⁹ Clearly, it is difficult to strike a balance between the functional changes and evolution of historical cities on the one hand, and the traffic, tourism pressure, constructions and inner city functional changes which negatively impact (world) heritage sites.⁷⁴⁰ Thus, it is understandable that both national and foreign investments are needed and should be attracted to try to put in place the changes needed for historical cities to 'survive.' This is key also for historical cities' heritage to last.

With this in mind, it is easy to pinpoint the causes of the dispute which emerged with regard to a development project for the construction and management of an underground parking in Tallin, the capital of Lithuania.⁷⁴¹ Parkerings-Compagniet was a Norwegian company whose principal business activity consisted in the development and operation of public and private parking facilities, including the collection of parking fees and the enforcement of parking regulations.⁷⁴² After the fall of the Soviet Union, following Lithuania's transition to a market economy and a candidate to EU membership between 1991 and 1997, the Municipality of the City of Vilnius decided to create a parking system for the City of Vilnius, in order to control traffic and protect the integrity of the city's historic old town.⁷⁴³ To this end, the Municipality announced a tender for the purpose of obtaining private investment in connection with the design and operation of a parking system.⁷⁴⁴ While initially, the Municipality of Vilnius entertained relations with Egapris Consortium, of which Parkerings had become a member,⁷⁴⁵ and the board of the City of Vilnius awarded the Egapris Consortium the bid,⁷⁴⁶ a number of problems emerged, including some contrasts between the Municipality and the Lithuanian Government.⁷⁴⁷

Following the submission of parking plans, beyond the adjustments suggested by other entities, the *National Monument Protection Commission* objected to the parking plan based on the fact that the planned garages would have changed the character of the Old Town, it would have destroyed large areas of unexplored cultural layer, and the intensity of traffic and air pollution in the Old Town would have been likely to increase with a consequent loss in

⁷³⁹ UNESCO World Heritage List, *Historic Centre (Old Town) of Tallinn*, available at <http://whc.unesco.org/en/list/822>.

⁷⁴⁰ R. van Oers, *Managing Cities and the Historic Urban Landscape Initiative – An Introduction*, in UNESCO, *Managing Historic Cities*, World Heritage Papers No. 27, (World Heritage Centre: 2010, Paris), p.7, available at http://whc.unesco.org/documents/publi_wh_papers_27_en.pdf.

⁷⁴¹ *Parkerings-Compagniet AS v. Republic of Lithuania*, Award, *Op. Cit.*

⁷⁴² *Ibid.*, para.1.

⁷⁴³ *Ibid.*, para.51.

⁷⁴⁴ *Ibid.*, para.52.

⁷⁴⁵ *Ibid.*, paras.62-63.

⁷⁴⁶ *Ibid.*, para.72.

⁷⁴⁷ *Ibid.*, para.119 ff.

attractiveness of tourists and to the residents and visitors.⁷⁴⁸ The remarks by the National Monument Protection Commission substantially pointed out, among others, the big, common problem of historic cities, that is the existence of overlapping layers of cultural heritage, some of which might be unknown. The Environmental Protection Department of Vilnius Region stated that the plan did not contain any assessment of consequences of the projects and relative, possible solutions from the viewpoint of the environment and it did not approve the construction of underground garages in the area of the Sereikiskiu Park, a unique and valuable territory both for its environmental value and other aspects.⁷⁴⁹ Moreover, the Vilnius Territorial Division underlined, *inter alia*, that the solutions referred to in the parking plan directly affected the old city of Vilnius and its cultural monuments.⁷⁵⁰

This notwithstanding, the Municipality permitted the design of the underground parking lot on Gedimino Avenue, and the Mayor of the City approved the construction of the underground garage.⁷⁵¹ However, in 2001, the State Monument Protection Commission of the Republic of Lithuania issued unfavorable opinions regarding the project and stressed that upon installation of the garages, a big portion of the archeological heritage of the City of Vilnius would have been destroyed, and the use of up-to-date materials and technologies would have damaged the authenticity of the Old City of Vilnius.⁷⁵² The Ministry of Environment perfectly framed the scope of the problems, that is the reconciliation of the preservation and protection of cultural heritage with the needs of a modern economy and social development. Indeed, the Lithuanian Ministry of Environment wrote that:

*'[...] while being well-aware of the importance of the Old Town of Vilnius and the need to preserve the cultural and natural heritage, we are of the opinion that it is too early to declare the loss of authenticity of the Old Town of Vilnius. Similar parking areas have been constructed in the centres of many cities throughout Europe while reconciling the needs of heritage, modern economy and social development.'*⁷⁵³

Finally, the Municipality changed its mind and decided to develop exclusively another parking plan (the Pergales multi-storey car park).⁷⁵⁴ Some new problems arose,⁷⁵⁵ and in April 2001, the City discussed the possibility of building a parking under Gedimino Avenue and southern part of Municipality Square with the company Pinus Proprius. Pinus Proprius was proposing the development of a property that it partly owned (while the City of Vilnius owned the rest.) The Municipality approved the signing of a cooperation agreement (JAA) with Pinus Proprius, and with the approval of a Lithuanian Court, the City of Vilnius concluded a cooperation Agreement with Pinus Proprius.⁷⁵⁶ On the other hand, the Agreement previously concluded between the Municipality and the BP and Egapris Consortium was

⁷⁴⁸ *Ibid.*, para.142.

⁷⁴⁹ *Ibid.*, para.143.

⁷⁵⁰ *Ibid.*, para.145.

⁷⁵¹ *Ibid.*, para.146.

⁷⁵² *Ibid.*, para.147.

⁷⁵³ *Id.*

⁷⁵⁴ *Ibid.*, para.148.

⁷⁵⁵ *Ibid.*, paras.149-166.

⁷⁵⁶ *Ibid.*, paras.168.171.

terminated by the Municipality.⁷⁵⁷ Parkerings contended that the violation of the 'equitable and reasonable' treatment obligation, of the MFN treatment obligation and the obligations regarding expropriation under the relevant BIT had occurred.⁷⁵⁸ Its claims were however dismissed in their entirety.⁷⁵⁹

As already stressed, host states measures have regarded all types of heritage, cultural as well as natural. In *Compañía del Desarrollo de Santa Elena v. Costa Rica*, the dispute arising between Compañía del Desarrollo de Santa Elena (CDSE), a Costa Rican company where the majority of shareholders were U.S. citizens, and the Government of Costa Rica, revolved around the expropriation of a property known as Santa Elena and the relative compensation owed by Costa Rica,⁷⁶⁰ shows how cultural and environmental concerns might be entangled together. One peculiarity of this case was the absence of any investment agreement between Costa Rica and the United States of America. The 'legal' dispute before the investment arbitral tribunal was thus the outcome of the 'political' pressure that, as further described below, the United States exerted on Costa Rica in order to find a solution to the ongoing dispute over the compensation owed. As such, the case has been closely studied in the framework of the U.S. internal legislation adopted to pressure those states which do not pay adequate compensation for their conduct and to test the general assertion that international investment agreements have allowed depoliticizing foreign investment disputes.⁷⁶¹ The expropriated property was located in the Guanacaste Province and consisted, as described by the Tribunal:

*'[...] over 30 kilometers of Pacific coastline, as well as numerous rivers, springs, valleys, forests and mountains. In addition to its geographical and geological features, the Property is home to a dazzling variety of flora and fauna, many of which are indigenous to the region and to the tropical dry forest habitat for which it is known.'*⁷⁶²

While CDSE was constituted in 1970 in order primarily to develop a tourist resort on a part of the territory, to which end both financial and technical steps were taken, in 1978 the Government of Costa Rica issued an expropriation decree.⁷⁶³ The Government offered a compensation in accordance with the appraisal of the Property that one of its agencies had conducted one month earlier.⁷⁶⁴ The expropriation decree explicitly that:

'1. The current area of the Santa Rosa National Park is insufficient to maintain stable populations of large feline species such as pumas and jaguars, and that a substantial area needs to be added to it if it is to carry out its conservationist objectives. 2. The lands situated to the north of the Santa Rosa National Park contain flora and fauna of great scientific, recreational, educational, and tourism value, as well as beaches

⁷⁵⁷ *Ibid.*, para.188.

⁷⁵⁸ *Ibid.*, paras.196-197.

⁷⁵⁹ *Ibid.*, para.465.

⁷⁶⁰ *Compañía del Desarrollo de Santa Elena v. Costa Rica*, Final Award, *Op. Cit.*, paras.1-3.

⁷⁶¹ K. J. Vandeveld, *U.S. International Investment Agreements*, (Oxford University Press: 2009, New York), p.27-30.

⁷⁶² *Ibid.*, para.15.

⁷⁶³ *Ibid.*, paras.16-17.

⁷⁶⁴ *Id.*

that are especially important as spawning ground for sea turtles. 3. To meet these objectives the Government of the Republic requires the property that belongs to the Compañía de Desarrollo Santa Elena S.A. [...] 5. Mr. O’Dea Heelan [President of the Compañía de Desarrollo Santa Elena S.A] notified the state of his consent to the expropriation of the property described above, although in the same communication he indicated he is not in agreement with the price offered by the state.[...]’⁷⁶⁵

Thus, as explicitly indicated in the expropriation decree, the property was expropriated for environmental reasons, in order to add a substantive portion of land to an existing national park (the Santa Rosa National Park). A number of legal proceedings took place between the Parties before Costa Rican courts, but the issue of the amount of compensation to be paid remained unresolved.⁷⁶⁶ Besides the amount of compensation, no other point was in dispute between the Parties.⁷⁶⁷ Following Costa Rican law, which provided that the original owner might have requested the return of the property if the property expropriated for a public purpose had not been dedicated to that purpose within ten years, in 1987 the Costa Rican Government issued a decree effectively expanding the boundaries of the Santa Rosa National Park so as to incorporate the Santa Elena property.⁷⁶⁸ But following some pressure from the United States, Costa Rica eventually consented to an arbitral proceedings to resolve the question of the amount of compensation before an ICSID Tribunal, though in the absence of any investment agreement between the two countries.⁷⁶⁹ In fact, in application of the 1994 *Helms Amendment*, which prohibited U.S. foreign aid and approval of financing by international financial institutions to countries expropriating the property of a U.S. citizen of corporation owned for at least 50% by U.S. citizens where adequate and effective compensation has not been paid, a U.S.-backed \$175,000,000 Inter-American Development Bank loan to Costa Rica had been delayed until Costa Rica had consented to refer the Santa Elena case to international arbitration.⁷⁷⁰ Eventually, the Arbitral Tribunal determined the amount of compensation owed by Costa Rica in between the amount offered by this latter and the amount requested by the foreign investor.

Compañía del Desarrollo de Santa Elena v. Costa Rica was not Costa Rica’s only foreign investment dispute concerning environmental sites of great value. Some years after the issuance of the award of the Santa Elena case, Marion and Reinhard Unglaube filed a case with an arbitral tribunal concerning the alleged expropriation by Costa Rica of land that they had acquired for the development of an eco-tourism project.⁷⁷¹ Unlike *Santa Elena v. Costa Rica*, in *Unglaube v. Costa Rica*, the request for arbitration was submitted on the basis of an existing BIT (the bilateral investment treaty between Costa Rica and Germany).⁷⁷² Also, though in principle there existed two cases with two different claimants, Ms. Marion Unglaube on the

⁷⁶⁵ *Ibid.*, para.18, quoting the expropriation decree of Costa Rica of 05 May 1978.

⁷⁶⁶ *Ibid.*, paras.19-21.

⁷⁶⁷ *Id.*

⁷⁶⁸ *Ibid.*, para.22.

⁷⁶⁹ *Ibid.*, paras.24-26.

⁷⁷⁰ *Id.*

⁷⁷¹ *Marion Unglaube and Reinhard Unglaube v. Republic of Costa Rica*, ICSID Case No.ARB/08/1 and ARB/09/20, Award, 16 May 2012, para.1.

⁷⁷² *Id.*

one hand, and Mr. Reinhard Unglaube on the other hand, the parties agreed that the two arbitral proceedings would have been treated in a consolidated manner.⁷⁷³ The Tribunal determined that Costa Rican law was the law applicable to the dispute, a point on which the parties agreed.⁷⁷⁴ Similarly to the Santa Elena case, the dispute concerned some properties which were owned, either individually or jointly, by the claimants in the vicinity of a beach (Playa Grande) in the Guanacaste Province.⁷⁷⁵ Given the endangered status of Leatherback Turtles and that Playa Grande was an important site where these turtles laid their eggs, in 1991 Costa Rica announced that it wanted to create a national park (Las Baulas National Marine Park) in that area, and it adopted legal, administrative and court-ordered measures to that end.⁷⁷⁶

While the claimants did not dispute the importance of protecting nesting areas for Leatherback Turtles and the need for environmentally-sensitive development, they disagreed with Costa Rica on the rights and protections available to owners of property in Costa Rica, and in particular under the Costa Rica-Germany BIT, and on the scope of the rights of Costa Rica to take private property and to regulate the use of certain private properties.⁷⁷⁷ Specifically, the private properties at issue in the case were located in the Playa Grande area and were two contiguous lands to be distinguished in a 'Phase I Property,' where a Panamanian company (Palm Beach S.A.) had made an investment to urbanize the land in order to create a low-density, ecologically-responsible development of this portion of the peninsula, and which eventually pertained to both claimants jointly, and a 'Phase II Property,' pertaining to Ms. Marion Unglaube.⁷⁷⁸ The claimants alleged that they had always used their properties to create low-density, ecologically-sensitive tourism-development and that, to this end, they had also commissioned environmental studies which included specific plans to improve the turtle nesting habitat in the area.⁷⁷⁹ In 1991, the President of Costa Rica and the Ministry of Natural Resources and Mines (MIRENEM) issued a decree that announced the intention of the Government to create Las Baulas National Marine Park and to acquire private properties located in the area, for which funds were to be sought in the 1992 budget.⁷⁸⁰ Mr. Unglaube, as a representative of Palm Beach S.A., had been negotiating with MIRENEM, also after the issuance of the 1991 decree, expressing the will to donate some land to the Park and to establish some 'green zones' within the Project area.⁷⁸¹ The claimants alleged that MIRENEM had replied agreeing to the donation, confirming approval of the project and welcoming Mr. Unglaube's proposal for a modified plan.⁷⁸² These arrangements, claimants argued, were formalized in a 1992 agreement which specifically recorded Palm Beach S.A.'s donation of part of the land of the project to Costa Rica together with its commitment to

⁷⁷³ *Ibid.*, para.27.

⁷⁷⁴ *Ibid.*, paras.27-32.

⁷⁷⁵ *Ibid.*, para.37.

⁷⁷⁶ *Id.*

⁷⁷⁷ *Ibid.*, para.39.

⁷⁷⁸ *Ibid.*, paras.41-42.

⁷⁷⁹ *Ibid.*, para.43.

⁷⁸⁰ *Ibid.*, para.48.

⁷⁸¹ *Ibid.*, para.49.

⁷⁸² *Ibid.*, para.50.

create ‘green corridors’.⁷⁸³ They claimed that Palm Beach donated land on the understanding that Costa Rica would have reaffirmed its approval of the project and prevented difficulty with regard to the permitting process.⁷⁸⁴ Also, they added that the project owners had complied with all their obligations under the 1992 agreement.⁷⁸⁵ Conversely, they alleged that Costa Rica only initially complied with the 1992 agreement, permitting construction of the Phase I Project over the first subsequent decade, and that in 2003 Costa Rican authorities started to act contrary to their commitments under the 1992 agreement.⁷⁸⁶ The Costa Rican Government, through the Municipality of Santa Cruz Ministry of Environment and Energy (MINA E), adopted a number of measures (such as the suspension of the construction permits) and tried along many years to expropriate the claimants’ properties (or parts thereof).⁷⁸⁷ The uncertainty concerning the future treatment of their properties by Costa Rican authorities and the various actions resulted, according to the claimants, in a direct interference not only with a part of Phase II Property (a 75-meter strip), but also with the remainder of Phase II property and the properties of Phase I, with the situation worsening since the start of the arbitral proceedings.⁷⁸⁸ In light of all these alleged facts, and of the alleged ongoing interference by Costa Rica with the claimants’ properties at the time of the arbitral proceedings, the claimants claimed that Costa Rica had violated several obligations under the relevant BIT.⁷⁸⁹ In particular, the Unglaubes contended that Costa Rica had violated several of its obligations under the relevant BIT, including those on expropriation, fair and equitable treatment and full protection and security.⁷⁹⁰ Their claims were only partly accepted by the Tribunal, Ms. Marion Unglaube successfully claiming that an expropriation had taken place in practice following Costa Rica inability to perform the actual expropriation planned over the years.

III.3.E. Cultural Factors Spurring Investment Disputes

Though it was not the only investment dispute where nationality issues emerged, the *Wagu ih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt* case⁷⁹¹ can be counted among those cases where Arbitral Tribunals substantially elaborated on the concept of individuals’ nationality under public international law and the relevant BIT.⁷⁹² Yet, this

⁷⁸³ *Ibid.*, para.51.

⁷⁸⁴ *Ibid.*, para.53.

⁷⁸⁵ *Ibid.*, para.54.

⁷⁸⁶ *Id.*

⁷⁸⁷ *Ibid.*, paras.55-92.

⁷⁸⁸ *Ibid.*, para.96.

⁷⁸⁹ *Ibid.*, para.97.

⁷⁹⁰ *Id.*

⁷⁹¹ *Wagu ih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt*, ICSID Case No.ARB/05/15, Award, 1 June 2009.

⁷⁹² R. Aguirre Luzi, B. Love, *Individual Nationality in Investment Treaty Arbitration: The Tension Between Customary International Law and Lex Specialis*, in A. K. Bjorklund, I. A. Laird, S. Ripinsky (Eds.), *Investment Treaty Law: Current Issues III – Remedies in International Investment Law – Emerging Jurisprudence in International Investment Law*, (British Institute of International and Comparative Law: 2009, U.K.), p.189-190.

dispute is unique for the interactions of political, social and cultural elements which played a key role in the emergence of the dispute between two Italian citizens and Egypt under the 1989 Italy-Egypt BIT.⁷⁹³ The two claimants were investors in two companies incorporated under the laws of Egypt working in the touristic and hotel management business.⁷⁹⁴ They alleged that, through a number of actions which had started in 1995, Egypt had expropriated their investment consisting of the property they owned and a development project.⁷⁹⁵ They adduced in support of their argument the existence of several Egyptian courts pronouncements in their favor which had never been complied with by the Egyptian Government.⁷⁹⁶ In particular, as highlighted by the Arbitral Tribunal in its Award, the claimants contended *inter alia* that this dispute involved ‘*undisguised bigotry and religious zealotry*,’ and that Egypt had not even seriously contested its liability as it had not contested claimants’ recitation of the facts.⁷⁹⁷ They claimed a violation of the relevant BIT as well as of international law and Egyptian law.⁷⁹⁸ On the other hand, Egypt invoked a number of defenses on points of law and, in particular, the fact that Mr. Siag was a national of Egypt and thus could not avail himself of the protection of the Italy-Egypt BIT, and that the expropriation had been lawful and the claim of damage ‘*exaggerated*.’⁷⁹⁹ The Tribunal first found that there was no dispute between the parties with regard to the recitation of facts and sequence of events evoked by the claimants, and Egypt had not countered the claimants’ witnesses relating to their property and development project.⁸⁰⁰ While Mr. Siag was born in Egypt with the Egyptian nationality and had added later the Lebanese and Italian nationalities to the Egyptian nationality, Mrs. Vecchi, the mother of Mr. Siag, had the Italian citizenship at birth, that later lost and reacquired, adding it to the the Egyptian nationality that she had acquired through marriage.⁸⁰¹

In 1989, Egypt, through its Ministry of Tourism, had sold a property located in the Sinai Peninsula on the Red Sea and at the border with Israel to the Touristic Investments and Hotels Management Company (SIAG) S.A.E. (‘Siag Touristic’), a limited liability company incorporated under the laws of Egypt.⁸⁰² In 1992, SIAG Touristic and its shareholders created a limited partnership company under the laws of Egypt, Siag Taba, to which the above-mentioned property was transferred.⁸⁰³ Together, the two claimants got to own more than 95% of the property.⁸⁰⁴ The Claimants planned to implement a development project which consisted of a resort with a capacity of 1,560 persons and infrastructural works, to be built in three phases following the grant of the necessary governmental approvals.⁸⁰⁵ Together the

⁷⁹³ *Ibid.*, para.1.

⁷⁹⁴ *Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt*, Award, *Op. Cit.*, para.2

⁷⁹⁵ *Id.*

⁷⁹⁶ *Id.*

⁷⁹⁷ *Ibid.*, para.3.

⁷⁹⁸ *Ibid.*, para.4.

⁷⁹⁹ *Ibid.*, para.5.

⁸⁰⁰ *Ibid.*, para.12.

⁸⁰¹ *Ibid.*, paras.14-16.

⁸⁰² *Ibid.*, paras.18-19.

⁸⁰³ *Ibid.*, para.20.

⁸⁰⁴ *Ibid.*, para.22.

⁸⁰⁵ *Ibid.*, para.23.

two Claimants owned more than 98% of the development project.⁸⁰⁶ Between 1990 and 1994, basic construction work on the property was commenced and in 1994, Siag Touristic entered into an agreement with Lumir Holding Ltd., an Israeli company, to secure financing for a part of the development project.⁸⁰⁷ From the moment when Mr.Siag informed the Egyptian Government of the agreement with Lumir, notwithstanding the assurance that Siag family would have kept owning the development project,⁸⁰⁸ a number of delays in the implementation of the development project started.⁸⁰⁹ In particular, in 1995, upon notice that the Egyptian Government was opposed to Mr. Siag's business relationship with the Israeli company Lumir, Mr. Siag informed the Government that he did not object to terminating the agreement with Lumir, and effectively terminated it in the same year.⁸¹⁰ While Siag began construction of different phases of the development project,⁸¹¹ several problems emerged with the Egyptian authorities which repeatedly tried to redeem the land and cancel the development project.⁸¹² However, a number of Egyptian court decisions favorable to Siag from 1996 onward.⁸¹³ Among others, Egypt ignored the decision of its highest administrative jurisdiction and in 2001 the Egyptian Ministry of Tourism issued a Decree canceling the contract with Siag.⁸¹⁴ In a new administrative process started by Siag against the Egyptian Government, this latter evoked in its defense Siag relationship with Lumir, and specifically summoned Israel conflict with Palestinians:

*'The Government's defence once again was based on Siag's relationship with Lumir and stated, as elements of fact, the following: [...] "Those who believe that Israel is a disaster that has struck upon the Palestinian people only, and that Israel's premeditated aggression and expansion do not exceed Palestine, are not aware of the Zionist movement and its aims and broader plans. In fact, the Israeli danger threatens the historical and cultural entity of the Arab Nation. Israel represents a material danger that threatens all neighbouring countries with invasion, aggression and occupation in all its types. [...] Perhaps, the researcher of the historical roots of the expansionist Zionist aspirations and the ideological and planning framework of Israeli aggression, and the motives behind the formation of the Zionist idea and its growth, is able to expose the expansionist aims of Israel, so that Arabs are aware of the Zionist intentions and work toward protecting their countries from the Israeli invasion.'*⁸¹⁵

Egypt also argued that the territory of Taba (where the development project had to take place) had returned to Egypt after three military, legal and 'diplomatic' wars, and the

⁸⁰⁶ *Id.*

⁸⁰⁷ *Ibid.*, paras.24-25.

⁸⁰⁸ *Ibid.*, para.26.

⁸⁰⁹ *Ibid.*, paras.27 ff.

⁸¹⁰ *Ibid.*, paras.30-32.

⁸¹¹ *Ibid.*, paras.33 ff.

⁸¹² *Ibid.*, paras.36 ff.

⁸¹³ *Ibid.*, paras.45 ff.

⁸¹⁴ *Ibid.*, paras.65-66.

⁸¹⁵ *Ibid.*, para.68.

claimants wished to bring Jews back again in the territory.⁸¹⁶ Again, the Court rejected Egypt's contention.⁸¹⁷ Later, in other proceedings, Egyptian authorities mentioned that political, historical and legal considerations had pushed Egypt to adopt its decisions.⁸¹⁸ These arguments were however rejected by Egyptian courts.⁸¹⁹ As a result, the claimants argued, Egypt had ignored a number of rulings of its courts in favor of claimants.⁸²⁰ In sum, claimants submitted that Egypt had seized their property with five separate decrees and had seized physical control of the property on two occasions, in violation of the relevant BIT's provisions on expropriation, fair and equitable treatment, full protection and security and most-favored-nation treatment.⁸²¹ The Arbitral Tribunal concluded that an expropriation had taken place (a point further discussed below), together with Egypt's obligation to provide the claimants' investment with fair and equitable treatment and full protection and security, subjecting the investment (both the property and the development project) to unreasonable measures, all in violation of the relevant BIT.⁸²²

The factual backgrounds of all these cases show that, as previously pointed out, though for the sake of clarity and from a *realpolitik* perspective, the distinction between different expressions of cultural heritage might be appropriate, in practice a number of expressions of heritage are entangled together. Also, the relation between foreign investment and cultural and natural heritage is in practice extremely complex. This relation may take a number of 'forms' which show some potential conflict in practice, as it happens for every field(s) of international law (for instance, conflicts between human rights and cultural heritage protection or human rights themselves)⁸²³, but also a vital alliance. Therefore, it seems confirmed that this is a symbiotic relation.

⁸¹⁶ *Ibid.*, para.69.

⁸¹⁷ *Ibid.*, para.70.

⁸¹⁸ *Ibid.*, paras.73-74.

⁸¹⁹ *Id.*

⁸²⁰ *Ibid.*, para.369.

⁸²¹ *Ibid.*, para.370-376.

⁸²² *Ibid.*, para.631 (II).

⁸²³ On this latter point see L. Zucca, *Constitutional Dilemmas: Conflicts of Fundamental Legal Rights in Europe and the U.S.A.*, (Oxford University Press. 2007, U.K.).

Chapter III.4. International Investment Arbitration Cases and Cultural Heritage: Unprecedented Problems and Open Questions

In the above-mentioned investment disputes, investment arbitral tribunals had the opportunity to address a number of significant matters. This, albeit some disputes did not get to the merits phase: as a case in point, the Arbitral Tribunal's award in *MHS v. Malaysia*, was for instance annulled by an Annulment Committee. Nonetheless, given the thorough discussion of the notion of protected 'investment,' the case has provided food for thought on the matter. In a somewhat similar fashion, there has been a number of investment cases which did not get to the merits phase but nonetheless offer interesting perspectives on foreign investments and cultural heritage. Where some cases have touched upon more 'traditional' forms of heritage, such as natural landscapes or historical monuments, other investment disputes have emerged with regard to 'unconventional' cultural heritage expressions. Indeed, though difficult to define as a concept, the idea of cultural heritage commonly summons to mind something which has a long history. To the contrary, for some forms of cultural heritage the function as '*memento*' and recollection of special events is more important than antiquity. Battlefields and other places which are connected to important wars and conflicts are a good example. It was with the First World War that it emerged the idea that certain places which had been very important for the War itself could bear a collective memory and thus become the *lieux de mémoire* (*memory spaces*), creating a new idea and category of heritage.⁸²⁴ The transformation of these spaces in cultural heritage expressions right after the First World War, and in the light of their memorial function concerning that War, deconstructed the idea that in order to qualify as cultural heritage a place, monument, practice and so on, had to date back to centuries. This is not to exclude that certain memory spaces might be qualified as such, by definition of the law, after centuries from the events they are related to. These sites have also been in the limelight in some investment disputes.

The investment dispute between Renée Rose Levy and Gremictel S.A. and Peru⁸²⁵ related to some lands in Peru near the 'Morro Solar,' the site of one of the most important battles in Peruvian history, the 1881 Battle of San Juan and Chorillos during the Pacific War between Peru and Chile.⁸²⁶ In 1977, as the centennial of the battle was approaching, Peru's declared the Morro Solar 'intangible.'⁸²⁷ Nine years later, in 1986, Peru's National Institute of Culture declared several buildings and areas, including the Morro Solar, 'monuments.'⁸²⁸ In 1995, the Municipality of Chorillos sold the lands through a public bidding procedure which had required some land development projects to be presented by the winning bidder(s).⁸²⁹ Gremco, a Peruvian company belonging to the Levy Group, eventually acquired the three

⁸²⁴ J.-C. Capronnier, E. Marguin-Hamon, P. Smith, *Le Patrimoine de la Grande Guerre*, In Situ – Revue des patrimoines 25, (2014), available at <https://insitu.revues.org/11683>.

⁸²⁵ *Renée Rose Levy and Gremictel S.A. v. Republic of Peru*, ICSID Case No.ARB/11/17, Award, 9 January 2015.

⁸²⁶ *Ibid.*, para.7.

⁸²⁷ *Ibid.*, para.8.

⁸²⁸ *Ibid.*, para.9.

⁸²⁹ *Ibid.*, paras.11 ff.

parcel of lands involved in the public bidding process.⁸³⁰ Under these lands sales contracts, the Municipality of Chorillos had to lend its official support to the buyer (Gremco) for its requests to the Municipality of Lima and other competent authorities for the obtention of the authorizations required for an adequate development of the project.⁸³¹ The Parties later had a contention in the arbitration on whether these contracts imposed an obligation upon Peru to facilitate the project and issue the necessary permit or they did not overrun the legal restrictions on the lands at issue.⁸³² Gremco later consolidated the three project into a single tourism and urban megaproject ('*Costazul Project*').⁸³³ A domestic arbitration took place between Gremco and the Municipality of Chorillos over the Municipality's obligations on certain registration and the release of certain part of the land under the sale contracts, which were declared valid and together with the ensuing obligations for the Municipality.⁸³⁴ Between 2003 and 2004, Gremcitel, a Peruvian company, acquired the land and the rights of the Costazul Project from Gremco: both companies were parties, according to the Claimant, of the Levy group.⁸³⁵ After the acquisition of the land from Gremco, many interactions (correspondence, application for authorizations, reports, etc.) took place between Gremco (and later Gremcitel) and the Peruvian Government and public authorities with the aim of identifying potential areas in which development would have been restricted.⁸³⁶ Among these exchanges, in 2002 Gremco and the National Institute of Culture entered into an Agreement of Cooperation in order to delimit the archaeological areas within in the claimants' property.⁸³⁷ Following the Agreement and some investigations, in 2003, the National Institute of Culture's National Technical Commission of Archaeology confirmed the intangibility of the Morro Solar and that Gremco had to submit and carry out an evaluation project to delimit, prospect and restrict excavation of part of its land.⁸³⁸ While this decision was later reconfirmed, in December 2003, Gremco submitted to the National Institute of Culture a report on their Agreement containing delimitation proposal for the historical in archaeological areas.⁸³⁹ In that same month, Gremco sent letters to the National Institute of Culture criticizing the adoption of delimitation criteria which were different from those applied to other archaeological sites in Lima, proposing an individual delimitation of each archaeological site and explaining that the Battle had not taken place on its land.⁸⁴⁰ After this correspondence, in 2004, the National Institute of Culture's National Technical Commission of Archaeology issued a decision delimiting the individual archaeological areas, reducing the area which was considered intangible for archaeological reasons.⁸⁴¹ Later the National Institute of Culture started providing a number of Certificates of Inexistence of Archaeological Artifacts for the areas free of any archaeological remains attending, according to the claimants, that 80% of

⁸³⁰ *Ibid.*, paras.12-14.

⁸³¹ *Ibid.*, paras.15-16.

⁸³² *Ibid.*, para.17.

⁸³³ *Ibid.*, para.18,

⁸³⁴ *Ibid.*, para.19.

⁸³⁵ *Ibid.*, para.20.

⁸³⁶ *Ibid.*, para.22.

⁸³⁷ *Ibid.*, paras.26.

⁸³⁸ *Ibid.*, para.27.

⁸³⁹ *Ibid.*, paras.29-30.

⁸⁴⁰ *Ibid.*, para.31.

⁸⁴¹ *Ibid.*, para.32.

their land was free of archaeological artifacts impeding the development of the project.⁸⁴² With two Resolutions of 2004 and 2005, a Historical Commission was created to propose the boundaries of the intangible historical area of the Morro Solar, a proposition later used in 2007 by the National Institute of Culture to delimit the area.⁸⁴³

While Peru claimed that the Historical Commission had conducted a careful review of historical evidence related to the battle, the claimants considered its findings arbitrary.⁸⁴⁴ The claimants contended that the 2007 delimitation of the area by the National Institute of Culture imposed on the land an intangibility status which did not exist until then and thus rendered the Costazul Project meaningless: that was the measure which, for the claimants, gave rise to the dispute.⁸⁴⁵ It is worth mentioning that among the opposed contentions of the Parties, the claimants argued that the legal dispute arose directly out of an investment, since Article 1 of the relevant BIT defined investment in broad terms including movable and immovable property, shares, obligations and rights to performance having economic value.⁸⁴⁶ According to them, Peru had breached its obligation to accord fair and equitable treatment.⁸⁴⁷ Peru, in turn, argued *inter alia* that Ms. Levy's control of Gremcitel constituted an 'abuse of process,' being the outcome of an operation the sole purpose of which was to attract the protection of the France-Peru BIT at a time when the dispute had arisen or was at least foreseeable.⁸⁴⁸ In addition, there was no 'investment' under either the ICSID Convention or the BIT since claimants had no right to develop the 'Costazul Project' and Ms. Levy had not proved that she had made any financial contribution to acquire the investment.⁸⁴⁹ On the merits, Peru argued that the claimants could have no legitimate expectations that they could develop their land free from restrictions and that it had acted transparently, with the 2007 delimitation Resolution being based on careful historical reviews.⁸⁵⁰

The Tribunal did not really delve into the substance of the claims as it accepted Peru's objection regarding the abuse of process.⁸⁵¹ Stressing that the characterization of Peru's objection of abuse of process (as an objection to jurisdictional or admissibility) would have not been dispositive of it,⁸⁵² it confirmed that investment arbitral tribunals had resorted to, and applied, the doctrine of abuse of process or abuse of rights.⁸⁵³ The Tribunal laid emphasis on the fact that organizing or reorganizing the corporate structure in order to obtain investment treaty benefits is not illegitimate *per se*, but it might constitute an abuse of process where this is carried out with the intention to invoke a treaty's protection at a time when a dispute is foreseeable, depending on the specific circumstances of the case.⁸⁵⁴ The threshold to find an abuse of right or an abuse of process is high, since such an abuse cannot be

⁸⁴² *Ibid.*, para.34.

⁸⁴³ *Ibid.*, para.35.

⁸⁴⁴ *Id.*

⁸⁴⁵ *Ibid.*, para.37.

⁸⁴⁶ *Ibid.*, para.63.

⁸⁴⁷ *Ibid.*, para.65.

⁸⁴⁸ *Ibid.*, para.69.

⁸⁴⁹ *Ibid.*, para.70.

⁸⁵⁰ *Ibid.*, para.71.

⁸⁵¹ *Ibid.*, paras.174 ff.

⁸⁵² *Ibid.*, paras.180-181.

⁸⁵³ *Ibid.*, paras.183 ff.

⁸⁵⁴ *Ibid.*, paras.184-185.

presumed and can be found only in very exceptional circumstances.⁸⁵⁵ However, the Tribunal concluded that while the event giving rise to the dispute occurred on 18 October 2007, the acts that set in motion Ms. Levy's investment in Gremcitel occurred just about over a month before, and a review of the record showed that this was not a coincidence.⁸⁵⁶ In the Tribunal's view, the only reason for the sudden transfer of the majority of shares in Gremcitel to Ms. Levy was her French nationality.⁸⁵⁷ This was confirmed by the language contained in some corporate resolutions.⁸⁵⁸ Gremcitel corporate restructuring hence constituted an abuse of process and the Tribunal was precluded from exercising jurisdiction over the dispute at hand.⁸⁵⁹ The Tribunal also found it serious that the claimants had tried to establish the Tribunal's jurisdiction through 'untrustworthy, if not utterly misleading documents'⁸⁶⁰ and concluded that a finding of abuse of process justified an award of costs against the unsuccessful party.⁸⁶¹ Based on judicial economy reasons, the Tribunal avoided the question of the existence of an investment under the ICSID Convention and the relevant BIT.⁸⁶²

The case testifies to the difficulty in identifying the *lieux de mémoire*: since their identification and protection is based on their 'memorial' value rather than any aesthetic or material one, and since they often are landscapes rather than man-made monuments, the law has an instrumental value in their 'creation.' That said, it is clear that the doctrine of the abuse of right or abuse of process allows to avoid cases of corporate restructuring simply with the aim of challenging measures unfavorable to foreign investors, including cultural and cultural heritage ones, as in the case at hand. This shows that though certain measures might not be genuinely adopted for cultural concerns, foreign investors protection is not always available. Although the responses of investment arbitral tribunals to corporate maneuvering have varied significantly, lacking any consistency,⁸⁶³ it seems safe to say that in cases such as *Levy and Gremcitel v. Peru*, the abuse of right or abuse of process doctrine strengthen the legitimacy of the entire international investment law system.⁸⁶⁴

The investment arbitral proceedings between Mr. Gallo and Canada was concluded in a similar way. As previous cases show, investment disputes might involve a number of questions entangled together. This might happen not only from the viewpoint of international investment law, with a number of different, connected claims by foreign investors, but also with regard to states' measures, which might concern a number of sectors, as in *Vito G. Gallo v. Canada*.⁸⁶⁵ In 2002, a Canadian company acquired an abandoned mine in Ontario (the Adams Mine), with a view to transforming it into a waste disposal site.⁸⁶⁶ Some administrative

⁸⁵⁵ *Ibid.*, paras.186.

⁸⁵⁶ *Ibid.*, para.188.

⁸⁵⁷ *Ibid.*, paras.191-192.

⁸⁵⁸ *Id.*

⁸⁵⁹ *Ibid.*, para.195.

⁸⁶⁰ *Ibid.*, paras.194.

⁸⁶¹ *Ibid.*, para.201.

⁸⁶² *Ibid.*, paras.196-197.

⁸⁶³ T. L. S. Voon, A. D. Mitchell, J. Munro, *Legal responses to Corporate Manoeuvring in International Investment Arbitration*, *Journal of International Dispute Settlement* Vol.5, Iss.1, (2014).

⁸⁶⁴ As predicated, in general, in the analysis of H. Ascensio, *Abuse of Process in International Investment Arbitration*, *Chinese Journal of International Law* Vol.13, Iss.4, (2013).

⁸⁶⁵ *Vito G. Gallo v. The Government of Canada*, PCA Case No.55798, Award, 15 September 2011.

⁸⁶⁶ *Ibid.*, para.121.

approvals for the use of the Mine as a waste disposal had already been obtained.⁸⁶⁷ In 2004, the Ontario legislature passed the *Adams Mine Lake Act* (AMLA): the Act prohibited the use of the Mine as a waste disposal, it revoked the existing approvals and it provided for limited compensation for the company.⁸⁶⁸ One of the main concerns about the transformation of the mine in a waste disposal related to the potential contamination of local drinking water.⁸⁶⁹ Mr. Vito G. Gallo, an American citizen, claimed to be the owner and controller of the Ontario company at the time when the AMLA was adopted.⁸⁷⁰ He claimed compensation for the damages suffered arguing that Canada had violated its obligations under the NAFTA concerning fair and equitable treatment and expropriation (Articles 1105 and 1110 of the NAFTA) as well as its obligations under customary international law.⁸⁷¹ Conversely, Canada contended that prior to the introduction of the AMLA, Mr. Gallo was not the owner of the Ontario company, owned in reality by a wealthy Canadian real estate developer, and hence was not an ‘investor’ under the NAFTA.⁸⁷² Similarly to *Gremcitel v. Peru*, Canada contended also that there was no ‘investment of an investor of a Party’ under the NAFTA and that there was an abuse of right which deprived the claimant of legal standing in the arbitral proceedings.⁸⁷³

The Tribunal clarified that the AMLA had the purpose to totally prohibiting the use of Adams Mine as a waste disposal, revoking all environmental approvals and declaring extinguished all the agreements signed for the purchase of certain lands adjacent to the Mine.⁸⁷⁴ The AMLA specified that these measures did not ‘constitute an expropriation or injurious affection’ and provided a compensation limited to the amount of reasonable expenses incurred in on the day that the AMLA had come into force, explicitly excluding payment of any loss of goodwill or possible profits.⁸⁷⁵ However, the Arbitral Tribunal found that Mr. Vito G. Gallo had not proved the date when he had acquired ownership and control of the Ontario company affected by the AMLA, and that his acquisition predated the AMLA.⁸⁷⁶ The Tribunal’s was thus precluded from delving into the merits of the case.

It seems nevertheless worth noting that both parties had interesting positions. Canada had argued that the AMLA was part of broad environmental reforms, including other measures for the protection of the environment and the availability of safe drinking water in Ontario.⁸⁷⁷ Mr. Gallo in turn rejected Canada’s contention on the environmental dangers deriving from the mine, arguing that its project provided for an environmentally sound solution to solid waste disposal and that the groundwater resources in the surrounding area

⁸⁶⁷ *Id.*

⁸⁶⁸ *Id.*

⁸⁶⁹ Global Affairs Canada, NAFTA – Chapter 11 – Investment – *Cases Filed Against the Government of Canada, V. G. Gallo v. Government of Canada*, available at <http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/gallo.aspx?lang=eng>.

⁸⁷⁰ *Vito G. Gallo v. The Government of Canada*, Award, *Op. Cit.*, para.121.

⁸⁷¹ *Id.*

⁸⁷² *Ibid.*, para.122.

⁸⁷³ *Ibid.*, para.146.

⁸⁷⁴ *Ibid.*, para.270.

⁸⁷⁵ *Ibid.*, para.271.

⁸⁷⁶ *Ibid.*, paras.290, 312.

⁸⁷⁷ *Vito G. Gallo v. The Government of Canada*, PCA Case No.55798, Government of Canada – Statement of Defence, 15 September 2008, paras.137 ff.

would have been protected, as proved by the analysis of an engineering firm specialized in the design of waste management systems.⁸⁷⁸ Canada also added that some delays and problems derived from the obligation to consult with Aboriginal communities before taking any action that could have affected established or asserted Aboriginal rights in the light of recent case law in Canada.⁸⁷⁹ Hence, a state measure might have a concurrent environmental and cultural impact. Clearly, the question of whether preventing the use of Adams Mine '*for its future speculative use as a waste disposal site,*' while the Ontario company retained its ownership did not amount to expropriation, as contended by Canada,⁸⁸⁰ remains open. Canada had contended further that Mr. Gallo had not demonstrated that the certificates and permits at issue constituted property and a number of conditions had to be met to operate the waste disposal. Hence, there could not be any expropriation of a 'cause of action' which did not constitute an investment.⁸⁸¹ Further, the company had no right to use Adams Mine as a waste disposal in the future, the investor bearing the risk of regulatory change in the absence of any undertaking or promise by the State to the contrary.⁸⁸² Of course, any clarification by an arbitral tribunal on whether Canada's contentions are right might have a bearing on cultural conservation and safeguard measures.

In the alternative, Canada argued that, if the Tribunal considered that the AMLA was an expropriation, it was a lawful expropriation under Article 1110 (1) of the NAFTA.⁸⁸³ Contrary to Mr. Gallo's contention that only measures with general application have a legitimate public purpose,⁸⁸⁴ Canada contended that a state has considerable discretion in assessing whether a measure is required for a public purpose.⁸⁸⁵ Moreover, the expropriation was non-discriminatory as required under Article 1110 of NAFTA, Canada argued, since as showed by the case law,⁸⁸⁶ the measure is discriminatory where there is a discrimination on the basis of nationality and there is no reasonable basis for this difference in treatment.⁸⁸⁷ The AMLA had also amended the *Environmental Protection Act* and its provisions were subsequently applied to prevent another Ontario company from expanding its landfill.⁸⁸⁸ To sustain otherwise would mean '*that a State could never lawfully expropriate a specific piece of land owned by a foreign national.*'⁸⁸⁹ The AMLA provided a due process of law,⁸⁹⁰ and provided compensation exceeding fair market value of the Adams Mine site immediately prior to the enactment of the

⁸⁷⁸ *Vito G. Gallo v. The Government of Canada*, PCA Case No.55798, Vito G. Gallo - Statement of Claim, 23 June 2008, paras.22, 39 ff.

⁸⁷⁹ *Vito G. Gallo v. The Government of Canada*, PCA Case No.55798, Government of Canada – Statement of Defence, *Op. Cit.*, paras.105 ff.

⁸⁸⁰ *Ibid.*, para.201.

⁸⁸¹ *Ibid.*, para.216.

⁸⁸² *Ibid.*, para.219.

⁸⁸³ *Ibid.*, para.224.

⁸⁸⁴ *Vito G. Gallo v. The Government of Canada*, PCA Case No.55798, Vito G. Gallo - Statement of Claim, *Op. Cit.*, para.230.

⁸⁸⁵ *Vito G. Gallo v. The Government of Canada*, PCA Case No.55798, Government of Canada – Statement of Defence, *Op. Cit.*, para.231.

⁸⁸⁶ *Feldman v. Mexico*, ICSID Case No.ARB(AF)/99/1, Award, 16 December 2002, para.137.

⁸⁸⁷ *Vito G. Gallo v. The Government of Canada*, PCA, Case No.55798, Government of Canada – Statement of Defence, *Op. Cit.*, para.233.

⁸⁸⁸ *Ibid.*, para.234.

⁸⁸⁹ *Ibid.*, para.235.

⁸⁹⁰ *Ibid.*, paras.236 ff.

AMLA.⁸⁹¹ Whether these arguments would have been successful we will never know. If accepted by the Tribunal, they would have allowed Canada to clarify that a large space for maneuver exist for host states to take measures interesting foreign investment without needing to pay compensation. In this sense, scholars have pointed out that this case provides food for thought since, while normally measures affecting investors' rights are general, the AMLA was an *ad hoc* regulation, which carried even in its title a reference to the mine owned by the foreign investor.⁸⁹² This, despite Canada's proposition that the AMLA had amended the *Environmental Protection Act* and was general in nature.⁸⁹³

In *Luchetti v. Peru*, the Tribunal dismissed the claims of the foreign investors (the owners of an industrial plant for the manufacturing and sale of pasta in Peru's capital, Lima) regarding the annulment of a construction permit based on the alleged need to protect marshes and wetlands and the Ecological Reserve of Pantanos de Villa.⁸⁹⁴ The Tribunal concluded that the foreign investors' claims did not fall under the scope of Peru's consent to international adjudication under the invoked Peru-Chile BIT and consequently the Tribunal did not have jurisdiction to hear the merits of the case.⁸⁹⁵ The foreign investors' (which in the meantime had changed their trade name) application for annulment was rejected by the *Ad hoc* Committee.⁸⁹⁶ Hence, no insight on Peru's freedom to adopt measures concerning the ecological reserve without compensating foreign investors could be drawn from this case. However, even where an annulment of the Tribunal's Award would have occurred, as pointed out by the *Ad hoc* Committee, its task was to consider whether the Award could be subject to annulment and not '*to review the decision itself which the Tribunal arrived at, still less to substitute its own views for those of the Tribunal, but merely to pass judgment on whether the manner in which the Tribunal carried out its functions met the requirements of the ICSID Convention.*'⁸⁹⁷ Though this statement seems to partly contradict the stance adopted by the *Ad hoc* Committee in *MHS v. Malaysia*, the *Ad hoc* Committee decision would have been more likely than not to leave the question of Peru's freedom to legitimately adopt ecological protection measures without compensating foreign investors unanswered.

As already pointed out, these cases did not get to the merits phase and the arbitral tribunals did not have an opportunity to address, or elaborate on, the question which emerged in each one of them. They nonetheless stimulate further the reflection on international investment law and cultural heritage. The cutting-edge questions and problems arising show the complexity of the subject and the difficulty that any international court or tribunal might be faced with in the future. Besides the jurisdictional matters, one might add that maybe the time was not ripe to find a final solution to the problems emerging in each

⁸⁹¹ *Ibid.*, para.244.

⁸⁹² V. S. Vadi, *Reconciling Environmental Health and Investors' Rights in International Investment Law*, in J- Ronald Engel, L. Westra, K. Bosselmann (Eds.), *Democracy, Ecological Integrity and International Law*, (Cambridge Scholars Publishing: 2010, U.K.), p.235.

⁸⁹³ *Vito G. Gallo v. The Government of Canada*, Government of Canada – Statement of Defence, *Op. Cit.*, para.234.

⁸⁹⁴ *Empresas Lucchetti, S.A. and Lucchetti Peru, S.A. v. Republic of Peru*, ICSID Case No.ARB/03/4, Award, 07 February 2005, paras.15 ff.

⁸⁹⁵ *Ibid.*, para.62.

⁸⁹⁶ *Industria Nacional de Alimentos, S.A. and Indalsa Perú, S.A. v. Republic of Peru*, ICSID Case No.ARB/03/4, Decision on Annulment, 05 September 2007, p.31.

⁸⁹⁷ *Ibid.*, para.97.

case: a further understanding of the relationship between foreign investments and international investment law on the one hand, and cultural (and natural) heritage and international cultural law is needed in order to correctly frame each question and to address it properly. Although desirable, a better understanding has not yet been achieved and this is one of the main reasons driving this research work.

Chapter III.5. Practical Questions of the Intersection Between International Investment Law and Cultural Heritage

A quick look at the intersections between international investment law and (international) cultural heritage (law) both at the substantive and dispute settlement level reveals a number of questions which deserve attention. These questions relate all to practical problems that investment tribunals have been faced with. Understanding the role of international cultural law within investment arbitration might help elucidate the status of culture under international law in general, but it might also be 'dispositvie' of certain legal issues. Also, the mere fact that investment arbitral proceedings might involve culture make it necessary to reflect on the possibility to use this dispute settlement mechanism for cultural disputes. These are just some examples of the matters revolving around this intersection. In fact, the discussion could continue along the lines of the expropriation of cultural and natural heritage (and heritage-related rights) and of the standards of conduct that these two branches of international law promote, if any.

These brief remarks show already how the same issue might have a dual nature and a bearing for both international investment and cultural law. As such, this is proof in itself of the strong connection between these two fields. This latter observation makes it necessary to highlight that though several different subjects have been identified and singled out below, they are all connected among themselves. Hence, even if expropriation will be discussed in a specific sub-chapter, some significant remarks will emerge already in the discussion on the role of cultural law in investment arbitration.

III.5.A. What is the Clout of (International) Cultural Heritage (Law) in International Investment Arbitration?

The presence and significance of international cultural heritage norms in international investment agreements have been already discussed. It has been argued that international cultural heritage norms might find their way in international investment agreements not only when specific provisions on heritage are included within the agreements. International cultural heritage law might also have a bearing on international investment agreements through the application of other rules of international law and of customary international law. In fact, investment agreements are not created in a *vacuum*: they are to be placed in the context of general international law. It is key to understand how international investment tribunals have dealt in practice with the potential application and clout of cultural heritage law in investment arbitral proceedings. This question goes beyond the importance of cultural heritage-related provisions in investment agreements. It is in fact a much broader question on the importance, potential value and role that international rules on culture might play in investment arbitration more generally.

This is not a notional point: international cultural heritage instruments and rules might change substantially the results of investment disputes in practice. In turn, as shown, international investment disputes might have a significant impact on cultural heritage. While this might look like a dog chasing its own tail, a correct framing of this issues is consequential.

First and foremost, in the context of investment arbitration the limited mandate and jurisdiction of arbitral tribunals make it necessary to specifically identify the source of each potentially applicable rule and the question to which it should be applied. In *Bernhard von Pezold and others v. Republic of Zimbabwe* and *Border Timbers Limited and others v. Republic of Zimbabwe*,⁸⁹⁸ a dispute emerging under the Switzerland-Zimbabwe BIT over timber plantation activities, two non-disputing parties (the European Center for Constitutional and Human Rights, ECCHR, and Indigenous Communities) submitted a request to file *amici curiae* briefs with the Arbitral Tribunal. As the Tribunal itself pointed out in its Procedural Order, the two groups have argued that:

*'[...] both parties in this arbitration incur shared responsibility vis-à-vis the indigenous communities, who, it is asserted, have rights under international law in relation to which the Claimants' properties are located. In this regard, the Petitioners submit that international human rights law on indigenous peoples applies to these arbitrations in parallel to the relevant BITs and the ICSID Convention.'*⁸⁹⁹

The Tribunal rejected the groups' petition to submit *amici* briefs and, as a reaction, the ECCHR has claimed that this rejection shows the failure of the system of international investment arbitration as currently designed to ensure the compatibility of its decisions with human rights.⁹⁰⁰ This grave assertion should be assessed against the analysis and reasoning of the Arbitral Tribunal in the case. The Arbitral Tribunal evaluated the position of the two non-disputing parties in light of Rule 37 (2) (*Visit and Inquiries; Submissions of Non-Disputing Parties*) of the ICSID Arbitration Rules,⁹⁰¹ adding to the conditions set forth by this provision

⁸⁹⁸ *Bernhard von Pezold and others v. Republic of Zimbabwe*, ICSID Case No.ARB/10/15 and *Border Timbers Limited, Border Timber International (Private) Limited, and Hangani Development Co. (Private) Limited v. Republic of Zimbabwe*, ICSID Case No. ARB/10/25.

⁸⁹⁹ *Bernhard von Pezold and others v. Republic of Zimbabwe*, ICSID Case No.ARB/10/15 and *Border Timbers Limited and others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/25, Procedural order No.2, 26 June 2012, para.25.

⁹⁰⁰ European Center for Constitutional and Human Rights, *Human Rights Inapplicable in International Investment Arbitration? – A Commentary on the Non-Admission of ECCHR and Indigenous Communities as Amici Curiae Before the ICSID Tribunal*, (Berlin: 2012), p.2.

⁹⁰¹ Rule 37 (2) (*Visit and Inquiries; Submissions of Non-Disputing Parties*) of the *Rules of Procedure for Arbitration Proceedings (the Arbitration Rules) of ICSID*, adopted on 25 September 1967, effective as of 1 January 1968, reads as follow:

'(2) After consulting both parties, the Tribunal may allow a person or entity that is not a party to the dispute (in this Rule called the "non-disputing party") to file a written submission with the Tribunal regarding a matter within the scope of the dispute. In determining whether to allow such a filing, the Tribunal shall consider, among other things, the extent to which:

(a) the non-disputing party submission would assist the Tribunal in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties;

(b) the non-disputing party submission would address a matter within the scope of the dispute;

(c) the non-disputing party has a significant interest in the proceeding.

for non-disputing parties wishing to submit a brief with an ICSID arbitral tribunal the need for them to be independent.⁹⁰² However, in the specific case, the Tribunal concluded that there existed legitimate doubts as to the independence or neutrality of these parties and that their submissions would not have assisted the Tribunal in the determination of a factual or legal issue related to the proceedings, as mandated by the ICSID Arbitration Rules.⁹⁰³ Hence, the Tribunal based its decision on the differences existing between the issues raised by the non-disputing parties and the issues in dispute between the foreign investor and Zimbabwe:

*'[...] The Arbitral Tribunal agrees in this regard with the Claimants that the reference to "such rules of general international law as may be applicable" in the BITs does not incorporate the universe of international law into the BITs or into disputes arising under the BITs. Moreover, neither Party has put the identity and/or treatment of indigenous peoples, or the indigenous communities in particular, under international law, including international human rights law on indigenous peoples, in issue in these proceedings.'*⁹⁰⁴

Though this assertion might be regarded by some as a way to dismiss *tout court* the sensitive question it was faced with, the Tribunal did not shy away from the question of the relationship between international investment law and human rights, basing its reasoning on the main feature of investment arbitrations:

*'The Arbitral Tribunals are not persuaded that consideration of the foregoing is in fact part of their mandate under either the ICSID Convention or the applicable BITs. The Respondent has not yet filed a substantive pleading in these proceedings. However, it was afforded the opportunity to make observations on the Application, including any observations as to the perspective the Petitioners propose to bring to the factual and legal issues in these proceedings. The Respondent affirmed its initial observations that any NDP submission must fall within the parameters of Rule 37(2) and must not impinge on its territorial integrity. Whether or not the proposed NDP submission would have the effect of impinging on the Respondent's territorial sovereignty is unclear. However, the Respondent has neither raised as a defence in these proceedings that it has obligations towards the indigenous communities under international law nor has it indicated that a submission from the Petitioners based on their Application may be relevant to factual or legal issues in these proceedings.'*⁹⁰⁵

The Tribunal shall ensure that the non-disputing party submission does not disrupt the proceeding or unduly burden or unfairly prejudice either party, and that both parties are given an opportunity to present their observations on the non-disputing party submission.'

⁹⁰² *Bernhard von Pezold and others v. Republic of Zimbabwe and Border Timbers Limited and others v. Republic of Zimbabwe*, Procedural order No.2, *Op. Cit.*, paras.48-49.

⁹⁰³ *Ibid.*, paras.53-57.

⁹⁰⁴ *Ibid.*, para.57.

⁹⁰⁵ *Ibid.*, para.59.

One might not share the Arbitral Tribunal's view on the difference between the rules applicable under the NAFTA and other international law rules. However, this seems to be a common stance among investment tribunals and one which does not imply necessarily that other rules have no bearing in investment arbitral disputes. As for the admissibility of non-disputing parties submissions, that questions completely pertains to the discretionary view of the arbitral tribunal in each case.

In *Glamis Gold v. The United States*, the same question of the possibility for non-disputing parties to submit *amici curiae* briefs emerged. Under NAFTA Article 1128 (*Participation by a Party*) '[o]n written notice to the disputing parties, a Party may make submissions to a Tribunal on a question of interpretation of this Agreement.' The Quechan Indian Nation filed a request to file a non-disputing party submission.⁹⁰⁶ In 2005, the Arbitral Tribunal issued a *Decision on the Application and Submission by Quechuan Indian Nation* pointing out that the submission satisfied the criteria of the NAFTA Free Trade Commission's Statement on Non-Disputing Party Participation and did not represent an undue burden or cause delay to the proceeding.⁹⁰⁷ The Tribunal accepted that submission, with the caveat that the Tribunal was not required to address the submission at any point of the proceeding.⁹⁰⁸ Besides the Quechan Indian Nation, several non-governmental organizations took steps in order to file non-disputing party submission, and namely the National Mining Association, Sierra Club and Earthworks, and Friends of the Earth.⁹⁰⁹ The decision of the Tribunal highlights two important points which go beyond the matter of the limited mandate and jurisdiction of the Tribunal. On the one hand, the possibility to submit *amici curiae* briefs might represent a possibility for the s.c. 'civil society' to participate in the shaping of international economic law and help strengthen the legitimacy of the international investment law system.⁹¹⁰ This assertion should be tempered by the fact that *amici curiae* briefs do not always represent the view of civil society, something the state should be in charge of representing - the possibility to file briefs is in fact open to business organizations as well (thus potentially strengthening the sway of business rather than civil society on investment arbitration).⁹¹¹ On the other hand, opening the arbitral procedure to non-disputing parties might result in a burden for the efficiency of the process, losing the cost-efficient and speedy-adjudication features that make it preferable for disputing parties.⁹¹² Any decision on *amici curiae* briefs cannot escape from an assessment of each and every one of these opposing elements. No easy reply exists. Nor seems it reasonable to blame investment arbitral tribunals for respecting the choices of the parties regarding both the dispute settlement procedure and the applicable law.

⁹⁰⁶ *Ibid.*, paras.267 ff.

⁹⁰⁷ *Ibid.*, para.274.

⁹⁰⁸ *Id.*

⁹⁰⁹ *Ibid.*, para.286.

⁹¹⁰ F. Ortino, *The Impact of Amicus Curiae Briefs in the Settlement of Trade and Investment Disputes: An Analysis of the Shrimp/Turtle and Methanex Decisions*, in K. M. Meessen (Ed.), *Economic Law as an Economic Good*, (Sellier Publishing: 2009, Munich), p.316.

⁹¹¹ V. Heiskanen, *Book Review – P. F. J. Macrory, A. E. Appleton, M. G. Plummer, The World Trade Organization: Legal, Economic and Political Analysis, Op. Cit.*, p.1151, quoting Peter Sutherland.

⁹¹² E. Levine, *Amicus Curiae in International Investment Arbitration: The Implications of an Increase in Third-Party Participation*, *Berkeley Journal of International Law* Vol.29, Iss.11, (2011), p.219-220.

Of course, the argument of the ‘deference’ that investment tribunals should give to other branches or rules of international law is not made only by non-disputing parties. In *Grand River Enterprises Six Nations v. the United States*,⁹¹³ one of the claimants (Mr. Arthur Montour) had claimed that the measures at issue concerning the sale and distribution of cigarettes were inconsistent with his reasonable investment-backed expectations in violation of both Article 1105 (*Minimum Standard of Treatment*) and Article 1110 (*Expropriation and Compensation*) of the NAFTA.⁹¹⁴ Namely, Mr. Arthur Montour relied on a series of treaties which allegedly assured him the right to pursue parallel independent political and economic life as a member of an Indian people.⁹¹⁵ Thus, he contended that he had legitimate expectations not to be subjected to regulatory actions regarding the tobacco industry by the states of the United States.⁹¹⁶ Moreover, Mr. Arthur Montour claimed that individual states of the United States did not have jurisdiction to regulate commerce among Native Americans, especially when it involved transactions outside of the states’ geographic boundaries or within “Indian country,” including reservation lands.⁹¹⁷ In turn, the United States disputed the claimants’ characterization of applicable law, and denied that Mr. Arthur Montour could have reasonably expected that his activities would have been wholly immune from state regulation.⁹¹⁸

The Tribunal first noted that both Parties had advanced categorical positions on the U.S. Federal Indian law. In the Tribunal’s view, while both parties had posited ‘*bright lines*’ where they did not exist, ‘*U.S. federal Indian law is a complex and not altogether consistent mixture of constitutional provisions, federal statutes, and judicial decisions by the U.S. Supreme Court and other courts.*’⁹¹⁹ The Tribunal’s observation touched upon one relevant, unresolved point of the relations between the United States and North American Indian tribes. Back in 1830, one of the first measures of President Andrew Jackson had been the Indian Removal Act which established that since Native Americans constituted a threat to the safety and security of the early United States, funds were provided to negotiate and relocate some Indian tribes to the west of the country.⁹²⁰ When Georgia imposed its laws to the Cherokee living within its territory, the Indian tribes concerned filed a complaint with the U.S. Supreme Court and in *Cherokee Nation v. Georgia*, Chief Justice Marshall denied that the tribe was sovereign and independent but declared that it was not subject to state laws.⁹²¹ Of course, further events and municipal courts decision ensued. But this seminal case, with its somehow uncertain conclusion, shows how it has been difficult to regulate and accommodate the competing interests of Indian tribes and the states of the U.S. Indeed, the Investment Arbitral Tribunal in *Grand River Enterprises Six Nations* confirmed that ‘*the U.S. domestic law is currently far from conclusive about the question raised here of the extent of permissible state regulation.*’⁹²² The

⁹¹³ *Grand River Enterprises Six Nations, Ltd., Et Al. v. United States of America*, Award, *Op Cit.*

⁹¹⁴ *Ibid.*, para.127.

⁹¹⁵ *Ibid.*, paras.128-129.

⁹¹⁶ *Id.*

⁹¹⁷ *Ibid.*, para.130.

⁹¹⁸ *Ibid.*, para.133.

⁹¹⁹ *Ibid.*, para.137.

⁹²⁰ R. V. Remini, *A Short History of the United States*, (Harper Perennial: 2008, U.S.), p.100.

⁹²¹ *Ibid.*, p.100-101.

⁹²² *Grand River Enterprises Six Nations, Ltd., Et Al. v. United States of America*, Award, *Op. Cit.*, para.138.

Tribunal accepted that the invoked provisions of U.S. Federal Indian law or of the Jay Treaty might have been a source of legitimate expectations for claims under the NAFTA. It stated in fact that foreign investors 'reasonable or legitimate expectations' under the NAFTA are the result of the representations or conduct by a state party.⁹²³ However, they did not generate such legitimate expectations for the claims in the dispute at hand.⁹²⁴ Given the 'unsettled nature' of U.S. domestic law in relevant respects in the dispute, as a prudent investor, Mr. Montour could have not reasonably expected that the State would not have applied to him the tobacco industry-related measures.⁹²⁵ Moreover, the Jay Treaty, although important for protecting cross-border movement and trade among indigenous peoples in North America, could not be interpreted as granting Mr. Montour absolute immunity from state regulation for commercial activities involving cross-border trade at a significant scale, as contended by Mr. Montour.⁹²⁶ Mr. Montour should have known that trade in tobacco products had historically been the subject of close and extensive regulation by U.S. states.⁹²⁷

Mr. Arthur Montour's claims did not however stop there. He also claimed that the treatment received by various states of the United States had violated the U.S. obligation to afford fair and equitable treatment under Article 1105 of the NAFTA (*Minimum Standard of Treatment*).⁹²⁸ The 'controlling element' in the application of Article 1105 of the NAFTA is international law,⁹²⁹ but:

*'[...] the content of the obligation imposed by Article 1105 must be determined by reference to customary international law, not to standards contained in other treaties or other NAFTA provisions, or in other sources, unless those sources reflect relevant customary international law. A violation of another treaty does not establish a violation of Article 1105. Further, the concepts of "fair and equitable treatment" and "full protection and security" refer to existing elements of customary international law regarding the treatment of aliens and do not add to that standard.'*⁹³⁰

Among others, Mr. Arthur Montour contended that the content of the fair and equitable treatment obligation under the NAFTA was shaped for the United States by the Jay Treaty, by the principles of customary international law which involved indigenous peoples and international human rights treaties and customary rules.⁹³¹ Hence, the fair and equitable standard, the claimant argued, varied depending on the status and legal rights of the subject it had to be applied to.⁹³² The Tribunal however decided that '*[w]hile other legal rules may shape the context in which Article 1105 is applied, they do not alter the content of the customary*

⁹²³ *Ibid.*, paras.140-141.

⁹²⁴ *Id.*

⁹²⁵ *Ibid.*, para.142.

⁹²⁶ *Ibid.*, para.143.

⁹²⁷ *Ibid.*, para.144.

⁹²⁸ *Ibid.*, para.173.

⁹²⁹ *Ibid.*, para.174.

⁹³⁰ *Ibid.*, para.176.

⁹³¹ *Ibid.*, para.180.

⁹³² *Ibid.*, para.180.

*international law minimum standard of treatment.*⁹³³ Consequently, the Tribunal dismissed all the claims made against the United States under Article 1105 of the NAFTA.⁹³⁴ Indeed, the Tribunal further developed its reasoning on the law applicable to the specific dispute:

*'The Tribunal understands the obligation to "take into account" other rules of international law to require it to respect the Vienna Convention's rules governing treaty interpretation. However, the Tribunal does not understand this obligation to provide a license to import into NAFTA legal elements from other treaties, or to allow alteration of an interpretation established through the normal interpretive processes of the Vienna Convention. This is a Tribunal of limited jurisdiction; it has no mandate to decide claims based on treaties other than NAFTA [...] The Tribunal is particularly mindful in this regard of the Free Trade Commission's directive that a violation of an obligation under another treaty does not give rise to a breach of Article 1105.'*⁹³⁵

Canada, a non-disputing party in the proceedings, fully agreed with the Tribunal on this point. Pursuant to Article 1128 of the NAFTA, Canada had filed a non-disputing party submission contending that a violation of the Jay Treaty did not establish a violation of the minimum standard of treatment as alleged by the claimants, and ILO Convention 169 and the UN Declaration on the Rights of Indigenous Peoples did not constitute customary international law, and so did not fall within the ambit of NAFTA Article 1105 (1).⁹³⁶ This conclusion runs contrary to the National Chief of the Assembly of First Nations views. He had sent a letter, read and considered by the Tribunal, where he endorsed the UN Declaration of the Rights of Indigenous Peoples and the customary international law principles it reflects, calling for indigenous rights to be taken into account whenever a NAFTA arbitration involves First Nations investors or investments.⁹³⁷ The entanglement of internal matters (such as the relationship between Indian tribes and, respectively, Canada and the United States) and international matters might generate 'confusing' situations such as the one of *Grand River Six Nations v. The United States*.

In *Grand River Six Nations* the Arbitral Tribunal had also to consider the relevance to be ascribed to indigenous communities' customary rules. Indeed, the claimants had argued that the three individuals claimants and the Grand River Enterprises had constituted together an 'enterprise' that operated in the United States in an undocumented manner customary among indigenous people, which constituted an 'investment' protected under the NAFTA.⁹³⁸ The Tribunal excluded that culturally-rooted practices might amount to an 'investment' under the NAFTA, which '*refer[s] to some form of business association with its own juridical personality constituted or organized under applicable law, rather than mere mutually beneficial business, contractual, or culturally-rooted relations.*'⁹³⁹ In the case at hand, there existed no evidence of

⁹³³ *Ibid.*, para.181.

⁹³⁴ *Ibid.*, para.238.

⁹³⁵ *Ibid.*, para.71.

⁹³⁶ *Grand River Enterprises Six Nations, Ltd., Et Al. v. United States of America*, Award, *Op. Cit.*, para.59.

⁹³⁷ *Ibid.*, para.60.

⁹³⁸ *Ibid.*, paras.90-91.

⁹³⁹ *Ibid.*, para.92.

the constitution of such an enterprise.⁹⁴⁰ The Tribunal also rejected the claimants' argument that they had constituted an enterprise under the Seneca Nation of Indians Business Code of 1988, which included traditional custom and practice to the conduct of business operations. The Code did not contain any provision on the constitution of enterprises, even less for their constitution for purposes of the NAFTA.⁹⁴¹ Though the Tribunal was respectful '*of the cultural patterns that inform business relations among First Nations peoples,*' it did not question in itself that indigenous customary laws, written or unwritten, could provide grounds for the establishing of an enterprise for the purposes of the NAFTA,⁹⁴² but:

*'[...] there is nothing to show that the culturally-based or other business understandings that the Claimants describe are sufficient under Seneca law and thereby under NAFTA. Mere assertions of the existence of Seneca law and custom, just as mere assertions of other forms of law, are not enough.'*⁹⁴³

In addition, the record had suggested that the claimants had not regarded the Seneca Code as relevant for their collective enterprise, since they had no Seneca Business Licence as required by the Code for every individual doing business in the Seneca Indians Reservation.⁹⁴⁴ Hence, there existed no investment in the form of an enterprise under Articles 1139 and 201 of the NAFTA.⁹⁴⁵ Grand River Enterprises and the two individual claimants (Jerry Montour and Kenneth Hill) further contentions on the qualification of an enterprise, a loan, a property or other interests as 'investment' under the NAFTA were rejected.⁹⁴⁶

Investment tribunals have referred to other 'sources' of international law besides indigenous peoples matters. In *Pey Casado v. Chile*, the Arbitral Tribunal was faced with the need to assess whether the investor was a national of a State other than the host State under Article 25 (2) (a) of the ICSID Convention.⁹⁴⁷ The Tribunal concluded that at the critical dates,⁹⁴⁸ it could not admit Chile's challenge that Mr. Pey Casado had the double nationality (Chilean and Spanish).⁹⁴⁹ In particular, in its assessment of the facts and of the question of whether the conduct of Chilean authorities over time had deprived Mr. Pey Casado of his Chilean nationality, the Tribunal referred to an agreement on double nationality between the two countries (*Convenio Bilateral de Doble Nacionalidad*). In the *Convenio*, there was no objection concerning the possibility for a subject to have the double nationality, Spanish and Chilean, based in particular on the grounds identified in the *Preamble* that '*los españoles y los*

⁹⁴⁰ *Ibid.*, paras.93-94.

⁹⁴¹ *Ibid.*, paras.99-102.

⁹⁴² *Ibid.*, para.103.

⁹⁴³ *Ibid.*, para.103.

⁹⁴⁴ *Ibid.*, para.104.

⁹⁴⁵ *Ibid.*, para.106.

⁹⁴⁶ *Ibid.*, para.122.

⁹⁴⁷ *Pey Casado y Fundacion Presidente Allende c. Republica de Chile*, Award, *Op. Cit.*, paras.236 ff.

⁹⁴⁸ The two critical dates were the date at which the Parties had given their consent to resort to ICSID arbitration and the date at which the request for arbitration had been registered, *Ibid.*, para.238.

⁹⁴⁹ *Ibid.*, para.322.

*chilenos forman parte de una comunidad caracterizada por la identidad de tradiciones, cultura e idioma [...].*⁹⁵⁰

The Tribunal also referred to the *Interamerican Commission on Human Rights* and to its work on the right to nationality in Chile.⁹⁵¹ However, the Tribunal's stance with regard to human rights instruments appeared 'mixed': while it referred to the work of human rights bodies to reach its conclusions on some points, it was very clear in signaling that international human rights instruments, though relevant, were not directly applicable in the case at hand:

*'En este contexto, el Tribunal de arbitraje recuerda, asimismo, las disposiciones relativas a la renuncia de una nacionalidad que figuran en la Convención Interamericana sobre Derechos Humanos. Aunque estas normas no son directamente aplicables al presente caso...[Esta Convención fue ratificada por Chile el 21 de Agosto de 1990, pero obviamente no se aplica directamente a los nacionales españoles] [...] cabe, no obstante, subrayar- como lo han hecho las Demandantes durante el procedimiento – que el artículo...'*⁹⁵²

While this is a good example of 'substantive' interaction between investment law and other branches of international law, there might also be 'procedural' connections and interactions between different fields of international law. *Grand River Enterprises Six Nations v. The United States* featured not only questions on the relationships to other sources of (international) law in proceedings under the NAFTA, as already noted above, but also the some 'procedural' connections with other international law proceedings. In 2007, the United States lodged a challenge to disqualify Mr. Anaya, one the arbitrators of the proceedings, under Article 10 (1) of the UNCITRAL Arbitration Rules, which governed that proceeding, based on his service as counsel to the petitioners in the case *Dann v. The United States* before the *Inter-American Commission on Human Rights*.⁹⁵³ The Deputy Secretary-General of ICSID notified Prof. Anaya that his representation of, and assistance to, the petitioners in the proceedings before the Inter-American Commission on Human Rights would have been incompatible with simultaneous service as an arbitrator in the NAFTA proceedings and requested Prof. Anaya if he intended to continue representing or assisting parties in the non-NAFTA proceedings.⁹⁵⁴ Prof. Anaya responded that he was determined to cease his involvement in the the proceedings before the Inter-American Commission on Human Rights upon his nomination to serve as the Special Rapporteur on Indigenous peoples of the United Nations Human Rights Council.⁹⁵⁵ In November 2007, the Secretary-General of ICSID notified Prof. Anaya and the Parties that she had not decided to sustain the challenge.⁹⁵⁶ It seems worth noting that the case *Mary and Carrie Dann v. United States*, where Prof. Anaya had been involved before the Inter-American Commission on Human Rights, also concerned indigenous

⁹⁵⁰ *Ibid.*, para.246.

⁹⁵¹ *Ibid.*, paras.267-269.

⁹⁵² *Ibid.*, para.313 and footnote 263.

⁹⁵³ *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, Award, *Op. Cit.*, para.28.

⁹⁵⁴ *Ibid.*, para.31.

⁹⁵⁵ *Id.*

⁹⁵⁶ *Id.*

peoples rights.⁹⁵⁷ The petitioners, two sisters members of the Western Shoshone indigenous people who lived in Nevada, contended that the State had interfered with the Dann's use and occupation of their ancestral lands (which was in their current possession and actual use) by purporting to have appropriated the lands as federal property through an unfair procedure before the Indian Claims Commission, by physically removing and threatening to remove the Dann's livestock from the lands, and by permitting or acquiescing in gold prospecting activities within the Western Shoshone traditional territory, and thus violating several provisions of the American Declaration of the Rights and Duties of Man (the American Declaration).⁹⁵⁸ The United States denied all allegations and contended that no human rights violation was at stake, but rather a '*lengthy litigation of land title and land use questions that had been and were still subject to careful consideration by all three branches of the United States government.*'⁹⁵⁹ The Inter-American Commission concluded that, although it was not for it to determine whether and to what extent the Danns might have properly claimed a subsisting right to property in the Western Shoshone ancestral land,⁹⁶⁰ the State had failed to ensure the Dann's right to property under conditions of equality contrary to the American Declaration in connection with their claims to property rights in the Western Shoshone ancestral lands.⁹⁶¹

All these cases prove how close investment law and human rights are. However, human rights represent only one part and possible approach to cultural law. Accordingly, the cases cited do not represent the complete spectrum of possible situations where the role of international cultural heritage law rules was tested by investment tribunals. In the *SPP v. Egypt*, the Tribunal dealt with the relevance to be attached to the 1972 World Heritage Convention and its legal consequences on States' obligations toward foreign investors (together with the amount of compensation owed for an expropriation involving cultural heritage). The Arbitral Tribunal eventually attached some relevance to the 1972 UNESCO Convention, underscoring however that it is on States that lies the initiative for the inscription of cultural heritage on the World Heritage List. An eminent scholar has pointed out that the reasoning of the Arbitral Tribunal was fallacious since it did not consider that some of the obligations stemming from the 1972 World Heritage Convention are not contingent on the inscription of a site on any list.⁹⁶² The 1972 Convention seems to impose general obligations also with regard to cultural heritage of outstanding universal value not inscribed on any of its lists (under its Article 12). However, the fact that Egypt did not invoke such a provision in its arguments and the unclear scope of this provision might temper any criticism on the Tribunal's position. The *SPP* case still remains one of the few cases of (quasi-)judicial analysis of the World Heritage Convention.⁹⁶³ Further, as for the question of compensation, while the Tribunal attached some relevance to the 1972 UNESCO Convention in the calculation of the

⁹⁵⁷ *Mary and Carrie Dann v. United States*, Case 11.140, Inter-American Commission on Human Rights, Report No.75/02, 27 December 2002.

⁹⁵⁸ *Ibid.*, para.2.

⁹⁵⁹ *Ibid.*, para.3.

⁹⁶⁰ *Ibid.*, para.171.

⁹⁶¹ *Ibid.*, para.172.

⁹⁶² P. J. O'Keefe, *Foreign Investment and the World Heritage Convention*, International Journal of Cultural Property Vol.4, (1995), p.259-261.

⁹⁶³ P. J. O'Keefe, *Commentaire relatif à la Convention de l'Unesco de 1970 sur le trafic illicite des biens culturels*, (UNESCO: 2014, Paris), p.47.

quantum of the compensation owed by Egypt, the question appeared as mainly regulated by Egyptian law. As such, it is difficult to draw general conclusions under international law. On its face the case might appear as an attempt to invest in cultural heritage-rich areas. While one might think that investing in these areas might endanger cultural heritage, some have authoritatively maintained that the construction of a tourist complex near the Pyramids would have had a positive impact on the area.⁹⁶⁴ That, taking into consideration the dreadful state of the Pyramids and the surrounding area at the time of the investment and the high standards of the tourist development project complied with by SPP.⁹⁶⁵ In this sense, the World Bank has signaled how relevant investment in historic cities and cultural heritage 'assets' is for sustainable development.⁹⁶⁶ On this line, if problems arise concerning cultural heritage under the 1972 World Heritage Convention, the World Heritage Committee can caution and try to dissuade (though with no binding force) the States which do not comply with their obligations and can also address entities (such as corporations and private actors) other than state parties.⁹⁶⁷

First, in *SPP* the Tribunal found that Egyptian Law was applicable, as well as the UNESCO Convention of 1972 for the protection of cultural and natural heritage, that obliged Egypt to abstain from acts contrary to the Convention.⁹⁶⁸ The Tribunal found that the project site eventually chosen for the touristic project had been agreed upon and repeatedly endorsed by the Egyptian Government.⁹⁶⁹ Among others, the Arbitral Tribunal dismissed Egypt contention that SPP and SPP (ME) lacked the ability to complete the project.⁹⁷⁰ SPP had significant experience in the touristic resort business, but difficulties had emerged due to the failure of Egyptian authorities to provide certain infrastructural services and to obtain customs clearance for certain materials and equipment imported for the self-financing project.⁹⁷¹

Among all these arguments, Egypt had maintained that the entry into force on 17 December 1975 of the 1972 UNESCO Convention had obliged Egypt to cancel Pyramids Oasis Project.⁹⁷² Egypt had invoked the obligations under Articles 4 and 5 of the 1972 World Heritage Convention. Under Article 4:

'Each State Party to this Convention recognizes that the duty of ensuring the identification, protection, conservation, presentation and transmission to future generations of the cultural and natural heritage referred to in Articles 1 and 2 and situated on its territory, belongs primarily to that State. It will do all it can to this end, to the utmost of its own resources and, where appropriate, with any

⁹⁶⁴ J. Paulson, *Op. Cit.*, p.4-5.

⁹⁶⁵ *Id.*

⁹⁶⁶ G. Licciardi, R. Amirtahmasebi (Eds.), *The Economics of Uniqueness – Investing in Historic City Cores and Cultural Heritage Assets for Sustainable Development*, (The World Bank: 2012, Washington).

⁹⁶⁷ L. I. de Germiny, *Considerations Before Investing Near a UNESCO World Heritage Site*, in V. S. Vadi, S. Schneider (Eds.), *Art and Heritage Disputes in International and Comparative Law*, Transnational Dispute Management Vol.10, Iss.5, (2013), p.7.

⁹⁶⁸ *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, Award on the Merits, *Op. Cit.*, para.78.

⁹⁶⁹ *Ibid.*, para.89.

⁹⁷⁰ *Ibid.*, para.113.

⁹⁷¹ *Ibid.*, paras.116-126.

⁹⁷² *Ibid.*, para.150.

international assistance and co-operation, in particular, financial, artistic, scientific and technical, which it may be able to obtain.'

Under Article 5(d) of the Convention:

'To ensure that effective and active measures are taken for the protection, conservation and presentation of the cultural and natural heritage situated on its territory, each State Party to this Convention shall endeavour, in so far as possible, and as appropriate for each country: . . . to take the appropriate legal, scientific, technical, administrative and financial measures necessary for the identification, protection, conservation, presentation and rehabilitation of this heritage [...]

Egypt further invoked Article 11 of the World Heritage Convention and its mechanism of registration of cultural heritage sites with the World Heritage Committee as well.⁹⁷³ Prof. Kahn, expert for Egypt, submitted that the inscription was divided into two phases: a first one, under the initiative of the State with the request of inscription of a site(s), and a second phase of exam and eventual inscription by the World Heritage Committee.⁹⁷⁴ SPP, for its part, claimed that the Egypt's expropriation was not based on the UNESCO Convention but that the World Heritage Convention had been used as a '*post hoc rationalization*' for an act of expropriation which had nothing to do with the Convention, and that even if antiquities existed in the lands chosen for the project other measures short of cancellation could have been taken in conformity with the World Heritage Convention.⁹⁷⁵ In fact, Egypt had nominated the Pyramids Fields from Giz to Dahshur for inclusion in the World Heritage List under Article 11 of the World Heritage Convention only on 26 February 1979, around nine months after the cancellation of the project,⁹⁷⁶ and as already signaled, the World Heritage Convention has the purpose of protecting cultural and natural heritage of outstanding universal value. In its *Preamble*, the Convention stresses that '*[c]onsidering that part of the cultural and natural heritage are of outstanding interest and therefore need to be preserved as part of the whole heritage of mankind as a whole.*'⁹⁷⁷ However, on the other hand, SPP's claim addressed the need to avoid that cultural and cultural heritage measures be taken as a means to justify certain measures *ex post* or as a disguised, pure violation of investors' rights. A similar danger might loom also in other realms, for instance in the case of restrictive trade measures justified on cultural grounds, with no real concern for cultural policies. In its analysis, the Arbitral Tribunal took into consideration the substantive content of the UNESCO Convention and the procedure of inscription of cultural heritage sites:

'In the Tribunal's view, the UNESCO Convention by itself does not justify the measures taken by the Respondent to cancel the project, nor does it exclude the Claimants' right to compensation. According to the system of the Convention, as acknowledged

⁹⁷³ *Ibid.*, para.151.

⁹⁷⁴ *Ibid.*, para.152.

⁹⁷⁵ *Ibid.*, para.153.

⁹⁷⁶ *Id.*

⁹⁷⁷ *Preamble of the Convention Concerning the Protection of the World Cultural and Natural Heritage, Op. Cit.*

*by the Respondent, "le classement est finalement le fait des autorités internationales de l'Unesco (Comité)." Thus, the choice of sites to be protected is not imposed externally, but results instead from the State's own voluntary nomination. Consequently, the date on which the Convention entered into force with respect to the Respondent is not the date on which the Respondent became obligated by the Convention to protect and conserve antiquities on the Pyramids Plateau. It was only in 1979, after the Respondent nominated "the pyramid fields" and the World Heritage Committee accepted that nomination, that the relevant international obligations emanating from the Convention became binding on the Respondent. Consequently, it was only from the date on which the Respondent's nomination of the "pyramid fields" was accepted for inclusion in the inventory of property to be protected in the UNESCO Convention in 1979 that a hypothetical continuation of the Claimants' activities interfering with antiquities in the area could be considered as unlawful from the international point of view.'*⁹⁷⁸

The UNESCO Convention does not exclude a subject's right to compensation and inscription on the World Heritage List takes place initially on the state's own initiative. However, as signaled by some commentators and noted above, there might be some obligations which stem from the World Heritage Convention even concerning non-inscribed cultural heritage. Under Article 12 of the 1972 Convention:

'The fact that a property belonging to the cultural and natural heritage has not been included in either of the two lists mentioned in paragraphs 2 and 4 of Article 11 shall in no way be construed to mean that it does not have an outstanding universal value for purposes other than those resulting from inclusion in these lists.'

Hence, this provision might impose some 'general' obligations of protection for cultural heritage. Though not inscribed on the World Heritage List and/or on the List of World Heritage in Danger, and thus without imposing core obligations for the State in respect of heritage registered in these lists, still obligations under Articles 4 and 5 of the World Heritage Convention should apply for heritage of outstanding universal value. It remains that the significance of this disposition is not clear, and its unusual location within the Convention does not help at all in elucidating its real clout.⁹⁷⁹

Eventually, the Arbitral Tribunal determined that registration of the relevant areas under the Convention happened belatedly in the context of the dispute, but certain acts such as the Decree declaring the lands of the project site 'public property (Antiquities)' pursuant to an Egyptian law authorizing expropriation when necessary to protect antiquities, were contemporaneous with the cancellation of the project and showed a genuine concern for the protection of cultural heritage.⁹⁸⁰ The Arbitral Tribunal hence determined that SPP's activities on the Pyramids Plateau would have become internationally unlawful in 1979, but not before

⁹⁷⁸ *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, Award on the Merits, *Op. Cit.*, para.154.

⁹⁷⁹ F. Lenzerini, *Article 12 Protection of Properties Not Inscribed on World Heritage List*, *Op. Cit.*, p.201 ff.

⁹⁸⁰ *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, Award on the Merits, *Op. Cit.*, para.156.

that date, and this was relevant for the correct calculation of the quantum of compensation owed by Egypt to SPP.⁹⁸¹

UNESCO conventions and recommendations were referred to also in other cases. In *Glamis Gold v. the United States*, when addressing the international rules relevant to the dispute, the Arbitral Tribunal also explicitly cited the 1968 UNESCO *Recommendation Concerning the Preservation of Cultural Property Endangered by Public or Private Works*, recommending States to take legislative or whatever steps necessary to preserve, salvage or rescue cultural property and that ‘at the preliminary survey stage of any project involving construction in a locality recognized as being of cultural interest...several variants of the project should be prepared and considered,’⁹⁸² and the UNESCO 1972 World Heritage Convention.⁹⁸³ However, the Tribunal did not seem to refer to the Recommendation or the 1972 Convention in its reasoning or final determinations.

To sum up, the debate on the application and relevance of other sources of international law, including international cultural heritage conventions, has heavily centered on the much-criticized stances taken by arbitral tribunals. Some have wondered whether investment arbitral tribunals suggest ignoring other treaties’ obligations. In light of the above-mentioned considerations on the unique nature of each arbitral tribunal, the conclusions of arbitral tribunals have to be taken *cum grano salis*. Each international investment agreement and each case has its own peculiar features: generalizations can be dangerous. On this point, criticism on investment tribunals’ selectivity in the application of other international law sources has mounted in particular with regard to human rights. However, this selectivity has been applied even with regard to other branches of international law, such as international trade law. In its 2007 Award on the Merits, the NAFTA Tribunal in *UPS v. Canada* was faced with several tricky questions⁹⁸⁴ One of them was whether the actions of Canada Post could be attributed to Canada.⁹⁸⁵ The possibility or not to consider Canada Post’s conduct as attributable to the Government of Canada entailed a decision on the role of international law and international jurisprudence in the context of NAFTA arbitral proceedings, as shown by the opposing arguments of the parties. UPS substantiated its claim recalling the International Law Commission’s (by then, Draft) Articles on Responsibility of States for Internationally Wrongful Acts, the value of which had been recognized in the ICJ *Genocide Convention* case, and which set forth in Article 4 that ‘the conduct of any State organ shall be considered an act of that State under international law.’⁹⁸⁶ Canada Post, UPS argued, was an institution of the Government of Canada,⁹⁸⁷ and a WTO Panel in the Canada-Periodicals case had concluded that Canada Post’s pricing policy was a governmental measure not affected by the separate legal personality of the former.⁹⁸⁸ The appeal to the Appellate Body had not raised this point and hence, the Panel’s conclusion on it had remained unchanged.⁹⁸⁹ Canada, in turn, argued that

⁹⁸¹ *Ibid.*, paras.157, 190 ff.

⁹⁸² *Glamis Gold, Ltd. v. United States of America*, Award, *Op. Cit.*, para.83.

⁹⁸³ *Ibid.*, para.84.

⁹⁸⁴ *United Parcel Service of America Inc. v. Government of Canada*, UNCITRAL, Award on the Merits, 24 May 2007.

⁹⁸⁵ *Ibid.*, paras.45 ff.

⁹⁸⁶ *Ibid.*, para.47.

⁹⁸⁷ *Ibid.*, para.50.

⁹⁸⁸ *Ibid.*, paras.52-53.

⁹⁸⁹ *Ibid.*, para.53.

customary international law, Canadian law and the WTO rulings were '*displaced*' by the specific terms of the NAFTA.⁹⁹⁰ The ILC (Draft) Articles could not apply as the NAFTA represented a *lex specialis* (under ILC Article 55) and Canada Post had not been empowered by Canadian law to exercise '*elements of the governmental authority*.'⁹⁹¹ The Tribunal concluded that the '*residual law reflected in*' the ILC (Draft) Articles did not apply under the circumstances of the case and the rules of NAFTA Chapters 11 and 15 '*governed*' the case.⁹⁹² The Tribunal was careful in distinguishing the NAFTA from the GATT at the WTO. The provisions of the GATT considered in the case *Canada-Periodicals*, it determined, do not make any distinction '*as NAFTA Chapters 11 and 15 plainly and carefully do, between organs of State of a standard type (like the Canadian Post Office before 1981) and various other forms of State enterprises*.'⁹⁹³ It concluded that the actions by Canada Post were not in general attributable to Canada as a Party to the NAFTA.⁹⁹⁴

Even a superficial reading of the arbitral tribunals' decisions cited above makes it safe to reject the criticism that the investment arbitration systems does not take into consideration duly other rules of international law, including human rights. This criticism, though meaningful as it might appear, seems somehow simplistic. It certainly touches upon a sensitive nerve of the international investment arbitration system, but it might pose the wrong question, wrapping altogether a number of different points. Procedurally, investment tribunals have limited mandate and jurisdiction and any criticism on them which does not target concurrently or principally those international actors which shape the international investment dispute settlement system (states, primarily) might miss the point. A similar situation emerges substantively. Without buying too easily the theory of the fragmentation of international law into different, isolated branches,⁹⁹⁵ one might wonder whether an international human rights court would apply an investment treaty to a dispute or whether it would limit itself to applying the direct source of its jurisdiction (such as the European Convention on Human Rights) as applicable law. Moreover, while it should be established whether any other rule of international law has a real importance for the question that an investment tribunal is faced with in practice, the shape of the claims and arguments of the parties play a key role in making the application of other rules of international law acceptable or not. It appears safe to conclude that investment tribunals have not been completely oblivious of these international instruments, though their bearing clearly changes according to the specific facts of each case.

III.5.B. Investment Arbitral Tribunals, Standing Adjudicative Bodies and Cultural Heritage-Related Disputes: A Viable Solution?

⁹⁹⁰ *Ibid.*, para.54.

⁹⁹¹ *Ibid.*, para.56.

⁹⁹² *Ibid.*, paras.59, 63.

⁹⁹³ *Ibid.*, para.61.

⁹⁹⁴ *Ibid.*, para.62.

⁹⁹⁵ P.-M. Dupuy, *Unification Rather Than Fragmentation of International Law? The Case of International Investment Law and Human Rights Law*, *Op. Cit.*, p.61.

By stressing that investment arbitral tribunals' powers depend on the mandate disputing parties have entrusted them with,⁹⁹⁶ the Tribunals in *Bernard von Pezold and others v. Zimbabwe* and *Grand River Six Nations v. The United States*, referred to in the previous sub-chapter, addressed an inherent and yet extremely contentious problem of the international investment dispute settlement system. Provocatively, based on the *ad hoc* jurisdiction nature of investment arbitral tribunals, an eminent scholar has recently questioned the possibility to reach consistency in the interpretation of substantive investment rules.⁹⁹⁷ The result of the multiplicity of treaties which, though similar, should be interpreted individually and differently according to the international customary law rules on treaty interpretation, and of the multiplicity of *ad hoc* investment arbitral tribunals created with regard to specific treaties and matters 'is that decisions in investor-state disputes are a true "wilderness of single instances"'.⁹⁹⁸

These remarks show the magnitude of the problem that the *ad hoc* nature of arbitral investment tribunals generates. As shown, some perceive the question of the limited mandate and jurisdiction only in respect of the difficult applicability of other international law rules (such as human rights and international cultural heritage rules) in investment arbitration. However, this point affects the existence and legitimacy of international investment law itself. As such, it has pushed for the questioning of the existing system from inside, with investment law scholars and practitioners alike trying to address this criticism, and has made investment tribunals often face an 'existential dilemma.' As a case in point, in *Glamis Gold*, the Arbitral Tribunal did not shy away from the question of the difference between standing adjudicatory bodies and *ad hoc* arbitral tribunals. The Tribunal considered that its mandate was 'similar to the case-specific mandate ordinarily found in international commercial arbitration.'⁹⁹⁹ Of course, arbitral tribunals created under the NAFTA are not standing bodies:

*'Unlike a standing adjudicative body which addresses multiple disputes (for example, the Iran-United States Claims Tribunal which addressed several thousand disputes arising out of the 1979 Iranian Revolution), an arbitral panel that is focused on a particular dispute is not confronted with the possibility that it will need to apply an earlier decision in a later proceeding. Likewise, an arbitral tribunal is not confronted with the task of reconciling its later decisions with its earlier ones. Notwithstanding the likelihood that numerous arbitrations would arise under Chapter 11 of the NAFTA, the three states of North America did not establish a standing adjudicative body but rather chose to have arbitrations resolved by distinct arbitral panels. In this sense, it is clear that this Tribunal is asked to have a case-specific focus as it proceeds to address this dispute.'*¹⁰⁰⁰

⁹⁹⁶ *Ibid.*, para.61.

⁹⁹⁷ Y. Banifatemi, *Consistency in the Interpretation of Substantive Investment Rules: Is It Achievable?*, in R. Ehandi, P.Sauvé (eds.), *Prospects in International Investment Law and Policy*, (Cambridge University Press: 2013, U.K.).

⁹⁹⁸ *Ibid.*, p.204.

⁹⁹⁹ *Glamis Gold, Ltd. v. United States of America*, Award, *Op. Cit.*, para.3.

¹⁰⁰⁰ *Id.*

However, since the NAFTA contains a public system for the protection of private investments, whose integrity is ensured by the multitude of arbitral tribunals created in each case, 'Chapter 11 system as a whole requires a modicum of awareness of each of these tribunals for each other and the system as a whole.'¹⁰⁰¹ The Tribunal laid emphasis on the systemic implications of its decisions, pointing out that '[a] case-specific mandate is not license to ignore systemic implications. To the contrary, it arguably makes it all the more important that each tribunal renders its case-specific decision with sensitivity to the position of future tribunals and an awareness of other systemic implications.'¹⁰⁰²

Clearly enough, the limited jurisdiction and the *ad hoc* nature of investment arbitral tribunals is a feature shared also by commercial arbitral tribunals. This explains why investment arbitral tribunals make sometimes reference to commercial arbitration case law in order to support their conclusions where problems common to both types of arbitration emerge. The Arbitral Tribunal in *Charles Lemire v. Ukraine* drew on the similarities between international commercial and investment arbitration to resolve the interpretative doubts concerning an imprecise arbitration clause.¹⁰⁰³ As mentioned above, in the specific case, a settlement agreement had been 'transformed' into an award for the explicit purpose to make the settlement agreement enforceable through the New York Convention. The award however reiterated that any dispute arising from, or in connection with, the settlement agreement should have been resolved through arbitration.¹⁰⁰⁴ The dispute settlement clause in the agreement/award referred however to the ICSID Additional Facility Rules, rather than the ICSID Convention, since only the Rules were applicable at the time when the settlement agreement was signed, as at that time the ICSID Convention had not yet entered into force in, and for, Ukraine.¹⁰⁰⁵ To decide on the matter, the Arbitral Tribunal referred to international commercial arbitration:

*'Imprecise arbitration clauses are a frequent occurrence in commercial arbitration. They must be interpreted by the arbitrators, in order to restore the true intention of the parties, distorted by the parties' ignorance of the mechanics of arbitration, error in designating the correct institution or rules, or, as here, supervening legal developments. [...] In our case, the true intent of the parties is very clear: the Arbitration Clause explicitly says that "either party may address to ICSID its application for the settlement" of the dispute. The very wording of the Arbitration Clause evidences the parties' wish that disputes arising from the Settlement Agreement be settled through arbitration administered by ICSID, and not through any other dispute settlement mechanism, nor by any national Court.'*¹⁰⁰⁶

The parties, the Tribunal concluded, had been clear on the preferred dispute settlement mechanism, and since the ICSID Additional Facility Rules were no longer available

¹⁰⁰¹ *Ibid.*, para.5.

¹⁰⁰² *Ibid.*, para.6.

¹⁰⁰³ *Joseph Charles Lemire v. Ukraine, Decision on Jurisdiction and Liability, Op. Cit.*

¹⁰⁰⁴ *Ibid.*, para.71.

¹⁰⁰⁵ *Ibid.*, paras.75.

¹⁰⁰⁶ *Ibid.*, paras.80-81.

and had been superseded by the ICSID Convention, the Tribunal concluded, the ICSID Convention had to be applied.¹⁰⁰⁷

Two relevant points stand out from the Tribunal's considerations. First, investment arbitral tribunals do not appear to take lightly their role and any statement or ruling is informed by careful reflections on the systemic consequences stemming from them. One-sided as they may appear sometime, these tribunals are well aware of the international law context they act within. Second, though commercial arbitration is one dispute settlement mechanism often resorted to resolve cultural property and property-related disputes,¹⁰⁰⁸ investment arbitral tribunals appear to have referred to commercial arbitration only when a comparable procedural question arose. Though of course investment arbitral tribunals are not standing adjudicatory bodies such as the ICJ, as further discussed in the conclusions of this work, they appear suitable to resolve cultural heritage and cultural heritage-related disputes. The problems concerning the consistency of their jurisprudence or their limited mandate are not to be overlooked. But other international courts and tribunals, general or specific alike, also feature advantages and drawbacks. No international dispute settlement system is perfect and, in this context, investment arbitral tribunals are more efficient than what they might look like at first glance.

III.5.C. The Double Value of Cultural Heritage: Can Cultural Heritage Represent an Investment?

As mentioned at the outset of this research work, the double value, economic and cultural, of cultural heritage has raised several concerns with regard to the international status and regulation of heritage. This has undoubtedly resulted in a number of debates in both international investment law and international cultural heritage law *fora*. In order to strike what some states perceived as a necessary, appropriate balance between the economic and cultural values, the 2005 UNESCO Convention on Cultural Diversity was negotiated and adopted.¹⁰⁰⁹ The 2005 UNESCO Convention clarifies in its preamble that '*cultural activities, goods and services have both an economic and a cultural nature, because they convey identities, values and meanings, and must therefore not be treated as solely having commercial value*'.¹⁰¹⁰ This Convention has been negotiated with an eye to, and in clear relation with, the liberalization of trade in services at the WTO. Whether the 2005 UNESCO Convention and the

¹⁰⁰⁷ *Ibid.*, paras.82.

¹⁰⁰⁸ E. Varner, *Arbitrating Cultural Property Disputes*, Cardozo Journal of Dispute Resolution Vol.13, (2012); M.-A. J. Renold, *Arbitration and Mediation as Alternative Resolution Mechanisms in Disputes Relating to the Restitution of Cultural Property*, *Op. Cit.*; I. Barker, *Thoughts of an Alternative Dispute Resolution Practitioner on an International ADR Regime for Repatriation of Cultural Property and Works of Art*, in B. T. Hoffman (Ed.), *Art and Cultural Heritage – Law, Policy and Practice*, (Cambridge University Press: 2006, U.S.).

¹⁰⁰⁹ *Convention on the Protection and Promotion of the Diversity of Cultural Expressions*, *Op. Cit.*

¹⁰¹⁰ *Preamble of the Convention on the Protection and Promotion of the Diversity of Cultural Expressions*, *Op. Cit.*

GATS at the WTO are conflicting or can be complementary is still subject to debate.¹⁰¹¹ However, the purpose of the Convention, aiming at allowing signatories to '*formulate and implement their cultural policies and to adopt measures to protect and promote the diversity of cultural expressions*',¹⁰¹² appears as a clear recognition of the need to find a compromise between cultural and economic value of cultural goods and services, and hence of heritage in general. The need to 'reinstate' their cultural value has been the driving force of the negotiation and adoption of the Convention. This idea that culture and cultural heritage have an important economic value is concurrently the bedrock of UNESCO's support to the view that, notwithstanding the absence of cultural heritage from mainstream debates on sustainable development, cultural heritage has a great potential to contribute, among others, to economic goals.¹⁰¹³

These remarks might however appear under a new light if considered against the case law of investment arbitral tribunals. In *MHS. V. Malaysia*, MHS had contended that its performance under the contract was an 'investment' protected under the Malaysia-United Kingdom BIT, which covered '*every kind of asset*' including '*claims to money or to any performance under contract, having financial value*' and '*business concessions conferred by the law and or under contract, including concessions to search for, cultivate, extract or exploit natural resources*,' and that it was an '*approved project*' under Article 1(b)(ii) of the relevant BIT.¹⁰¹⁴ MHS claimed that Malaysia had violated several of its obligations under the relevant BIT, such as those concerning the protection of investment and expropriation.¹⁰¹⁵ In turn, Malaysia objected to the jurisdiction of the Arbitral Tribunal under the ICSID Convention on several grounds and, namely, that the dispute between the parties did not concern an 'investment' nor an 'approved project' under the relevant BIT and that in fact the subject matter of this dispute was purely contractual in nature and had been already settled.¹⁰¹⁶ As the Arbitral Tribunal observed, any one of the jurisdictional objections raised by Malaysia would have been sufficient to deny MHS' relief, if upheld.¹⁰¹⁷

The first jurisdictional objection addressed by the Arbitral Tribunal centered on the issue of the existence of an 'investment' under both the Malaysia-UK BIT and Article 25 (1) of the ICSID Convention, a two-stage approach necessary for the jurisdiction of the Arbitral Tribunal to be established.¹⁰¹⁸ *Inter alia*, Malaysia had submitted that the contract between the parties had been entered into '*for the sole purpose of archeological interest and the study of historical heritage*.'¹⁰¹⁹ The ICSID Convention does not define the term 'investment' and,

¹⁰¹¹ L. Gómez Bustos, P. Sauvé, *¿Una Historia de Dos Soledades? La Convención de la UNESCO Sobre Diversidad Cultural y el Derecho de la OMC*, in R. Bouzas (Ed.), *Después de Doha: la agenda emergente del sistema de comercio internacional*, (Marcial Pons Editores: Madrid, 2007).

¹⁰¹² Article 5 of the *Convention on the Protection and Promotion of the Diversity of Cultural Expressions*, *Op. Cit.*

¹⁰¹³ UNESCO, *World Heritage and Sustainable Development*, available at <http://whc.unesco.org/en/sustainabledevelopment/>.

¹⁰¹⁴ *Malaysian Historical Salvors SDN, BHD v. The Government of Malaysia*, Award on Jurisdiction, *Op. Cit.*, paras.38-39.

¹⁰¹⁵ *Ibid.*, para.40.

¹⁰¹⁶ *Ibid.*, para.41 (41-41.4).

¹⁰¹⁷ *Ibid.*, para.42.

¹⁰¹⁸ *Ibid.*, para.43, 54-55.

¹⁰¹⁹ *Ibid.*, para.47 (a).

though ICSID arbitral tribunals' decision lack precedential effect, a number of previous cases might have assisted the Tribunal in clarifying this issue.¹⁰²⁰ To understand whether the contract at hand fell under the concept of 'investment' in Article 25 (1) of the ICSID Convention, the Tribunal, resorting to Article 31 of the VCLT, concluded that the word 'investment' had to be interpreted '*so as to encourage, facilitate and to promote cross-border economic cooperation and development.*'¹⁰²¹ To support its stance, the Tribunal further recalled that Paragraph 9 of the Report of the Executive Directors on the ICSID Convention had been interpreted by Prof. Schreuer, a leading scholar in the field, to show that the object and purpose of the Convention indicated a positive impact on development.¹⁰²² The Arbitral Tribunal hence found that '*[a]ccordingly, the term 'investment' should be interpreted as an activity which promotes some form of positive economic development for the host State.*'¹⁰²³

In the Tribunal's view, an analysis of the relevant case law revealed the existence of two main approaches adopted by investment tribunals on the definition of 'investment'.¹⁰²⁴ Under what the Tribunal called the '*typical characteristics approach,*' there are certain typical characteristics which do not have to be all necessarily present at the same time for an operation to qualify as an 'investment' under the Convention. These elements are a certain duration, a certain regularity of profit and return, a risk assumed by both sides, a substantial commitment of resources and a contribution to the host state's development.¹⁰²⁵ Under the '*jurisdictional approach,*' these elements are to be intended as necessary jurisdictional requirements, the absence of (even one of) which makes it impossible for an operation to be qualified as a protected investment.¹⁰²⁶ The Arbitral Tribunal eventually cautioned on the fact that the differences between the two approaches are rather '*academic*' and in practice, no difference in the analysis performed on any operation would have made '*any significant difference to the ultimate finding of the tribunal.*'¹⁰²⁷

Once established what it thought to be the general trends in investment case law concerning the definition of 'investment,' the Tribunal adopted a '*fact-specific and holistic approach*' to assess the maritime salvage contract in the case at hand.¹⁰²⁸ First, the Tribunal determined that the regularity of profits or returns was lacking, though this was not decisive, as proved by investments of pharmaceutical companies.¹⁰²⁹ Second, the contribution in money and industry was common under commercial salvage contracts and was not comparable to that of other relevant cases.¹⁰³⁰ Third, the original duration of the contract was of 18 months and its final duration (4 years), though falling under the common timespan of two to five years for investments, was only fortuitous as it was based on MHS capacity to find

¹⁰²⁰ *Ibid.*, para.56.

¹⁰²¹ *Ibid.*, paras.65-66.

¹⁰²² *Ibid.*, paras.66-67.

¹⁰²³ *Ibid.*, para.68.

¹⁰²⁴ *Ibid.*, paras.69 ff.

¹⁰²⁵ *Ibid.*, paras.44, 70; quoting at para.40 C. H. Schreuer, *The ICSID Convention: A Commentary*, (Cambridge University Press: 2001, U.K.), p.140.

¹⁰²⁶ *Ibid.*, para.70.

¹⁰²⁷ *Ibid.*, para.105.

¹⁰²⁸ *Ibid.*, para.107.

¹⁰²⁹ *Ibid.*, para.108.

¹⁰³⁰ *Ibid.*, para.109.

the vessel (hence ‘quantitatively’ satisfactory but not ‘quantitatively’ for the Tribunal).¹⁰³¹ Fourth, the ‘fortuitous’ duration of the contract had to be connected to the contribution to the host state development since *‘the longer the duration, the greater the economic commitment,’* and this was missing in the case at hand.¹⁰³² Fifth, since salvage contracts are commonly on a ‘no finds- no pays’ basis, the assumption of risk by MHS was inherent in the transaction as a normal commercial risk (thus again ‘quantitatively’ satisfactory but not ‘qualitatively’ for the Tribunal).¹⁰³³

Laying emphasis on the element of the contribution to the host State’s development, the Tribunal determined that the case law analyzed *‘swings in favor of requiring a significant contribution to be made to the host State’s economy. Were there not the requirement of significance, any contract which enhances the Gross Domestic Product of an economy by any amount, however small, would qualify as an “investment”.*¹⁰³⁴ In addition, in the case at hand, given the lack of the other elements (some were only ‘quantitatively’ present), the element of the contribution was decisive to determine whether an ‘investment’, and hence the jurisdiction of the Tribunal, existed.¹⁰³⁵ Any contract makes an economic contribution to the place where it is performed but, in this case, the first concerning a marine salvage claim, the contract was not a *‘readily recognizable investment’*:¹⁰³⁶

*‘Unlike the construction contract in Salini which, when completed, constituted an infrastructure that would benefit the Moroccan economy and serve the Moroccan public interest, the Tribunal finds that the contract did not benefit the Malaysian public interest in a material way or serve the Malaysian economy in the sense developed by ICSID jurisprudence, namely that the contributions were significant.’*¹⁰³⁷

The Tribunal concluded that the contract had not made any significant contribution to the economic development of Malaysia.¹⁰³⁸ This conclusion was reached notwithstanding MHS claims that it had employed Malaysian people and imparted them valuable knowledge and know-how on historical marine salvage, thus providing *‘gainful employment to Malaysians’* and benefitting the *‘Malaysian public interest and economy to some extent.’*¹⁰³⁹ For the Tribunal:

‘[...] this benefit is not of the same quality or quantity envisaged in previous ICSID jurisprudence. The benefits which the contract brought to the Respondent are largely cultural and historical. These benefits, and any other direct financial benefits to the

¹⁰³¹ *Ibid.*, paras.110-111.

¹⁰³² *Ibid.*, paras.111, 113-145.

¹⁰³³ *Ibid.*, para.112.

¹⁰³⁴ *Ibid.*, para.123.

¹⁰³⁵ *Id.*

¹⁰³⁶ *Ibid.*, paras.125, 129.

¹⁰³⁷ *Ibid.*, para.131.

¹⁰³⁸ *Ibid.*, para.143.

¹⁰³⁹ *Ibid.*, para.132.

*Respondent, have not been shown to have led to significant contributions to the Respondent's economy in the sense envisaged in ICSID jurisprudence.'*¹⁰⁴⁰

Valuable knowledge and know-how had been imparted to the local population on historical marine salvage, hence benefitting Malaysia museums, and international attention had been drawn on it as an attractive location for historical and archaeological reasons, thus determining revenue-generating tourism.¹⁰⁴¹ In addition, the contract, MHS had argued, had contributed over US\$1 million in cash to the Malaysia treasury.¹⁰⁴² In dismissing MHS' arguments, the Tribunal also considered irrelevant the fact that contract was the largest ever made within the historical marine salvage industry: to determine whether there is an investment '*the litmus test must be its overall contribution to the economy of the host State, Malaysia.*'¹⁰⁴³ Since it found that no 'investment' under Article 25 (1) of the ICSID Convention existed and that consequently it had not jurisdiction, the Tribunal established that there was no need to assess whether the contract was an 'investment' under the Malaysia-United Kingdom BIT.¹⁰⁴⁴ The Center had no jurisdiction on the case under discussion, and the Tribunal had no competence to consider MHS' claims.¹⁰⁴⁵

The Tribunal decision in itself might be sufficient to entirely rediscuss the idea that culture and cultural heritage have an economic value and that they actively contribute to states' development. The case however proceeded further. After the issuance of the Award on Jurisdiction, MHS applied for its annulment under Article 52 (1) (b) of the ICSID Convention claiming that the Arbitral Tribunal had manifestly exceeded its powers by failing to exercise the jurisdiction it was endowed with over the dispute under the ICSID Convention and by the terms of the Malaysia-U.K. BIT.¹⁰⁴⁶ Before the *Ad hoc* Committee MHS based its claim on three main arguments. First, it claimed that the Arbitral Tribunal had applied an '*overly-restrictive definition of the term investment.*'¹⁰⁴⁷ Applying the VCLT and resorting to the ordinary meaning of the term 'investment' and the ICSID Convention's *travaux préparatoires*, the Tribunal had to conclude that 'investment' under Article 25 (1) of the ICSID Convention is a '*broad and inclusive concept*' and great weight had to be ascribed to the intentions of the parties to the BIT.¹⁰⁴⁸ Second, the Tribunal had turned a characteristics-based test on 'investment' into a (compulsory) jurisdictional-conditions one.¹⁰⁴⁹ This had no support in the ICSID Convention nor in the ordinary meaning of the term 'investment' and the ICSID Conventions' *travaux préparatoires*.¹⁰⁵⁰ On this point, MHS also contended that the Tribunal had established that an 'investment' must contribute to the economic development of the host state drawing it from its interpretation of the *Preamble* of the ICSID Convention which in turn

¹⁰⁴⁰ *Id.*

¹⁰⁴¹ *Ibid.*, para.133.

¹⁰⁴² *Id.*

¹⁰⁴³ *Ibid.*, para.135.

¹⁰⁴⁴ *Ibid.*, paras.146-147.

¹⁰⁴⁵ *Ibid.*, para.151.

¹⁰⁴⁶ *Malaysian Historical Salvors SDN, BHD v. The Government of Malaysia*, Decision on the Application for Annulment, *Op. Cit.*, para.1.

¹⁰⁴⁷ *Ibid.*, para.28.

¹⁰⁴⁸ *Id.*

¹⁰⁴⁹ *Ibid.*, para.29.

¹⁰⁵⁰ *Id.*

simply reflects the desirability of such contribution, as later indicated in the Award in *Pey Casado v. Chili*.¹⁰⁵¹ Finally, MHS argued that the Tribunal had erred in requiring that, even adopting a characteristic-conditions test, these characteristics be present both quantitatively and qualitatively for an 'investment' to be existent, making confusion among these elements and erring in its assessment.¹⁰⁵² On these characteristics, MHS argued that the '*contribution to the economic development of the host State*' is not supported by the text of the ICSID Convention and that the Tribunal had further arbitrarily imposed that such a contribution be '*substantial*' or '*significant*.'¹⁰⁵³ The Tribunal should have taken into account the broad definition of investment under the Malaysia-U.K. BIT, a definition which in turn governs the scope of an investment under Article 25 (1) of the ICSID Convention.¹⁰⁵⁴ For all these reasons, MHS claimed that the Tribunal had exceeded its powers and a '*wrong jurisdictional holding is by its nature manifest*.'¹⁰⁵⁵

On its part, Malaysia asked the *ad hoc* Committee to reject MHS's request for annulment of the award in its entirety.¹⁰⁵⁶ Malaysia's arguments were based on the view that an 'investment' under Article 25 (1) of the ICSID Convention has to contribute to the host state development, that the Tribunal had not manifestly exceeded its powers and that MHS had misrepresented the case and had not requested an annulment but an appeal.¹⁰⁵⁷

The *ad hoc* Committee pointed at the outset that the definition of 'investment' under (article 1 of) the Malaysia - U.K. BIT was broad and encompassed the contract between MHS and Malaysia.¹⁰⁵⁸ The *Ad hoc* Committee further stressed that it could not understand how the Sole Arbitrator/Arbitral Tribunal had concluded that the contract was not an 'investment.'¹⁰⁵⁹ Under Article 7 of the relevant BIT, recourse to ICSID arbitration was practically the only dispute settlement option available to the parties and this meant that, in the absence of jurisdiction under the ICSID Convention, the investor was left without any international recourse options.¹⁰⁶⁰ This result would have been difficult to reconcile with the intentions of Malaysia and the U.K. which had in mind a comprehensive definition of investment as reflected in the text of the BIT.¹⁰⁶¹ Indeed, the *Ad hoc* Committee proceeded, the term 'investment' was deliberately left undefined in the ICSID Convention and, with certain limits, bilateral and multilateral treaties which today constitute '*the engine of ICSID's effective jurisdiction*,' should inform the definition of 'investment' under the Convention.¹⁰⁶² The Sole Arbitrator/Arbitral Tribunal had committed a gross error that gave rise to a manifest failure to exercise jurisdiction when he did not consider and apply the definition of investment under the relevant BIT.¹⁰⁶³ Accordingly, the *Ad hoc* Committee concluded that the Sole

¹⁰⁵¹ *Ibid.*, para.30.

¹⁰⁵² *Ibid.*, paras.31-35.

¹⁰⁵³ *Ibid.*, para.36.

¹⁰⁵⁴ *Ibid.*, para.38.

¹⁰⁵⁵ *Ibid.*, para.39.

¹⁰⁵⁶ *Ibid.*, para.43.

¹⁰⁵⁷ *Ibid.*, paras.43-55.

¹⁰⁵⁸ *Ibid.*, paras.58-61.

¹⁰⁵⁹ *Ibid.*, para.61.

¹⁰⁶⁰ *Ibid.*, para.62,

¹⁰⁶¹ *Id.*

¹⁰⁶² *Ibid.*, paras.63-73.

¹⁰⁶³ *Ibid.*, para.74.

Arbitrator/Arbitral Tribunal had manifestly exceeded its powers for three main reasons and it had to annul the arbitral award.¹⁰⁶⁴ The Arbitral Tribunal had failed to consider and apply the Malaysia-U.K. BIT and its broad definition of ‘investment.’¹⁰⁶⁵ It had elevated certain criteria, which it found to bear upon the interpretation of Article 25 (1) of the ICSID Convention, to jurisdictional conditions and ‘*exigently interpreted the alleged condition of a contribution to the economic development of the host state so as to exclude small contributions, and contributions of a cultural and historical nature.*’¹⁰⁶⁶ It had failed to take into consideration the *travaux préparatoires* of the ICSID Convention and, notably, the decisions of the drafters to leave the term ‘investment’ undefined and ‘*to accord great weight to the definition of investment agreed by the Parties in the instrument providing for recourse to ICSID.*’¹⁰⁶⁷ Thus, the *Ad hoc* Committee considered that contributions of a cultural and historical nature were in fact relevant. Being its decision an annulment one, it remains to be seen how a new investment arbitral tribunal would deal with the same questions. Yet, an investor, be it an individual or a company, needs a lot of financial resources to start from scratch a new arbitral proceedings in order for a foreign investor such as MHS to obtain ‘justice.’ On this line, the Sole Arbitrator/Arbitral Tribunal in *MHS v. Malaysia* will not be the first nor the last arbitral tribunal adopting a restrictive definitions of protected ‘investment.’ As a case in point, in *Romak v. Uzbekistan*, the Tribunal rejected the claimant’s argument that a whet supply contract and an award obtained under the auspices of the Grain and Feed Trade Association (GAFTA) constituted a protected ‘investment’ under the Switzerland-Uzbekistan BIT, and that the ‘*definition of “investment” in UNCITRAL proceedings (i.e., under the BIT alone) is wider than in ICSID arbitration.*’¹⁰⁶⁸ Though one might agree or not with the Tribunal’s conclusions, the underlying concern of the Tribunal, which is certainly present in every arbitral tribunal’s decision, appears understandable:

[...] the approach that Romak advances would mean that every contract entered into between a Swiss national and a State entity of Uzbekistan (regardless of the nature and the object of the contract), as well as every award or judgment in favor of a Swiss national (irrespective of the nature of the underlying transaction), would constitute an investment under the BIT. This in turn would mean that, by entering into the BIT, Switzerland and Uzbekistan have renounced, in respect of every contract entered into with a national of the other Contracting Party, the application of domestic (or the chosen governing) law, and surrendered the jurisdiction of their own domestic courts (or the chosen dispute-resolution forum), even if the contract is a simple one-off sales transactions.’¹⁰⁶⁹

¹⁰⁶⁴ *Ibid.*, para.81.

¹⁰⁶⁵ *Ibid.*, para.80.

¹⁰⁶⁶ *Id.*

¹⁰⁶⁷ *Id.*

¹⁰⁶⁸ *Romak S.A. v. The Republic of Uzbekistan*, PCA Case No.AA280, Award, 26 November 2009, paras.193-194, 242-243.

¹⁰⁶⁹ *Ibid.*, para.187.

Even having this legitimate concerns in mind, the decision of the Arbitral Tribunal in *MHS v. Malaysia* seems unacceptable. And indeed, besides being annulled by the *Ad hoc* Committee, the decision was later ‘contradicted’ by the Award in *Pey Casado v. Chile*, though the context of this second case was very different from the former. In *Pey Casado v. Chile*, the parties disagreed over the existence of an ‘investment,’ over the nationality of the foreign investor and over the consent to investment arbitration allegedly given by Chile.¹⁰⁷⁰ The Tribunal first pointed that the question of the nationality of the investor and of the existence of an ‘investment’ are not necessarily to be assessed in the same way under the ICSID Convention and under the relevant BIT.¹⁰⁷¹ Though previous decisions of ICSID tribunals were not binding, the Tribunal would have taken them into account in the absence of any contrary ‘*imperious reason*.’¹⁰⁷² The Tribunal then turned to the question of whether Mr. Pey Casado was the real owner of the assets in dispute, on which the Parties had focused on,¹⁰⁷³ and concluded that Mr. Pey Casado had acquired, and was the real owner of, the companies at hand (CPP S.A. and EPC Ltda.).¹⁰⁷⁴ This acquisition qualified as an ‘investment’ under the ICSID Convention.¹⁰⁷⁵ In the lack of a definition of ‘investment’ in the ICSID Convention and taking into account that ICSID tribunals’ decisions swung between the existence of general characteristics of an ‘investment’ and the existence of specific requirements for an ‘investment’ to exist, the Tribunal clarified that following the ICSID Convention an ‘investment’ exists once certain requirements are met.¹⁰⁷⁶ This did not mean to overlook that ICSID Tribunals have also diverged on whether three requirements (a contribution in the host state, a certain duration in time for this contribution and a certain risk for those making the contribution) or four requirements (the previous three plus the contribution to the development of the host state) should be present for an ‘investment’ to exist.¹⁰⁷⁷

The Tribunal decided in favor fo the three-requirement test, highlighting that a contribution to the host state development is a consequence rather than a requirement for an ‘investment’ to exist since when the ICSID Conventions favors investments, in reality it favors host states development.¹⁰⁷⁸ It further found that all three requirements of an ‘investment’ were met in the case at hand: Mr. Pey Casado had contributed financially and provided the companies with management work and his personal knowledge as an engineer; Mr. Pey Casado’s investment was made for an indefinite period of time; notwithstanding the wide diffusion of the newspaper *El Clarín*, its acquisition and exploitation entailed a risk, also in the

¹⁰⁷⁰ *Pey Casado y Fundacion Presidente Allende c. Republica de Chile*, Award, *Op. Cit.*, para.117; Further arguments by the Chilean Government focused on the non-retroactive effect of the relevant BIT (*Acuerdo entre el Reino de España y la República de Chile para la Protección y Fomento Recíprocos de Inversiones* de 2 de octubre de 1991) with regard to issues happened before its entry into force, on the lack of amiable consultations (*‘consultas amistosas’*) between the Fundación Presidente Allende and the Chilean Government, and that the claimants had already resorted to Chilean courts hence renouncing to the possibility to resort to international jurisdiction, *Ibid.*, para.12.

¹⁰⁷¹ *Ibid.*, para.118.

¹⁰⁷² *Ibid.*, para.119.

¹⁰⁷³ *Ibid.*, para.152.

¹⁰⁷⁴ *Ibid.*, paras.180 ff.

¹⁰⁷⁵ *Ibid.*, paras.231-232.

¹⁰⁷⁶ *Id.*

¹⁰⁷⁷ *Ibid.*, para.231.

¹⁰⁷⁸ *Ibid.*, para.232.

light of the economic and political context of the time.¹⁰⁷⁹ But the decision of the Arbitral Tribunal stands in some way even more in stark contrast with *MHS v. Malaysia* with regard to the Tribunal's (shortly reasoned, but still significant) position on the possibility for culture to contribute to the development of the host state. Though it stressed that the contribution to the host state development was not required for an 'investment' to exist, the Tribunal considered that this element was nonetheless existent in the case at hand:

*'Si bien estima que la contribución al desarrollo del Estado receptor no es un requisito, el Tribunal considera, a mayor abundamiento, que en todo caso estaría satisfecho en el caso concreto. La adquisición y la expansión del diario 'El Clarín', cuya tirada era, según las personalidades de la época, la más importante del país, contribuyó sin duda alguna al progreso económico, social y cultural del país.'*¹⁰⁸⁰

Moreover, some of Mr. Pey Casado's shares had been also transferred to the Fundación Presidente Allende.¹⁰⁸¹ Though the Fundación had been created with the purpose of obtaining compensation for the damages suffered from the coming to power in Chile of the military regime of General Pinochet, from its creation the Fundación had carried several judicial, political and cultural activities, such as:¹⁰⁸²

*'Intervención ante el Parlamento Europeo en relación con las confiscaciones bajo el régimen militar con ocasión del acuerdo marco suscrito entre la CEE y Chile; asignación de becas a los estudiantes chilenos residentes en España; defensa de las víctimas de cualquier nacionalidad del régimen instaurado a raíz del golpe de Estado; acciones judiciales en Europa en el "caso Pinochet"; actuaciones ante el Parlamento Español con vistas a la restitución de los bienes confiscados; etc.'*¹⁰⁸³

And all these activities with the explicit purpose to promote human rights and, *inter alia*, cultural rights.¹⁰⁸⁴ The Tribunal concluded that it had jurisdiction with regard to the Fundación Presidente Allende's claims (reaching the same conclusion on the application *ratione temporis* of the BIT as for Mr. Pey Casado's claims)¹⁰⁸⁵ both under Article 25 of the ICSID Convention and under the relevant BIT.¹⁰⁸⁶

These cases shed light on some matters which deserves further attention. They show indeed that the debate over the double value and meaning of culture and cultural heritage is far from being exhausted. Also, the debate is not theoretical: the recognition of both values might have, as shown, relevant consequences in practice. Further, these cases show how useful and positive the relationship between international investment law and cultural heritage can be: as for foreign investments in other sectors, foreign investments 'in' cultural

¹⁰⁷⁹ *Ibid.*, para.233.

¹⁰⁸⁰ *Ibid.*, para.234.

¹⁰⁸¹ *Ibid.*, paras.525-537.

¹⁰⁸² *Ibid.*, paras.508-509, Footnote 455.

¹⁰⁸³ *Ibid.*, para.509, footnote 455.

¹⁰⁸⁴ *Ibid.*, paras.503-504.

¹⁰⁸⁵ *Ibid.*, para.567.

¹⁰⁸⁶ *Ibid.*, para.568.

activities and cultural heritage are protected, where certain conditions are met. In this sense, while overemphasizing the economic value of cultural industries at the WTO, and more generally in the context of international trade, has been perceived negatively from a culture and cultural heritage viewpoint, though still not largely discussed in the context of international investment law, it is easy to forecast positive reactions. The perspective seems reversed and a fundamental difference between international trade and investment law seems exposed.

III.5.D. The Taking and Expropriation of Cultural and Natural Heritage and Heritage-Related Rights

Following the Communist and Mexican nationalizations and the decolonization process, and the ensuing nationalizations, expropriation has become a classic subject of international law during the 20th century.¹⁰⁸⁷ During the century, direct expropriation (i.e. an outright taking of property by the state, involving a transfer of ownership rights) has appeared to be the principal concern of scholars and practitioners. Recently, indirect expropriation (i.e. involving the total or the near-total deprivation of an investment with no formal transfer of title or outright seizure), has gained more currency.¹⁰⁸⁸ Indeed, the notion of indirect expropriation seems more complex and controversial.¹⁰⁸⁹ Decisions regarding indirect expropriation are often fact-specific and can be fully understood and rationalized only with regard to the specific underlying facts of each case.¹⁰⁹⁰ As a result, in the absence of any detailed, general and comprehensive definition of indirect expropriation, investment tribunals have come out with different standards.

On this line, it is extremely important to understand whether there is a prevailing liability standard for expropriation or, in other words, what is the analysis to be performed to understand whether certain state actions or conducts concerning cultural and/or natural heritage amount to indirect expropriation or to a non-compensable legitimate regulatory taking. Also, in this respect, though as signaled indirect expropriation is much more contentious than direct expropriation, there exist still some direct expropriation-related matters, such as the payment and calculation of compensation, which are subject to debate. The answer to any of these questions might in fact make the difference between successful cultural policies and unsuccessful ones. And investment tribunals have dealt with them in a number of cases.

¹⁰⁸⁷ A. Reinisch, *Expropriation*, in P. Muchlinski, F. Ortino, C. Schreuer, *The Handbook of International Investment Law*, (Oxford University press: 2008, U.K.), p.407.

¹⁰⁸⁸ UNCTAD, *Expropriation*, UNCTAD Series on Issues in International Investment Agreements II, (United Nations: 2012, New York/Geneva), p.1-2,7.

¹⁰⁸⁹ J. Waincymer, *Balancing Property Rights and Human Rights in Expropriation*, in P.-M. Dupuy, F. Francioni, E.-U. Petersmann (Eds.), *Human Rights in International Investment Law and Arbitration*, (Oxford University Press: 2009, U.K.), p.290 ff.

¹⁰⁹⁰ A. Reinisch, *Op. Cit.*, p.426.

In *SPP v. Egypt*, the main question of the dispute was the cancellation of the tourist residence development project and the lawfulness of the cancellation measures adopted by Egypt. Egypt, the Tribunal determined, was entitled to cancel the tourist development project on its own territory for a public purpose, that is to protect antiquities.¹⁰⁹¹ SPP and SPP (ME) had not challenged this right, but only that the cancellation amounted to an expropriation of their investment for which they were entitled to compensation both under Egyptian law and international law.¹⁰⁹² Compensation was indeed granted under Article 34 of the Egyptian Constitution, with not exception where antiquities were involved.¹⁰⁹³ Thus, it is worth noting already that the explicit provisions in the applicable Egyptian law regarding compensation reduced the scope of any debate on expropriation for public purpose/protection of antiquities. In fact, under Article 11 of the Egyptian Law No.215 of 1951 for the Protection of Monuments and Antiquities:

*'In the case of accidental discovery of an Antiquity by an individual or an entity, the competent department has the duty to take the measures necessary for its protection and this as of the date of declaration of the Discovery; within two months thereafter it is incumbent on said department either to remove the Antiquity found on private property (and) (or else) to take the necessary measures of expropriation of the site of the object discovered, or to keep it in situ subject to the requirements of registration pursuant to the present law. Compensation for expropriated land shall not take into account the value of the Antiquities.'*¹⁰⁹⁴

Hence, the Egyptian Law stipulated explicitly that the value of the antiquities should not have been factored in the amount of the compensation for the expropriated land. As noted above, the Law already contained precise guidelines on the exclusion of the value of antiquities from the amount of compensation due. This has been a matter of debate for many subsequent investment tribunals, as further discussed below.

One significant point addressed by the Tribunal in *SPP v. Egypt* regarded the possibility of contractual rights to be subject to expropriation. Egypt argued that no compensable taking of SPP and SPP (ME)'s property had taken place and that the claimants' interests affected by the cancellation of Pyramids Oasis Project were contractual or incorporeal rights not susceptible of expropriation.¹⁰⁹⁵ Egypt further contended that these contractual rights had only diminished in value but had not been expropriated and that a compensation had been offered to SPP (ME) to pursue the project in an alternative site.¹⁰⁹⁶ The claimants, on their part, contended that Egypt's arguments ignored economic reality and the cancellation of the Pyramids Oasis Project and the ensuing bad publicity had generated a bad climate of public opinion which had impacted also on international financial markets and on the possibility to

¹⁰⁹¹ *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, Award on the Merits, *Op. Cit.*, para.158.

¹⁰⁹² *Id.*

¹⁰⁹³ *Ibid.*, para.159.

¹⁰⁹⁴ Article 11 of the Egyptian Law No.215 of 1951 for the Protection of Monuments and Antiquities quoted by the Tribunal, *Id.*

¹⁰⁹⁵ *Ibid.*, para.160.

¹⁰⁹⁶ *Id.*

undertake further investments.¹⁰⁹⁷ The Tribunal found that compensation provided for by Egypt was not adequate and the cancellation of the project had had the effect of a taking of SPP (ME) rights and interests (derived, as a shareholder in ETDC, from EGOTH's rights of usufruct irrevocably transferred to ETDC).¹⁰⁹⁸ Though contractual (i.e. not *in rem* rights), these rights were protected under international law since '*there is considerable authority for the proposition that contract rights are entitled to the protection of international law and that the taking of such rights involves an obligation to make compensation therefore*' and '*that contractual rights may be indirectly expropriated.*'¹⁰⁹⁹ The alternative site proposed by Egypt was not suitable for tourist development and, in any case, was not the site originally agreed upon by the parties.¹¹⁰⁰ The claimants had made a substantial investment following their agreements with Egypt, and this latter's cancellation of the Pyramids Oasis project resulted in the expropriation of claimants' investment.¹¹⁰¹ As for the claims related to the second site for the development project on the Mediterranean coast, though this latter had not been canceled, the measures adopted by Egypt made it impossible for the joint venture between EGOTH and SPP (ME) to continue to operate.¹¹⁰² The Tribunal concluded that once paid the compensation fixed in its award, Egypt would have been released from any claim related to the investment project as a whole and SPP and SPP (ME)'s shareholding in ETDC would have been transferred to Egypt.¹¹⁰³ In reaching this conclusion, the Tribunal also rejected Egypt's invocation of the doctrine of the 'mutability' of administrative contracts, i.e. the possibility for public administration to introduce unilateral modifications to an administrative contract or concession or even to put an end to it where certain conditions exist.¹¹⁰⁴ The modifications in the contract cannot go as far as to distort (i.e. unbalance) the contract, and the change in the site would have determined much more than a variation of SPP and SPP (ME) obligations under the contract but '*it would have fundamentally changed the Parties' bargain and the underlying financial assumptions.*'¹¹⁰⁵

Lastly, turning to the quantum of compensation and assessing a number of possible methodologies for the calculation of the amount due, the Tribunal rejected the claimants' discounted cash flow (DCF) method.¹¹⁰⁶ In fact, the claimants' approach factored in the *lucrum cessans*, i.e. the earnings lost for the lot sales in the area projected through the year 1995, while the inscription of the site on the World Heritage List in 1979 would have made lot sales in the area illegal after the date of the inscription.¹¹⁰⁷ This conclusion proves that UNESCO conventions might be taken into consideration by investment tribunals with significant, practical consequences. An application for the annulment of the Award was subsequently filed, but the procedure was subsequently discontinued in 1993.

¹⁰⁹⁷ *Ibid.*, para.161.

¹⁰⁹⁸ *Ibid.*, paras.162-164.

¹⁰⁹⁹ *Ibid.*, paras.164-165.

¹¹⁰⁰ *Ibid.*, para.172.

¹¹⁰¹ *Id.*

¹¹⁰² *Ibid.*, paras.168-169.

¹¹⁰³ *Ibid.*, para.173.

¹¹⁰⁴ *Ibid.*, paras.174-176.

¹¹⁰⁵ *Ibid.*, paras.177-178.

¹¹⁰⁶ *Ibid.*, paras.190 ff.

¹¹⁰⁷ *Id.*

Though factually different, *Parkerings v. Lithuania* also featured a claim of expropriation relating to a contract terminated by the Government of Lithuania following a number of problems and public opinion opposition to the construction and operation of a multi-storey car park in the city center of the old town of Vilnius, a UNESCO world heritage site. Parkerings had contended that by repudiating the agreement with BP, its wholly-owned Lithuanian subsidiary, Lithuania had destroyed the value of BP and of its incorporated company VPK and that the interference of the Lithuanian Government with the agreement had deprived BP of the legal security afforded by the agreement itself.¹¹⁰⁸ Lithuania had replied that the termination of a contract amounts to an expropriation only in limited cases.¹¹⁰⁹ In particular, for this to happen, there must be a wrongful termination (while here the termination was lawful under the terms of the agreement) and there must be no remedy under the contract for the wrongful termination (while the agreement referred to Lithuanian courts).¹¹¹⁰ In addition, the termination must give rise to a substantial deprivation of the investor's enjoyment of the property (while here Parkerings kept controlling BP which, together with VPK continued to develop their activities in Lithuania.)¹¹¹¹

The Tribunal read Article VI of the relevant BIT, which declared that investments '*cannot be expropriated, nationalized or subjected to other measures having a similar effect [...]*,' as expressly contemplating *de facto* expropriation besides formal or direct expropriation.¹¹¹² It found that, if the conditions under Article VI of the relevant BIT had been met (with a public purpose, under domestic legal procedures, in a non-discriminatory manner and against a compensation) the expropriation would have been legitimate and would not have amounted to a violation of the treaty.¹¹¹³ Hence, the Tribunal had first to determine whether an indirect expropriation had occurred and, after, in the case of a positive answer, to assess whether the expropriation was legitimate.¹¹¹⁴ First, the Tribunal noted that a termination of an agreement amounts to an expropriation if the State has acted not only in its capacity of party to the agreement, but also in its capacity of sovereign authority, that is to say using its sovereign power and causing a breach as the result of this action.¹¹¹⁵ A State or its instrumentalities which simply breach an agreement, even grossly, acting as any other contracting party might have done, possibly wrongfully, is therefore not expropriating the other party.¹¹¹⁶ In this case, assuming that the Municipality of Vilnius breached the agreement, there was no evidence that it used its sovereign power in that respect.¹¹¹⁷ Second, a breach of contract is not, in itself, always sufficient for an indirect expropriation to exist under the relevant BIT.¹¹¹⁸ A preliminary determination of the existence of a contractual breach under domestic law (i.e. after the State counter-party has sued the State before a domestic court) is, in most cases, a

¹¹⁰⁸ *Parkerings-Compagniet AS v. Republic of Lithuania*, Award, Op. Cit., para.432.

¹¹⁰⁹ *Ibid.*, para.435.

¹¹¹⁰ *Ibid.*, paras.435-436.

¹¹¹¹ *Id.*

¹¹¹² *Ibid.*, paras.431, 437.

¹¹¹³ *Ibid.*, para.441.

¹¹¹⁴ *Ibid.*, para.442.

¹¹¹⁵ *Ibid.*, para.443.

¹¹¹⁶ *Id.*

¹¹¹⁷ *Ibid.*, para.445.

¹¹¹⁸ *Ibid.*, para.448.

prerequisite.¹¹¹⁹ BP and Parkerings had had the opportunity to bring the claim before the forum contractually chosen (Lithuanian courts) in order to complain about the breach of the agreement and these courts would have disposed of the matter competently, impartially and within a reasonable amount of time.¹¹²⁰ It was not the mission of the Arbitral Tribunal to decide on the alleged breach of the agreement.¹¹²¹ Third, the breach (in the case at hand, the termination) of the agreement, should have caused a substantial decrease in the value of the investment but, since in the case at hand no other condition for the existence of an expropriation was present, the Tribunal did not analyze this element and excluded that Parkerings had been expropriated within the meaning of Article VI of the Treaty.¹¹²²

Though both *SPP v. Egypt* and *Parkerings v. Lithuania* are important cases concerning alleged taking (or alleged taking) of heritage-related (contractual) rights, there are two cases that are commonly referred to in order to show the divergences existing among investment tribunals over the subject of expropriation. Quite surprisingly both concern cultural and natural heritage. In *Metalclad v. Mexico*, Metalclad's second main claim revolved around an alleged expropriation by Mexico in violation of Article 1110 of the NAFTA. The Tribunal first clarified that:

*'...expropriation under NAFTA includes not only open, deliberate and acknowledged takings of property...but also covert and incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State.'*¹¹²³

The Tribunal concluded that Mexico's permission of the Municipality's conduct in relation to Metalclad, which had been already found to violate the fair and equitable treatment obligation, was tantamount to expropriation in violation of the NAFTA.¹¹²⁴ Denying the local construction permit, based on its perception of environmental damage and the geological unsuitability of the landfill site, the Municipality acted outside its authority since the denial appeared with no basis in the proposed physical construction or in any defect of the site.¹¹²⁵ This, together with its administrative and judicial actions against an agreement concluded by Metalclad and Mexico providing for, and allowing, the operation of the landfill (the *Convenio*), had unlawfully prevented Metalclad's operation of the landfill and amounted to an indirect expropriation.¹¹²⁶ Also, the justified reliance of Metalclad on the representations of the Mexican Federal Government supported to this conclusion.¹¹²⁷ The Ecological Decree issued by the Governor of the Mexican State of San Luis Potosi (SLP) constituted a further ground for the finding of expropriation. Indeed, though the remarks above were already

¹¹¹⁹ *Id.*

¹¹²⁰ *Ibid.*, para.453.

¹¹²¹ *Ibid.*, para.454.

¹¹²² *Ibid.*, paras.455-456.

¹¹²³ *Ibid.*, para.103.

¹¹²⁴ *Ibid.*, para.104.

¹¹²⁵ *Ibid.*, para.106.

¹¹²⁶ *Ibid.*, paras.106-107.

¹¹²⁷ *Ibid.*, paras.107-108.

sufficient for a finding of expropriation, the Ecological Decree had created an ecological preserve and barred forever the operation of the landfill.¹¹²⁸

*'The Ninth Article, for instance, forbids any work inconsistent with the Ecological Decree's management program. The management program is defined by the Fifth Article as one of diagnosing ecological problems of the cacti reserve and of ensuring its ecological preservation. In addition, the Fourteenth Article forbids any conduct that might involve the discharge of polluting agents on the reserve soil, subsoil, running water or water deposits and prohibits the undertaking of any potentially polluting activities. The Fifteenth Article of the Ecological Decree also forbids any activity requiring permits or licenses unless such activity is related to the exploration, extraction or utilization of natural resources.'*¹¹²⁹

It is worth mentioning that the Tribunal considered that it needed not assess nor take into account the motivation or intent behind the adoption of the Ecological Decree. Yet, this remark seems tempered by the Tribunal's statement that *'[i]n deed, a finding of expropriation on the basis of the Ecological Decree is not essential to the Tribunal's finding of a violation of NAFTA Article 1110.'*¹¹³⁰ It concluded that Mexico had indirectly expropriated Metalclad's investment without providing for any compensation.¹¹³¹

The Tribunal's decision in Metalclad has been heavily criticized. It has been said that the reliance by the Tribunal on the *'economic benefit'* deriving from the property would capture virtually any type of government measure.¹¹³² This approach has been regarded as much more restrictive and overly relying on the economic impact test if compared to the two-step approach relying on the economic impact and expropriatory (as opposed to *bona fide*) regulation, of the Tribunal in *Glamis Gold v. The United States* nine years later.¹¹³³

In *Glamis Gold v. United States*, the first main claim by Glamis Gold revolved around an alleged violation of Article 1110 (1) of the NAFTA on expropriation.¹¹³⁴ The Arbitral Tribunal first distinguished between direct and indirect expropriation, underlining that there is a direct expropriation when an open, deliberate and acknowledged taking of property involving a transfer of title in favor of the state takes place, while there is an indirect expropriation when the *'the economic value of the property interest is radically diminished,'* though no formal action such as a nationalization nor a direct transfer of title from the investor to the host state takes place.¹¹³⁵ Two key factors to be assessed to determine whether the state's measure amounts to a non-compensable regulation or to compensable expropriation are *'inter alia, (1) the extent to which the measures interfered with reasonable and investment-backed expectations of a stable regulatory framework, and (2) the purpose and character of the*

¹¹²⁸ *Ibid.*, para.109.

¹¹²⁹ *Ibid.*, para.110.

¹¹³⁰ *Ibid.*, para.111.

¹¹³¹ *Ibid.*, para.112.

¹¹³² N. Bernasconi-Osterwalder, L. Johnson (Eds.), *International Investment Law and Sustainable Development – Key Cases from 2000 to 2010, Op. Cit.*, p.78.

¹¹³³ *Ibid.*, p.62

¹¹³⁴ *Ibid.*, paras.353 ff.

¹¹³⁵ *Ibid.*, para.355.

governmental actions taken.¹¹³⁶ In order to understand whether the degree of interference amounted to indirect expropriation two question shave to be pondered *'the severity of the economic impact and the duration of that impact.'*¹¹³⁷

Hence, according to the Arbitral Tribunal the degree of interference with property rights has to be the angular stone of a Tribunal's analysis to assess whether that property has been (indirectly) expropriated, and the Tribunals' analysis should focus on the severity of the economic impact of a certain measure and on the duration of that impact. The Tribunal referred to a number of previous NAFTA Tribunals decisions:

'Several NAFTA tribunals agree on the extent of interference that must occur for the finding of an expropriation, phrasing the test in one instance as, "the affected property must be impaired to such an extent that it must be seen as 'taken'"; and in another instance as, "the test is whether that interference is sufficiently restrictive to support a conclusion that the property has been 'taken' from the owner." Therefore, a panel's analysis should begin with determining whether the economic impact of the complained of measures is sufficient to potentially constitute a taking at all: "[I]t must first be determined if the Claimant was radically deprived of the economical use and enjoyment of its investments, as if the rights related thereto ... had ceased to exist." The Tribunal agrees with these statements and thus begins its analysis of whether a violation of Article 1110 of the NAFTA has occurred by determining whether the federal and California measures "substantially impair[ed] the investor's economic rights, i.e. ownership, use, enjoyment or management of the business, by rendering them useless. Mere restrictions on the property rights do not constitute takings.'"¹¹³⁸

Thus, the Arbitral Tribunal had to *'assess the impact of the complained of measures on the value of the project.'*¹¹³⁹ The Tribunal rejected the claimants' claim that the delay and temporary denial occasioned by the federal government amounted to an expropriation, since these decisions were of short duration.¹¹⁴⁰ Concerning Glamis Gold's claims that California's measures effected an expropriation, while Glamis asserted that the Imperial Project had a certain value before the adoption of some specific California measures,¹¹⁴¹ the Tribunal decided to carry its own analysis of the elements adduced as affecting the value,¹¹⁴² and concluded that the specific measures at issue did not result in a radical diminution in the value of the Imperial Project and rejected the claim that an expropriation had occurred.¹¹⁴³

As already mentioned, the Tribunal's decision in *Glamis Gold v. The United States* has been positively regarded as adopting a flexible standard for indirect expropriation. This has not however been the only decisions where arbitral tribunals have taken broad stances

¹¹³⁶ *Ibid.*, para.356

¹¹³⁷ *Id.*

¹¹³⁸ *Ibid.*, para.357.

¹¹³⁹ *Ibid.*, para.358.

¹¹⁴⁰ *Ibid.*, para..360.

¹¹⁴¹ *Ibid.*, para.362.

¹¹⁴² *Ibid.*, para.364.

¹¹⁴³ *Ibid.*, paras.366 ff., 534-536.

concerning expropriation. In *Grand River Enterprises Six Nations v. The United States*, the Arbitral Tribunal addressed Mr. Arthur Montour's claim that U.S. states measures affecting the sales of one of his companies had resulted in the expropriation of a substantial portion of the value of his investment in violation of Article 1110 of the NAFTA.¹¹⁴⁴ The Tribunal eventually rejected Mr. Arthur Montour's claim of expropriation.¹¹⁴⁵ In its reasoning, the Tribunal highlighted that the NAFTA text '*speaks of an "investment," not "an investment or some portion thereof[.],"*' and as showed by several NAFTA cases, it requires that an '*expropriation involves the deprivation or impairment of all, or a very significant proportion of, an investor's interest.*'¹¹⁴⁶ Recalling previous NAFTA tribunals' decisions, and in particular the standard applied to qualify measures as expropriations in *Feldman v. Mexico* and *Glamis Gold v. the United States*,¹¹⁴⁷ and that '*[n]on-NAFTA tribunals also have held that an expropriation requires very great loss or impairment of all of a claimant's investment,*'¹¹⁴⁸ the Tribunal concluded that:

'An act of expropriation must involve "the investment of an investor," not part of an investment. This is particularly so in these circumstances, involving an investment that remains under the investor's ownership and control and apparently prospered and grew throughout the period for which the Tribunal received evidence.'¹¹⁴⁹

Hence, the Tribunal appears to have set a very high threshold for an impairment of a foreign investment to amount to expropriation. Though in the specific case at hand the investment system was unsuccessfully resorted to in order to protect alleged cultural interest of peoples from Indian tribes, the Tribunal's conclusion should nonetheless be welcome as a positive 'jurisprudential' development which leaves host states a certain room for maneuver for public policies, including cultural policies.

Other investment tribunals have focused more on specific requirements for legal expropriation to take place. In the case *Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt*, the Tribunal addressed the delicate question of the public purpose nature (or lack thereof) of expropriatory measures.¹¹⁵⁰ Indeed, Egypt contended that the expropriation of claimants' land was made pursuant to a decree issued by the Egyptian Prime Minister for a public purpose, that is for the expropriation of natural gas.¹¹⁵¹ The Tribunal noted that:

'Egypt has submitted that, as the Al Sharq Gas Company, which now has ownership of the land in Taba, had used the land to construct a major pipeline to transport gas to Jordan, "there can't be any question but that this is a public purpose, what the land is being used for."'¹¹⁵²

¹¹⁴⁴ *Grand River Enterprises Six Nations, Ltd., Et Al. v. United States of America*, Award, Op. Cit., para.146.

¹¹⁴⁵ *Id.*

¹¹⁴⁶ *Ibid.*, para.147.

¹¹⁴⁷ *Ibid.*, paras.149-150.

¹¹⁴⁸ *Ibid.*, para.151.

¹¹⁴⁹ *Ibid.*, para.155.

¹¹⁵⁰ *Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt*, Award, Op. Cit.

¹¹⁵¹ *Ibid.*, para.382.

¹¹⁵² *Ibid.*, para.429.

Though the pipeline could have been built elsewhere, this possibility did not demonstrate in itself that the claimants' land was not expropriated for a public purpose, as argued by claimants.¹¹⁵³ The Tribunal accepted Egypt's expert assurance that Al Sharq Gas Company was a public company, but this was not sufficient to conclude that the expropriation had been for a public purpose.¹¹⁵⁴ The Tribunal eventually concluded that the failure of Egyptian measures to mention a public purpose and the lack of any evidence showing that the land had been expropriated for an unnamed public purpose, together with the fact that Al Sharq had been created well after the expropriation, proved that the expropriation had not been for a public purpose. The fact that the investment had later been put to a public use did mean that it had been expropriated for a public purpose, and in the case at hand, it was clear that the claimants' land had not been expropriated to be assigned to the Al Sharq company (which had been constituted only in 2000, four years after the expropriation had taken place, and put to public use only in 2003).¹¹⁵⁵ Hence, it was clear that the expropriation had not occurred for a public purpose.¹¹⁵⁶

The Arbitral Tribunal added that no 'adequate and fair compensation' had been paid by Egypt, and that, though the word 'prompt' was not explicitly mentioned in the BIT, it had to be considered as part of an 'adequate and fair compensation' and a 12-year delay in the payment of compensation was not 'prompt'.¹¹⁵⁷ Further, the expropriation had not followed proper legal procedures,¹¹⁵⁸ and the lack of notice and impossibility for claimants to be heard with regard to the measures which amounted to expropriation constituted a denial of justice.¹¹⁵⁹ Lastly, the Tribunal adopted the value of the expropriated assets in the hands of the claimants immediately prior to the expropriation as a basis to determine the quantum of the compensation owed by Egypt.¹¹⁶⁰ On this point, the Tribunal rejected the claimants' proposition of a 1995 sale of shares as a guiding criterion to determine the value of the property and the project as '*[a] transaction such as that is self-evidently unlikely to be a reliable proxy for an open-market transaction conducted at arms length on normal commercial terms. There are simply too many (obvious) non-commercial factors which might affect the price at which the transaction is concluded.*'¹¹⁶¹

Finally, rejecting a discounted cash-flow analysis,¹¹⁶² and considering that claimants had not 100% interest in the property and that their interest was a qualified one on the date of the expropriation, meaning that certain limitations applied to them such as the possibility to dispose of only a part of the land,¹¹⁶³ the Tribunal determined that:

¹¹⁵³ *Ibid.*, paras.429-430.

¹¹⁵⁴ *Ibid.*, paras.430-431.

¹¹⁵⁵ *Ibid.*, paras.431-432.

¹¹⁵⁶ *Id.*

¹¹⁵⁷ *Ibid.*, paras.434-435.

¹¹⁵⁸ *Ibid.*, para.437.

¹¹⁵⁹ *Ibid.*, paras.442-443.

¹¹⁶⁰ *Ibid.*, para.542.

¹¹⁶¹ *Ibid.*, para.564.

¹¹⁶² *Ibid.*, para.566.

¹¹⁶³ *Ibid.*, para.577.

*'The Tribunal considers that an award of damages should, as far as possible, put the injured party in the position he or she would have been in had there been no expropriation.'*¹¹⁶⁴

Of course, this might be problematic for cultural and natural heritage expropriation cases, where the objective of expropriatory measures is precisely to change the existing situation.

In both *SPP, Parkerings, Metalclad* and *Glamis Gold*, the Tribunals had to grapple with the overall notion of expropriation. However, as already mentioned, other investment tribunals have been faced with more specific expropriation-related questions, such as the amount of compensation owed by the expropriating state. In *Compañía del Desarrollo de Santa Elena v. Costa Rica*, the main point in dispute was precisely the amount of the compensation owed by Costa Rica for the expropriated property.¹¹⁶⁵ Costa Rica had argued that the compensation due had to be based on the fair market value of the property as of the date of its expropriation, taking into account the existing environmental legislation that would have significantly restrict, if not prohibit, the commercial development of Santa Elena subsequently.¹¹⁶⁶ If interest could be applied to the Award, Costa Rica submitted that international law recognized simple interests.¹¹⁶⁷ Conversely, *Compañía del Desarrollo de Santa Elena* (CDSE) claimed that it was entitled to receive compensation based on the fair market value of the property with no space for any consideration of any legislation, regulation or any other government acts subsequent to the 1978 expropriatory decree.¹¹⁶⁸ Moreover, both parties filed the Tribunal with written statements by their respective witnesses.¹¹⁶⁹ CDSE's witnesses pointed that Costa Rica could not avail itself of its environmental regulations subsequent to 1978 in order to determine the amount of compensation due, since its environmental laws and regulations would not have precluded the development of the property as initially planned by the investor.¹¹⁷⁰ Costa Rica's witnesses, in turn, stressed that Costa Rica had put much effort in designating the *Area de Conservación de Guanacaste* (including the Santa Elena property) as a World Heritage Site under the 1972 UNESCO World Heritage Convention, for its unique geological and biological features.¹¹⁷¹

The first point addressed by the Tribunal concerned the law applicable to the substance of the dispute, a potentially decisive point for the question of the compensation owed, as already seen in *SPP v. Egypt*. Following Article 42 of the ICSID Convention, the Arbitral Tribunal found that since it was not able to conclude that a clear and unequivocal agreement between the Parties that the dispute be decided solely in accordance with international law, the rules and principles of Costa Rican law consistent with the general principles of public international law on this subject would have been applied.¹¹⁷² Public

¹¹⁶⁴ *Ibid.*, para.582.

¹¹⁶⁵ *Compañía del Desarrollo de Santa Elena v. Costa Rica*, Final Award, *Op. Cit.*

¹¹⁶⁶ *Ibid.*, para.35.

¹¹⁶⁷ *Id.*

¹¹⁶⁸ *Ibid.*, para.37.

¹¹⁶⁹ *Ibid.*, paras.45 ff.

¹¹⁷⁰ *Ibid.*, para.45.

¹¹⁷¹ *Ibid.*, para.46.

¹¹⁷² *Ibid.*, paras.60-67.

international law rules would have prevailed in the case of inconsistency.¹¹⁷³ Hence, the Tribunal highlighted that the arbitration was governed by international law in effect and the real question was the applicable principles and rules of international law governing compensation in a case such as Santa Elena's one.¹¹⁷⁴ First, the Tribunal noted that '*[a]s the parties themselves submit, there rests upon the expropriating state a duty, in both Costa Rican and international law, to pay compensation in respect of even a lawful compensation.*'¹¹⁷⁵ Also, the parties agreed that the compensation to be paid had to be based on the principle of '*full compensation for the fair market value of the property i.e. what a willing buyer would pay to a willing seller,*' calculated by reference to its '*highest and best use.*'¹¹⁷⁶ The Tribunal further pointed out that:

'In approaching the question of the compensation for the Santa Elena Property, the Tribunal had borne in mind the following considerations:

- International law permits the Government of Costa Rica to expropriate foreign-owned property within its territory for a public purpose and against the prompt payment of adequate and effective compensation. This is not in dispute between the parties.

- While an expropriation or taking for environmental reasons may be classified as a taking for a public purpose, and thus may be legitimate, the fact that the Property was taken for this reason does not affect either the nature or the measure of the compensation to be paid for the taking. That is, the purpose of protecting the environment for which the Property was taken does not alter the legal character of the taking for which adequate compensation must be paid. The international sources of the obligation to protect the environment makes no difference.

*[...] Expropriatory environmental measures – no matter how laudable and beneficial to society as a whole – are, in this respect, similar to any other expropriatory measures that a state may take in order to implement its policies: where property is expropriated, even for environmental purposes, whether domestic or international, the state's obligation to pay compensation remains.'*¹¹⁷⁷

This latter remark explains the reason why the Tribunal did '*not analyse the detailed evidence submitted regarding what Respondent refers to as its international legal obligation to preserve the unique ecological site that is the Santa Elena Property.*'¹¹⁷⁸ Further, the Tribunal seemed to identify the Hull Rule of prompt, adequate and effective compensation as the one to be applied under international customary law and noted that the environmental purpose of the expropriation did not affect or alter in any way the nature or measure of the compensation owed by Costa Rica.

¹¹⁷³ *Id.*

¹¹⁷⁴ *Id.*

¹¹⁷⁵ *Ibid.*, para.68.

¹¹⁷⁶ *Ibid.*, paras.70,73.

¹¹⁷⁷ *Ibid.*, paras.71-72.

¹¹⁷⁸ *Ibid.*, Footnote 32.

That said, the Tribunal addressed the disagreements between the parties with respect to the date on which the property had been expropriated and as of which its fair market value had to be assessed.¹¹⁷⁹ First, the Tribunal turned to the question of the date at which the property had to be valued. There are a number of measures that states may adopt to assert control over a property and these measures may vary significantly as for the period of time involved, being immediate or gradual.¹¹⁸⁰ Though the Santa Elena property had been effectively included in the Santa Rosa National Park only in 1987, the expropriation decree had been issued in 1978:

*'A decree which heralds a process of administrative and judicial consideration of the issue in a manner that effectively freezes or blights the possibility for the owner reasonably to exploit the economic potential of the property, can, if the process thus triggered is not carried out within a reasonable time, properly be identified as the actual act of taking.'*¹¹⁸¹

Hence, though international law does not lay down any precise criterion, such as the date of the transfer of ownership or the date of the determination or payment of the compensation, which would allow considering the expropriation as 'consumated', *'[t]he expropriated property has to be evaluated as of the date on which the governmental "interference" has deprived the owner of his rights or has made those rights practically useless.'*¹¹⁸² Though the expropriation decree of 5 May 1978 was only the first step in the process of transfer of the property to the government, it is on that date that the taking of the property occurred since, though CDSA remained in possession of the property, it had lost the practical and economic use of the property was *'irretrievably lost'*.¹¹⁸³ It is as of that date that the property had to be valued.¹¹⁸⁴ As a consequence:

*'The significance of identifying the date of taking lies in its bearing on the factors that may properly be taken into account in assessing the "fair market value" of the Property—a value which, as noted, both sides are agreed must be the basis of the present Award. If the relevant date were the date of this Award, then the Tribunal would have to pay regard to the factors that would today be present to the mind of a potential purchaser. Of these, the most important would no doubt be the knowledge that the Government has adopted an environmental policy which would very likely exclude the kind of tourist, hotel and commercial development that the Claimant contemplated when it first acquired the Property. If, on the other hand, the relevant date is 5 May 1978, factors that arose thereafter—though not necessarily subsequent statements regarding facts that existed as of that date—must be disregarded.'*¹¹⁸⁵

¹¹⁷⁹ *Ibid.*, para.74.

¹¹⁸⁰ *Ibid.*, para.76.

¹¹⁸¹ *Id.*

¹¹⁸² *Ibid.*, para.78.

¹¹⁸³ *Ibid.*, paras.80-81.

¹¹⁸⁴ *Ibid.*, para.83.

¹¹⁸⁵ *Ibid.*, para.84.

It is worth stressing already at this point that, though the Tribunal's position might be clear when addressing the date of the expropriation and comparing that to the subsequent national policies and legislation concerning the protection of the environment, it does not appear clear with regard to the date of the expropriation and the existence of international obligations for the protection of natural environment. These obligations (for instance, Article 12 of the UNESCO World Heritage Convention) should have had a bearing on the amount of compensation due since Costa Rica could have legitimately hampered the development of the property even before the adoption of the environmental expropriation decree. Indeed, Costa Rica ratified the UNESCO World Heritage Convention in 1977,¹¹⁸⁶ though it effectively inscribed the *Area de Conservación Guanacaste* in 1999.¹¹⁸⁷ In addition, while investors legitimate expectations are normally measured against the business or reality they operate in, here one might wonder whether the investors should not have expected such an action by the Costa Rican Government. The Tribunal might have paid more attention to the connection between the expropriatory decree and the ensuing regulations and to whether they featured as a 'unique' package, with each measure being instrumental to the other, or as completely separated steps.

Addressing the second question, the value of Santa Elena property as of 5 May 1978, the Tribunal noted that Costa Rica itself had recognized that the property had a touristic potential, combining agriculture, ecology and tourism with great unexploited beauty.¹¹⁸⁸ The Tribunal could not go back to 1978 to make its own appraisal of the property, but it could make an assessment of the two 1978 appraisals provided by the claimant and the respondent, and make an approximation of the value taking into account all relevant circumstances of the case, including equitable considerations.¹¹⁸⁹ The Tribunal determined the fair market value of the property, in between the two figures of appraisals provided by the CDSA and the Costa Rica.¹¹⁹⁰ On this line, doubts might be expressed on the stance adopted by the Tribunal: the environmental purpose of the decree has no bearing on the measure of compensation, but the extraordinary environmental value of the expropriated land seems to have been factored in as enhancing the value of the property. This might have been due to the fact that that Costa Rica itself took the potential for touristic development into account in its evaluation of the property.¹¹⁹¹ But still signals a sort of double standard: the environmental value is considered only in order to enhance the value of the property and not to lower it, in the light of the special interest of the protection of the environment or of the limited possible uses of the property.

Finally, the Tribunal addressed the question of the interests due, if any, pointing that while there is a tendency in international jurisprudence to award only simple interest, in cases of property or property rights (such as the one of Santa Elena) '*compound interest is not*

¹¹⁸⁶ UNESCO, *World Heritage Convention State Parties – Ratification Status*, available at <http://whc.unesco.org/en/statesparties/>.

¹¹⁸⁷ UNESCO World Heritage List, *Area de Conservación Guanacaste*, available at <http://whc.unesco.org/en/list/928>.

¹¹⁸⁸ *Ibid.*, paras.85-87.

¹¹⁸⁹ *Ibid.*, paras.89-92.

¹¹⁹⁰ *Ibid.*, paras.94-95.

¹¹⁹¹ *Ibid.*, para.94.

*excluded where it is warranted by the circumstances of the case.*¹¹⁹² The Tribunal adduced a number of reasons and authorities to support the view that compound interest might be awarded under international law.¹¹⁹³ It is worth noting that, among these authorities, the Tribunal cited the conclusion of Prof. Arangio-Ruiz, Special Rapporteur of the UN Commission on State Responsibility, concerning the possibility to award compound interest to ensure full compensation for the damage suffered by an injured state,¹¹⁹⁴ thus directly transposing those conclusions *sic et simpliciter* to the interest to be awarded to a foreign investor. It concluded that an award of simple interest was not enough, and compound interest adjusted taking into account ‘*all the relevant factors*’ had to be awarded.¹¹⁹⁵ The Tribunal then proceeded to determine the amount of interest, without however explicitly mentioning the relevant factors to be considered in order to adjust the compound interests.¹¹⁹⁶ Hence, the Tribunal applied *tout court* rules conceived of in the context of state-to-state disputes to investor-to-state proceedings on expropriatory matters. Doubts on the legitimacy of such choice still remain.

Other investment tribunals have adopted different positions with regard to the evaluation of the environmental value of expropriated properties. In *Unglaube v. Costa Rica*, the Arbitral Tribunal was also faced with a claim of expropriation.¹¹⁹⁷ First, in its analysis, the Tribunal recalled leading scholars’ opinion on expropriation:

*‘It is today generally accepted that the legality of a measure of expropriation is conditioned on three (or four) requirements. These requirements are contained in most treaties. They are also seen to be part of customary international law. These requirements must be fulfilled cumulatively: [...] The measure must serve public purpose [...] The measure must not be arbitrary or discriminatory [...] Some treaties explicitly require that the procedure of expropriation must follow principles of due process [though] [...] it is not clear whether such a clause, in the context of the rule of expropriation, adds an independent requirement for the legality of the expropriation [...] The expropriatory measure must be accompanied by prompt, adequate and effective compensation.’*¹¹⁹⁸

The Tribunal was faced with a very common situation of a formal expropriation which was not effectively executed, nevertheless affecting the would-be-expropriated property. Indeed, the Tribunal first recalled that under the relevant BIT:

‘[...] compensation shall be equivalent to the value of the expropriated investment immediately before the date on which the actual or threatened expropriation, nationalization or similar measure has become publicly known [...] not later than the moment of expropriation, nationalization or comparable measures, there shall have

¹¹⁹² *Ibid.*, paras.96-97.

¹¹⁹³ *Ibid.*, paras.98 ff.

¹¹⁹⁴ *Ibid.*, para.102.

¹¹⁹⁵ *Ibid.*, paras.105-106.

¹¹⁹⁶ *Ibid.*, para.107..

¹¹⁹⁷ *Marion Unglaube and Reinhard Unglaube v. Republic of Costa Rica*, Award, *Op. Cit.*, para.202

¹¹⁹⁸ *Ibid.*, para.203, quoting R. Dolzer, C. Schreuer, *Principles of International Investment Law*, (Oxford University Press: 2008, U.K.), p.90-91.

*been put into effect, in proper form, arrangements designed to determine the amount of and to make the payment of the compensation due [...]*¹¹⁹⁹

The Tribunal continued its analysis:

*'The Tribunal finds that Respondent, in the process of initiating expropriation of the 75-Meter Strip did not make timely arrangements to determine and make payment to Marion Unglaube of the compensation required. As a result, the 75-Meter Strip of Phase II owned by the Claimant, Marion Unglaube, has been subjected to de facto expropriation – in the words of the Treaty, by "measure(s) tantamount to expropriation." [...] The narrow peninsula on which Claimants' land is situated is of obvious importance with regard to efforts to protect the endangered leatherback turtle. Costa Rica, which began establishing its National Park System in the 1970's (and therefore has extensive experience in the process), could readily have enacted legislation to expropriate all of this peninsula, including the Claimant's property. Assuming that compensation was properly provided for and paid, Costa Rica's legal position would have been unassailable and this dispute might never have occurred. [...] But that is not what has occurred. The 1991 Decree described the boundaries of the National Park so as clearly to include the 75-Meter Strip. Once having been identified for expropriation, the Tribunal considers that this strip was obviously impacted in terms of saleability and use, but no action was taken by the State at that point to seek the necessary funds or begin the process of expropriation. [...].'*¹²⁰⁰

The Tribunal recalled the Arbitral Tribunal decision in the *Santa Elena* case,¹²⁰¹ and concluded that the 75-metre strip had been similarly affected. It was for Costa Rica to provide for the adequacy and timeliness of the expropriation process, and the proper drafting of the National Park Law.¹²⁰² The Tribunal also referred to other international decisions, including a judgment of the ECtHR invoked by claimants.¹²⁰³ The Tribunal concluded that Costa Rica had begun to take actions which had deprived Ms. Marion Unglaube of her formal right of ownership of the 75-metre strip no later than in (22 July) 2003, but had not, and did not subsequently, make provisions for timely and adequate compensation to Ms. Unglaube as required by the BIT.¹²⁰⁴

Addressing the question of whether Costa Rica had expropriated other properties of the claimants (the remaining portions of the Phase II property and the Phase I property), the Tribunal stressed that Costa Rica (the MINAE) wanted to expropriate the remainder of the (Phase II) property, but this was based on some error and no further attempt was made to expropriate the Phase II property.¹²⁰⁵ The Tribunal concluded that *'this short-lived attempt to*

¹¹⁹⁹ *Ibid.*, para.203, quoting in English Article 4 (2) of the Costa Rica-Germany BIT.

¹²⁰⁰ *Ibid.*, paras.209-211.

¹²⁰¹ *Ibid.*, paras.214 ff.

¹²⁰² *Ibid.*, para.221.

¹²⁰³ *Ibid.*, para.222.

¹²⁰⁴ *Ibid.*, para.223.

¹²⁰⁵ *Ibid.*, paras.226-227.

*expropriate the remainder of the Phase II in late 2004 was temporary and ephemeral.*¹²⁰⁶ The Tribunal concluded that no expropriation had taken place under these circumstances.¹²⁰⁷

Lastly, The Tribunal found that since Costa Rica's expropriation did not conform to Article 4 (2) of the underlying BIT, as no compensation had been paid, the expropriation was illegal.¹²⁰⁸ However, the BIT only referred to legal expropriation and thus offered little concrete help in the case at hand.¹²⁰⁹ Nonetheless, the Tribunal could neither accept the claimant's contention that customary international law as interpreted by the International Court of Justice in the *Chorzow Factory* case was the only governing standard.¹²¹⁰ It concluded the standard applicable to determine the amount of compensation due was the fair market value, comprising the higher value that an investment might have acquired up to the date of the award plus incidental expense, together with any other discretionary choice made by the arbitrators.¹²¹¹ In its assessment, the Tribunal appeared to pay considerable attention to the environmental significance of the surrounding of the property in order to proceed to its evaluation based on the highest and best use of the property:

*'[...] If, as Claimants' expert has suggested, it is appropriate, in determining fair market value, to identify the highest and best use of this particular property, it seems plain to the Tribunal that that can only be the highest and best use subject to all pertinent legal, physical, and economic constraints. In this case, it obviously should refer not to high density usage – appropriate to a large city or factory area – but rather to a usage appropriate to the environmentally-sensitive surroundings – including residential home construction, with a density comparable to that permitted by the guidelines set forth in the 1992 Agreement.'*¹²¹²

Hence, the Tribunal seems to have adopted a slightly different approach (at least explicitly) from the one of the *Santa Elena* Tribunal, taking into account the environmental importance of the area, which was the reason why only a limited economic activity could have taken place in the region, but concurrently adding that:

*'Regarding the value of the 75-Meter Strip, it is not disputed that the area near Playa Grande is one of the few remaining areas in Costa Rica where it was and is still possible to obtain fee simple title to beachfront property. The beach's natural characteristics, together with its proximity to Liberia Airport (which regularly receives international flights), suggest a substantial value for the property.'*¹²¹³

The parties were in agreement that real estate values in the region had been fluctuating over time and the identification of the 'date of expropriation, i.e. the 'date of valuation' of the

¹²⁰⁶ *Id.*

¹²⁰⁷ *Id.*

¹²⁰⁸ *Ibid.*, para.305.

¹²⁰⁹ *Id.*

¹²¹⁰ *Ibid.*, paras.306-307.

¹²¹¹ *Ibid.*, paras.306-307.

¹²¹² *Ibid.*, para.309.

¹²¹³ *Ibid.*, para.312.

75-metre strip, presented a '*complicated and unsatisfactory set of choices*.'¹²¹⁴ The Tribunal concluded that it was fair and reasonable to value the loss assuming a sale of the property six months before the market peak '*and at a figure which gives some consideration to the normal fears and negative contingencies which are present in the minds of sellers and buyers making important investment decisions*.'¹²¹⁵ The Tribunal also considered that to fully repair the injury caused to the investment of Mrs. Marion Unglaube, it was required to determine the interest owed on those damages from the assumed date of sale to the date of its decision.¹²¹⁶ It noted that under customary international law, the interest rate should achieve the result of full reparation, and the rate should be based on the amount that an expropriated investor would have been in a position to have earned if he had been compensated in time and been able to commercially invest in its own country.¹²¹⁷ It further stated that the determination of the interest rate based on the requirements of the host State's law was not the prevailing practice under international law,¹²¹⁸ thus signaling the mix of municipal and international law applied to address different questions related to expropriation. Consequently, the Arbitral tribunal determined that the compensation due amounted to U.S.\$ 3,1 million, plus interests to the date of the award.¹²¹⁹

The obligation to compensate as much as to put the expropriated investor in the same situation existing prior to the expropriation might be extremely cumbersome for the host state and it might completely upset the meaning and success of its cultural policies. It might be interesting to compare the compensation owed by the state for expropriation with the one owed for breaches of the fair and equitable standard obligations. This is what the Tribunal in *Charles Lemire v. Ukraine* did in its 2011 Award.¹²²⁰ Having found that Ukraine had breached some of its obligations toward Mr. Lemire, the Tribunal addressed the question of the redress and quantum to be paid to Mr. Lemire.¹²²¹ A comparison between the specific rules for the calculation of compensation based on the '*fair market value*' of the expropriated property under Article III.1 of the relevant BIT on expropriation and the absence of any specific relief under Article II.3 of the relevant BIT for violations of the fair and equitable treatment could not lead to conclude that '*a violation of the FET standard may be left without redress*.'¹²²² Here, it is worth noting that in the case at hand, compensation could not be based on the fair market value of assets expropriated since, the Tribunal argued, this rule was established for expropriation, i.e. for breaches amounting '*to the total loss or deprivation of an asset*.'¹²²³ Thus, the Tribunal here seems to support indirectly the idea that partial loss or deprivation of an asset does not amount to direct or indirect expropriation (since both are addressed under Article III.1 of the U.S.-Ukraine BIT). In determining the compensation, after complex

¹²¹⁴ *Ibid.*, paras.313-315.

¹²¹⁵ *Ibid.*, para.318.

¹²¹⁶ *Ibid.*, para.319.

¹²¹⁷ *Ibid.*, paras.320-321.

¹²¹⁸ *Ibid.*, para.323.

¹²¹⁹ *Ibid.*, para.332.

¹²²⁰ *Joseph Charles Lemire v. Ukraine*, Award, *Op. Cit.*

¹²²¹ *Ibid.*, paras.145 ff.

¹²²² *Ibid.*, para.147.

¹²²³ *Ibid.*, para.148.

calculations, the Arbitral Tribunal identified the amount of compensation owed.¹²²⁴ It is worth noting that the Arbitral Tribunal finally tested the amount of compensation determined through a discounted cash flow model based on estimation of other parameters ‘*in order to confirm the reasonability fo the calculation.*’ The Arbitral Tribunal explicitly mentioned the need to compare the compensation to be awarded with the amount invested by Mr. Lemire,¹²²⁵ the risk environment in which Mr. Lemire had made his investment, i.e. a transitional economy where not clear recovery horizons existed,¹²²⁶ and a comparison with comparable transactions.¹²²⁷ The Arbitral Tribunal hence seemed to leave room for a flebixible evaluation of compensation through the testing of a merely economic and statistic method against some more general considerations and criteria. It confirmed in each case the proportionality and reasonability of the amount of compensation calculated.

To sum up, while investment tribunals seem to converge on some points, such as the need to put the expropriated party in a situation identical to the one he was in before the expropriation, the standards and level of impairment required by tribunals for certain actions or conducts to amount to expropriation have varied significantly. The higher the level of impairment requirement, the easier it is for states to take measures which amount to legitimate regulatory takings. Whether this is good for cultural heritage depends in reality from the specific circumstances of each case: a state might decide to expropriate cultural heritage or for cultural heritage-related reasons, without really having the necessary resources to protect or safeguard cultural or natural heritage which might have been better in the hands of foreign investors, with a due control by the state. It is impossible to state beforehand whether the public and the community as a whole will really benefit from a state’s expropriatory measures. Further, the decisions of investment tribunals regarding expropriations should be compared to decisions of human rights courts, namely the ECofHR. As a case in point, in *Potomska and Potomski v. Poland*, the Polish Government had prohibited construction and development of a property previously classified as farming land and later reclassified as historic monument for the existence of a historical Jewish cemetery to be protected and preserved.¹²²⁸ No direct expropriation could take place since no funds to pay compensation were available.¹²²⁹ The Court concluded that the significant restrictions the applicants had been subjected to in the circumstances of the case represented a measure to control the use of property,¹²³⁰ in violation of Article 1 of Protocol 1 of the Convention.¹²³¹ Hence, some convergence seems to exist between the Court jurisprudence and investment tribunals’ decisions such as *Umglaube v. Costa Rica*. That said, investment tribunals’ decisions on full compensations such as the one in the *Santa Elena* case, where the environmental value of the land was taken into account only as fostering tourism development instead of cautioning on the intense use of the area, seem to contradict the Court. The ECofHR had indeed the occasion to state that under Article 1 of Protocol 1 to the European Convention on

¹²²⁴ *Ibid.*, paras.296-297.

¹²²⁵ *Ibid.*, paras.299 ff.

¹²²⁶ *Ibid.*, paras.303 ff.

¹²²⁷ *Ibid.*, paras.307 ff.

¹²²⁸ *Case of Potomska and Potomski v. Poland*, App. no.33949/05, Judgment, 29 March 2011, paras.17-27.

¹²²⁹ *Ibid.*, para.28 ff.

¹²³⁰ *Ibid.*, para.63.

¹²³¹ *Ibid.*, para.80.

Human Rights, full compensation in the case of expropriation is not always granted where a legitimate public purpose to expropriate exist, including for cultural heritage reasons.¹²³² Whether in practice this consideration produces radically different results from the apparently one-sided viewpoint of the Tribunal in *Santa Elena*, which seemed already abandoned in the *Unglaube* case, is dubious. Still, the at least theoretical jurisprudential differences, which might be justified based on the diverse treaty provisions applied (BITs or IIAs provisions on the one hand, Article 1 of Protocol 1 of the European Convention on Human Rights on the other) do not appear as major problem if compared to the inconsistencies existing ‘inside’ the international investment law system, in investment disputes case law. One should hope for new investment tribunals’ decisions to take at least a definite, consistent and coherent path in order for legal security and predictability to be assured both for foreign investors and host states wishing to adopt measures affecting cultural heritage.

III.5.E. Cultural Heritage Carve Outs and Exception Provisions at the Test of International Arbitral Tribunals

Cultural and cultural heritage-related provisions in international investment agreements have already been previously discussed in the thesis. However, as already mentioned, these provisions need to be tested in practice. This is even more so for specific types of provisions such as culture and cultural heritage carve outs and exceptions. To date, the case law on these types of provisions is scarce. Also, it is worth noting that though there might be a difference between exception and carve out provisions, scholars and practitioners alike often refer to them adopting both terms with the same meaning. Taking a position on this subject goes beyond the purpose and scope of this research work. Accordingly, using one name or the other is not meant here as an ideological position on the matter. Conversely, attention is given to the interpretation and application in practice of these clauses, i.e. to their real substance and effects rather than to their *nomen iuris*.

The degree of attention and ‘depth’ of the assessment performed by international arbitral tribunals on these clauses has varied depending to their relevance with regard to the main points in dispute between the parties. In *Charles Lemire v. Ukraine*, in its 2011 Award, the Tribunal addressed several issues, including what is considered an unconvincing dissenting opinion written by Dr. Voss, one of the three arbitrators of this case, and appended to the final Award.¹²³³ Dr. Voss had addressed several points of the Arbitral Tribunal’s decision, and, among others, had focused on (what he considered) the Tribunal’s restrictive interpretation of the fair and equitable standard. Invoking the Annex to the United States-Ukraine BIT, and the exception contained therein excluding the application of the BIT national treatment obligation with regard to ownership and operation of television and radio broadcasting stations, Dr. Voss advocated for an extensive application of this provision to rule

¹²³² *Kozacioğlu v. Turkey*, ECtHR, Judgment, *Op. Cit.*, para.64.

¹²³³ *Joseph Charles Lemire v. Ukraine*, ICSID Case No.ARB/06/18, Award, 28 March 2011, paras.32-33.

out any violation of the BIT allegedly committed by Ukraine¹²³⁴ The exception provision read as follows:

*'3. Ukraine reserves the right to make or maintain limited exceptions to national treatment, as provided in Article II, paragraph 1, in the sectors or matters it has indicated below: production of equipment used exclusively for nuclear power plants; maritime transportation including ocean and coastal shipping; air transportation; nuclear electric energy generation; privatization of those educational, sports, medical and scientific facilities financed by the national budget; mining of salt; mining and processing of rare earth, and of uranium and other radioactive elements; ownership and operation of television and radio broadcasting stations; and ownership of land.'*¹²³⁵

The Tribunal rejected Dr. Voss' arguments on the grounds that the exception had a limited scope and that a notification was needed for Ukraine to invoke in practice the exception, a requirement that had not been complied with in the case at hand:¹²³⁶

*'In the Annex to the BIT, both the US and Ukraine reserved the right "to make or maintain limited exceptions to national treatment" in the "ownership and operation of radio stations". The literality of the Treaty does not leave room for doubt: the parties can make or maintain exceptions, but the scope of these limitations must be restricted to the principle of national treatment. This conclusion is confirmed by the definition of national treatment contained in Article II.1: [...]'*¹²³⁷

The Tribunal thus refused the Dissenting Arbitrator's view. Clearly enough, the Tribunal's interpretative task was made easier by the narrow interpretative space allowed by the clear wording of the provision at issue. Other investment tribunals have been charged with more difficult tasks. As a case in point, in *UPS v. Canada*, while UPS had claimed that Canada had violated its national treatment obligations under the NAFTA as a result of its *Publications Assistance Programme* (PAP), Canada had challenged the Tribunal's jurisdiction on this claim.¹²³⁸ Canada alleged that the Tribunal should have dismissed UPS' allegations on PAP based on the cultural industries exemption (under Article 2016 and Annex 2016 of the NAFTA) and the subsidies exemption (under Article 1108 (7) (b) of the NAFTA).¹²³⁹ In fact, the PAP, Canada sustained, was a 'measure' which had been 'adopted or maintained with respect to cultural industries.'¹²⁴⁰ UPS, in turn, contended that Canada Post activity consisted of the delivery (rather than 'distribution') of books, magazines, periodicals and newspapers and did not fall under the definition of 'cultural industries' of the NAFTA (contained in Article

¹²³⁴ *Ibid.*, para.44.

¹²³⁵ *Id.*

¹²³⁶ *Ibid.*, para.45-48.

¹²³⁷ *Ibid.*, para.46.

¹²³⁸ *United Parcel Service of America Inc. v. Government of Canada*, NAFTA, Award on Jurisdiction, *Op. Cit.*, para.104.

¹²³⁹ *Ibid.*, para.105.

¹²⁴⁰ *Ibid.*, para.107.

2017 of the NAFTA (*Definitions*) in Chapter 21 (*Exceptions*)).¹²⁴¹ The Tribunal first pointed out that:

*'[...] it is, at first blush, arguable that the intent of the article 2107(a) definition is to capture all aspects of what might be called the business of print-making and -selling; and indeed it is not necessarily obvious why. If the object and purpose of the "cultural industries" provisions of NAFTA are to benefit those industries. The delivery to consumers of cultural products should be excluded. [...] It might also be observed that at least certain activities associated with cultural industries but which Canada and the United States nonetheless chose to exclude from the NAFTA/FTA definition are expressly identified in article 2107(a), to wit: "... the sole activity of printing or typesetting." [...] It might, however, be argued that the intent of the Parties to NAFTA is clear on its face, namely, to exclude from the definition of cultural industries (as between Canada and the United States) "the sole activity of printing or typesetting."'*¹²⁴²

Moreover, specifically addressing UPS argument:

*'UPS submits that "[t]he mere fact that magazines are carried through the mail does not convert the mail delivery system into a cultural industry...". This assertion is likely correct, as far as it goes. It does not necessarily follow, however, that the activity of delivering cultural products to consumers is inconsistent with the protection of Canadian "cultural industries", as the concept is understood in the context of NAFTA, or that the persons engaged in delivering such products are excluded from the article 2107(8) definition of cultural industries.'*¹²⁴³

The Tribunal decided to postpone its assessment of Canada's argument to the merits phase of the dispute.¹²⁴⁴ Later, in its 2007 Award on the Merits, the Tribunal assessed the design, operation and objectives the *Publications Assistance Program* (PAP) to assess Canada's contention that the PAP fell under the s.c. 'cultural industries exception' set out in Article 2106 and Annex 2106 of the NAFTA.¹²⁴⁵ The Tribunal concluded that the PAP fell squarely within the scope of such an exemption.¹²⁴⁶ Even assuming that the PAP was not covered by the cultural industries clause, the Tribunal added, Canada was not in breach of NAFTA Article 1102 since, in that context, Canada did not accord Canada Post and UPS treatment 'in like circumstances.'¹²⁴⁷ The Tribunal explained that the primary public policy function of Canada's postal service was to perform the 'universal service obligation,' that is to provide an accessible, affordable, inbound and outbound postal service to all addresses in Canada in a

¹²⁴¹ *Ibid.*, para.108.

¹²⁴² *Ibid.*, paras.109-110.

¹²⁴³ *Ibid.*, para.111.

¹²⁴⁴ *Ibid.*, paras.114-115.

¹²⁴⁵ *United Parcel Service of America Inc. v. Government of Canada*, NAFTA, Award on the Merits, *Op. Cit.*, para.137.

¹²⁴⁶ *Ibid.*, para.137.

¹²⁴⁷ *Ibid.*, paras.138, 173-181.

timely fashion.¹²⁴⁸ In this connection, Canada's cultural and social policy with respect to publications (i.e. the subsidization of the costs of mail delivery) was designed to achieve two main purposes: to connect Canadians to each other through the provision of accessible Canadian cultural products, and to sustain and develop the Canadian publishing industry.¹²⁴⁹ The PAP provided distribution assistance to publishers, as a part of a broader Canadian federal cultural policy supporting the Canadian periodicals publishing industry.¹²⁵⁰ The PAP was co-administered by the Heritage Department, which set the eligibility criteria for publishers to gain access to the PAP, and Canada Post.¹²⁵¹ Subsidy payments were made directly to eligible publications through individual accounts at Canada Post to be used by those publications against the cost of Canada Post's publications and mail services.¹²⁵² Once the Heritage Department determined eligibility, Canada Post created individual accounts for each PAP publisher and calculated the funding amount for each mailing; Canada Post deposited PAP funds into these accounts, allowing PAP publishers to deduct from their account in order to pay some of their costs of delivery through Canada Post.¹²⁵³ This system was the result of the Heritage Department's determination that delivery through Canada Post was the best and most cost effective way to reach its policy objectives.¹²⁵⁴

Article 2016 and Annex 2016 explicitly remove from the scope of NAFTA, as between Canada and the United States, '*any measure adopted or maintained with respect to cultural industries.*'¹²⁵⁵ In this regard, while Canada contended that the PAP fell under NAFTA cultural industries provision, UPS claimed that the requirement for publishers to use Canada Post in order to receive federal assistance under the PAP had nothing to do with protecting cultural industries.¹²⁵⁶ An interesting point made by UPS was that the cultural industries exception applies only to cultural industries themselves, not to their delivery mechanism, and that there was no connection between the PAP's objective and Canada Post's involvement.¹²⁵⁷ In substance, UPS asked the Tribunal to find that only certain aspects of the PAP were potentially covered by the cultural industries exception.¹²⁵⁸ The Tribunal first stated that the language of NAFTA Article 2106 was expansive and that the cultural industries exception had a broad scope:

'The language of article 2106 is expansive indeed, serving to introduce into NAFTA an admittedly broad exception. This is intentionally so. The evidence is that it was clearly understood by the Parties in the context of the negotiation, execution and implementation of NAFTA, just as it had been understood in the context of the Canada-US FTA, that a Party's ability to pursue its domestic cultural policies would be

¹²⁴⁸ *Ibid.*, para.140.

¹²⁴⁹ *Ibid.*, para.146.

¹²⁵⁰ *Ibid.*, para.149.

¹²⁵¹ *Ibid.*, para.152.

¹²⁵² *Ibid.*, para.151.

¹²⁵³ *Ibid.*, para.153.

¹²⁵⁴ *Ibid.*, para.155.

¹²⁵⁵ *Ibid.*, para.156.

¹²⁵⁶ *Ibid.*, paras.156-157.

¹²⁵⁷ *Ibid.*, para.159.

¹²⁵⁸ *Ibid.*, para.160.

*virtually unimpaired by these trade and investment instruments. This is consistent with the expansive wording of article and annex 2106 which, on their face, do not circumscribe the nature, scope, objective or operation of an excepted measure, other than, as noted by Canada, by "requiring that the measure be in connection with cultural industries."*¹²⁵⁹

Beyond the recognition of the broad scope of the cultural industries provision and hence, of a broad regulatory space for Canada's cultural policies affecting foreign investors under the NAFTA, the Tribunal further stressed that there existed a compromise that NAFTA Parties had reached during negotiations for such an exemption provision to be included in the Agreement:

*'Moreover, to the extent that this broad exception for cultural industries may have reflected a concession by the other NAFTA Parties regarding a traditional Canadian position, a commercial and political balance was nonetheless achieved. As Annex 2106 explicitly recognizes, the quid pro quo for acceptance of such an exemption was the granting of a unilateral right of retaliation allowing a party to take measures of equivalent commercial effect in response to measures connected to cultural industries that, but for the exemption, would be in violation of NAFTA. As Canada submits: "[f]or the Tribunal to now introduce limitations to the scope of this cultural exemption would disturb the balance that was agreed to by the part[ies]."*¹²⁶⁰

This latter remark of the Tribunal touched upon one of the most contentious issues of international investment law: the possibility for foreign investors to challenge the interpretation and application of certain treaty provisions, thus changing the compromise stricken between the negotiating state parties. The Tribunal concluded that the requirement that publishers use Canada Post to distribute eligible publications was rationally and intrinsically connected to assisting the Canadian publishing industry.¹²⁶¹ Moreover, in the light of the definition of 'cultural industries' in the NAFTA, as it had already noted in its Award on Jurisdiction without ruling on the point, the NAFTA expressly included both 'publication' and 'distribution' within the cultural industries exception (Article 2107 (a)), and distribution necessarily includes a delivery mechanism, which hence falls within the NAFTA cultural industries exception.¹²⁶²

However, the Arbitral Tribunal did not reach this conclusion unanimously. Mr. Cass, one of the three arbitrators in this case, appended a '*separate statement*', both concurring and dissenting with several points decided upon by the Arbitral Tribunal, to the Award.¹²⁶³ Eminent practitioners have pointed out that one hundred percent of dissenting opinions in international arbitration are issued by party-appointed arbitrators and almost the totality of

¹²⁵⁹ *Ibid.*, para.162.

¹²⁶⁰ *Ibid.*, para.163.

¹²⁶¹ *Ibid.*, para.168.

¹²⁶² *Ibid.*, paras.170-172.

¹²⁶³ *United Parcel Service of America Inc. v. Government of Canada*, NAFTA, Separate Statement of Dean A. Ronald Cass, 24 May 2007.

them favor the party that appointed the dissenting arbitrator.¹²⁶⁴ Conversely, others have highlighted that dissenting opinions foster confidence and legitimacy in the investment dispute settlement process and play an important role in the continued development of investment arbitration.¹²⁶⁵ Regardless of the view taken, the dissenting opinion of Mr. Cass provides food for thought on the interpretation and application of the cultural exemption under the NAFTA. Among others, in the light of the similarity of the national treatment obligation in the NAFTA and those in other international agreements,¹²⁶⁶ Mr. Cass referred to the fact that a previous version of the PAP had been found in violation of Canada's trade obligations at the WTO in the *Canada – Periodicals* case, since an improper discrimination in favor of Canada Post had taken place. As a consequence, the rationale offered by Canada to the PAP in the NAFTA proceeding before the Arbitral Tribunal had to be called into question.¹²⁶⁷ Canada could have chosen other ways to assure that firms participating in the PAP met legitimate conditions, and its assertion that any inquiry should stop once it had advanced a public policy rationale for its actions would mean that Canada was the sole arbiter of the legitimacy of its public policy rationale.¹²⁶⁸ Canada had not rebutted, according to Mr. Cass, the *prima facie* case that UPS Canada and Canada Post were in like circumstances for eligibility for benefits associated with the delivery of Canadian periodicals.¹²⁶⁹

Further, supporting the idea that the PAP did not fall under the NAFTA cultural industries exceptions, Mr. Cass highlighted UPS' argument that the cultural industries exception only covered those activities closer to the core of the cultural enterprise, as showed by the express exclusion of activities such as typesetting and printing of books and periodicals from the definition of cultural industries in NAFTA Article 2107.¹²⁷⁰ The Arbitrator agreed with UPS's argument that the limitations in the cultural industries exception provision meant that even some aspects of activities directly connected to the production of cultural goods did not fall under the exception:

'As UPS urges, these limitations show that there are aspects of even the direct production of cultural products that might seem to come within the definition of cultural industries but which the NAFTA Parties thought did not merit the exception carved out for cultural industries. I agree with UPS, as well, that the characteristic that seems to separate the activities excluded from the cultural industries exception from activities covered by that exception is that the excluded activities are more mechanical activities that are less centrally related to the creative acts associated with cultural industries. UPS is correct, too, in observing that the activities at issue in

¹²⁶⁴ A. J. van den Berg, *Dissenting Opinions by Party-Appointed Arbitrators in Investment Arbitration*, in M. Arsanjani, J. Katz Cogan, R. Sloane, S. Wiessner (Eds.), *Looking to the Future: Essays on International Law in Honor of W. Michale Reisman*, (Martinus Nijhoff: 2010, Leiden/Boston), p.825.

¹²⁶⁵ P. J. Martinez Fraga, H. J. Samra, *A Defense of Dissents in Investment Arbitration*, University of Miami Inter-American Law Review Vol.43, (2012), p.476-477.

¹²⁶⁶ *Ibid.*, paras.57 ff.

¹²⁶⁷ *Ibid.*, paras.128-129.

¹²⁶⁸ *Ibid.*, paras.130-131.

¹²⁶⁹ *Ibid.*, para.133.

¹²⁷⁰ *Ibid.*, para.137.

*this proceeding look more like the mechanical activities excluded from the exception than like some of the activities clearly included.*¹²⁷¹

UPS had made a strong argument for the exclusion of delivery activities at issue in the arbitration from the scope of the cultural industries exception.¹²⁷² Nonetheless, UPS' argument did not appear as fully-fledged:

*'UPS' argument, however, does not explain the dividing line between the activities included within the definition of cultural industries and activities that are excluded from the cultural industries provision in a manner that allows simple, unquestioned application. While the line it proposes for separating cultural activities from other activities is suggestive, there are many aspects of creative work that could be cast as merely mechanical, including much of the work involved in producing movies for example. It is difficult to imagine that the work involved in set production, for instance, would be excluded from the definition of a cultural industry, even though it is predominantly mechanical work. Further, UPS' argument does not explain why the particular activities - typesetting and printing - were listed specifically as activities that fall outside the cultural industries exception and other activities, such as those UPS now urges the Tribunal to find outside the exception, were not.'*¹²⁷³

According to Mr. Cass, Canada had proposed a reasonable but overstated argument: since the cultural industries exception covered the distribution of books and periodicals, and that distribution includes the delivery mechanism, the treatment of delivery fell within the exception.¹²⁷⁴ However, for the Arbitrator, this did not mean that every aspect of the delivery necessarily fell within the exception: this reasoning would make the exception too broad, extending it well beyond any reasonable and foreseeable bounds.¹²⁷⁵ In particular, the subsidy given by Canadian Heritage and challenged by UPS effectively partly went to Canada Post rather than to periodical production and hence did not fall under NAFTA cultural industries exception.¹²⁷⁶ Given the reasonable connection to the exception, Canada had to be considered free to subsidize its cultural industries under the terms of Article 2106 and Annex 2106 of the NAFTA, but the NAFTA did not '*broadly immunized any decision by Canada to provide support to other industries, including to its mail and postal service, merely asserting a connection to a cultural goal.*'¹²⁷⁷ Thus, the Arbitrator supported UPS's argument that Canada had failed to meet the burden of demonstrating that this subvention fell within the cultural industries exception.¹²⁷⁸ In this sense, the Arbitrator concluded that Canada's decision respecting

¹²⁷¹ *Ibid.*, para.138.

¹²⁷² *Ibid.*, para.139.

¹²⁷³ *Ibid.*, para.140.

¹²⁷⁴ *Ibid.*, para.142.

¹²⁷⁵ *Ibid.*, paras.143-144.

¹²⁷⁶ *Ibid.*, paras.147-148.

¹²⁷⁷ *Ibid.*, para.150.

¹²⁷⁸ *Id.*

selection of a particular firm could be challenged without contradicting the cultural industries exception in the NAFTA.¹²⁷⁹

The dissenting part of the separate statement of Mr. Cass is telling about the difficulties in clearly defining a legitimate regulatory space for cultural policy. His observations on the national treatment obligation also signals how relevant cultural policies might be for trade and investment. Scholars have also supported the view that the Arbitral Tribunal's scrutiny of the PAP and its purpose was not sufficient and that it simply accepted Canada's argument that it ensured nationwide delivery of Canadian periodicals.¹²⁸⁰ The Tribunal did not assess whether Canada had engaged in any analysis of pros and cons of governmental delivery mechanisms versus private delivery mechanisms.¹²⁸¹ This discussion further shows that, beyond the arm wrestling on the scope and extension of the cultural industries exception within the context of the NAFTA, similar and parallel proceedings could be brought before WTO panels and AB on an intergovernmental level, with relevant though sour consequences for Canada.¹²⁸²

Regardless of the stance taken on the positive/negative effect and purpose of dissenting opinions, the opinions of both dissenting arbitrators in *Charles Lemire v. Ukraine* and *UPS v. Canada* touched upon, among others, the difficult question of the scope of carve-out and exception clauses. The very same nature of investor-state arbitration, where foreign investors act against host states (almost always) with a main, underlying claim of discrimination and protectionist policies, makes entire investment arbitral proceedings haunted with the idea that a protectionist measure might be disguised as a public purpose (cultural) measure. Hence, it is crucial to determine the exact scope and extension of specific culture-related provisions. An assessment and comparison of the two cases above provides relevant insights. Where clear wording with regard to their scope exists, no doubts can be expressed on carve-outs and exceptions: the Tribunal in *Charles Lemire v. Ukraine* did not have much leeway. Conversely, where the wording or drafting leaves more room for maneuver, as in the NAFTA/*UPS v. Canada* case, though it is difficult to draw the precise line distinguishing conducts falling under an exception and conducts falling out of it, any interpretation and application of such clauses should give it meaning and effect. Thus, though there might certainly be activities that are only loosely connected to cultural industries, they might fall under a cultural exception or exemption such as the one in the NAFTA as far as they are meaningful (and not completely irrelevant) for cultural industries. The scarcity of cases where such provisions are scrutinized might however prove that these sort of questions are often regulated 'upstream', i.e. when treaties are negotiated, or through diplomatic means. For this reason, cases such as *Charles Lemire v. Ukraine* or *UPS v. Canada* represent rare but precious instances of quasi-judicial scrutiny of cultural exceptions/exemptions.

¹²⁷⁹ *Ibid.*, para.154.

¹²⁸⁰ C. Henckels, *The Role of the Standard of Review and the Importance of Deference in Investor-State Arbitration*, in L. Gruszczynski, W. Werner (Eds.), *Deference in International Courts and Tribunals – Standard of Review and Margin of Appreciation*, (Oxford University Press: 2014, U.K.), p.128.

¹²⁸¹ J. Kurz, *Balancing Investor Protection and Regulatory Freedom in International Investment Law: The Necessary, Complex, and Vital Search for State Purpose*, in A. K. Bjorklund (Ed.), *Yearbook on International Investment Law and Policy 2013-2014*, (Oxford University Press: 2015, U.K.), p.292.

¹²⁸² J. Musitelli, *La Convention sur la diversité culturelle: anatomie d'un succès diplomatique*, *Revue Internationale et Stratégique* No.62, Iss.2, (2006), p.14.

III.5.F. Good Governance Between International Investment Law and International Cultural Heritage Law

While there is no single and exhaustive definition of good governance, the concept generally relates to political and institutional, decision-making processes and outcomes which are deemed key to achieve sustainable development goals.¹²⁸³ Hence, good governance regroups under its umbrella a number of different features. These characteristics might be summarized with a number of adjectives such as participatory, consensus-oriented, accountable, transparent, responsive, effective and efficient, equitable and inclusive, and the rule of law-consistent.¹²⁸⁴ It is legitimate to wonder whether the need for host states to respect specific obligations toward foreign investors, even where culture and cultural heritage are involved, foster any standard of transparency, accountability, rule of law, etc. to be complied with and, thus, whether it fosters good governance. In this sense, though of course this general question has already been partly addressed in each and every single sub-section of this Chapter, a case law-based discussion might help elucidate the point.

In *Metalclad v. Mexico*, the Arbitral Tribunal started its analysis stressing that NAFTA's objectives include transparency and the substantial increase of investment opportunities in the territories of the Parties and, as indicated in the *Preamble* of the NAFTA, '[t]he Parties to NAFTA specifically agreed to "ENSURE a predictable commercial framework for business planning and investment".'¹²⁸⁵ Environmental and cultural heritage measures, among others, might be adopted at the municipal, provincial, regional or state level depending on the constitutional allocation of power of each legal system. And under Article 201 (2) of the NAFTA '[f]or the purposes of this Agreement, unless otherwise specified, a reference to a state or province includes local governments of that state or province,' an approach consistent with the (by then, draft) articles on state responsibility and Mexico's position in the proceedings.¹²⁸⁶ The rule that an act of any state organ is to be considered an act of the state under international law, thus engaging its responsibility, if it breaches an international obligation of the state, is further regarded as one of the cornerstones of the law of state responsibility and a customary rule of international law.¹²⁸⁷ In addition, as permitted under Article 1128 of NAFTA (*Participation by a Party*), the United States of America made a written submission to the Tribunal stressing that actions by local governments, including municipalities, have to be considered as subject to NAFTA standards.¹²⁸⁸

¹²⁸³ United Nations Human Rights Office of the High Commissioner, *Good Governance and Human Rights*, available at <http://www.ohchr.org/EN/Issues/Development/GoodGovernance/Pages/GoodGovernanceIndex.aspx>.

¹²⁸⁴ United Nations Economic and Social Commission for Asia and the Pacific, *What is Good Governance?*, <http://www.unescap.org/sites/default/files/good-governance.pdf>.

¹²⁸⁵ *Metalclad Corporation v. The United Mexican States*, Award, *Op. Cit.*, paras.70-71.

¹²⁸⁶ *Ibid.*, para.73.

¹²⁸⁷ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007, p.43, para.385.

¹²⁸⁸ *Ibid.*, para.27.

Addressing Metalclad's first claim, the Arbitral Tribunal found that Metalclad's investment had not been accorded fair and equitable treatment in accordance with international law and Mexico had hence violated Article 1105 (1) of NAFTA.¹²⁸⁹ Referring to transparency under Article 102 (1) of the NAFTA (*Objectives*), the Arbitral Tribunal pointed out that:

*'[...] all relevant legal requirements for the purposes of initiating, completing and successfully operating investments made, or intended to be made, under NAFTA should be capable of being readily known to all affected investors of another Party. There should be no room for doubt or uncertainty on such matters. Once the authorities of the central government of any Party become aware of any scope for misunderstanding or confusion in this connection, it is their duty to ensure that the correct position is promptly determined and clearly stated so that investors can proceed with all appropriate expedition in the confident belief that they are acting in accordance with all relevant laws.'*¹²⁹⁰

Such a standard of transparency under the NAFTA is on its face extremely demanding for any State. This is even more so if one considers that, besides the existence of several, sometimes disconnected, ministries in the same government, several administrative layers (municipal, provincial, regional, state and federal) might exist. The Arbitral Tribunal's transparency standard was substantively revised by the Supreme Court of British Columbia upon challenge of the Award. Metalclad had acquired the company COTERIN for the sole purpose of developing and operating a hazardous landfill in the valley of La Pedrera, in Guazalcazar, SLP.¹²⁹¹ And the crux of the matter was whether a municipal permit for the construction of a hazardous waste landfill was required or not.¹²⁹² Although the Parties disagreed on this requirement, the Arbitral Tribunal had found that the absence of a clear rule or established practice or procedure on the handling of municipal construction permits was in itself 'a failure to ensure the transparency required by NAFTA.'¹²⁹³ These deficiencies, together with the actual denial of the municipal construction permit and the ensuing conduct of the Municipality, were 'improper'.¹²⁹⁴ According to the Arbitral Tribunal, though legitimate, the environmental concerns had been already satisfactorily accommodated:

*'This conclusion is not affected by NAFTA Article 1114, which permits a Party to ensure that investment activity is undertaken in a manner sensitive to environmental concerns. The conclusion of the Convenio and the issuance of the federal permits show clearly that Mexico was satisfied that this project was consistent with, and sensitive to, its environmental concerns.'*¹²⁹⁵

¹²⁸⁹ *Ibid.*, para.74.

¹²⁹⁰ *Ibid.*, para.76.

¹²⁹¹ *Ibid.*, para.77.

¹²⁹² *Ibid.*, para.79.

¹²⁹³ *Ibid.*, para.88.

¹²⁹⁴ *Ibid.*, para.97.

¹²⁹⁵ *Ibid.*, para.98.

The Arbitral Tribunal's reasoning that Mexico had been initially satisfied with regard to the project's consistency with the fixed environmental standards, partly 'exposed' the fact that the environmental concerns on which Mexico's public authorities had allegedly based their conduct affecting Metalclad might have not been genuine. On this line, *Metalclad v. Mexico* can be included among those investment disputes where the environmental measures adopted had a purely domestic legal basis (instead of international), and among those cases where the legality of the contested measures was assessed against international investment law as the governing legal standard.¹²⁹⁶ Given the similarity and overlapping scope and purpose of environmental and cultural heritage measures, it might be legitimate to wonder whether cultural and cultural heritage related measures have been reserved the same treatment. It is difficult to provide any answer to this question. Investment tribunals appear to have given some autonomous relevance to UNESCO conventions (for instance, in *SPP v. Egypt*) and to cultural policies (for instance, *Charles Lemire v. Ukraine*). However, it remains to be seen whether the structural differences between international environmental law and cultural heritage law, or simply the evolution and timespan between the different cases, might provide with an explanation for this 'apparent' difference of consideration. This latter subject goes beyond the scope of this thesis. Quite interestingly, the Arbitral Tribunal clarified also that, as clearly stated in Articles 26 and 27 of the VCLT, municipal law, such as the Municipality's alleged permit requirements, could not be invoked to justify a failure to perform a treaty (in this case, NAFTA.)¹²⁹⁷

Good governance questions might emerge also in connection with claims of violation of the fair and equitable treatment standard obligation. In *Grand River Six Nations Enterprises et al. v. The United States*, one of the main claims against the United States concerned the violation of the obligation of good faith and non-discrimination under Article 1105 of the NAFTA. This claim was based on the contention that the customary international law standard of equitable treatment comprised a duty of consultations for the United States with Native Indian investors parties to the dispute.¹²⁹⁸ While the claimants had supported their view on the existence of a customary international law rule requiring governmental authorities to consult indigenous peoples on governmental policies or actions significantly affecting them referring to a study of the International Law Association and to Article 19 of the United Nations Declaration of the Rights of Indigenous Peoples, the United States and Canada (in its non-disputing party submission) opposed this idea.¹²⁹⁹ The Tribunal was thus faced this difficult task addressing the distinction between individual and community rights:

'In any event, any obligations requiring consultation run between the state and indigenous peoples as such, that is, as collectivities bound in community. Article 19 of the U.N. Declaration provides that "States shall consult with indigenous peoples

¹²⁹⁶ J. E. Viñuales, *The Environmental Regulation of Foreign Investment Schemes Under International Law*, in P.-M. Dupuy, J. E. Viñuales (Eds.), *Harnessing Foreign Investment to Promote Environmental Protection – Incentives and Safeguards*, (Cambridge University Press: 2013, U.K.), p.276.

¹²⁹⁷ *Ibid.*, para.100

¹²⁹⁸ *Grand River Enterprises Six Nations, Ltd., Et Al. v. United States of America*, Award, *Op. Cit.*, para.190.

¹²⁹⁹ *Ibid.*, para.210.

through their own representative institutions" (emphasis added). It would go well beyond any articulation of the indigenous consultation norm, as well as far beyond its conceptual foundations as understood by the Tribunal, to hold that the norm obliges consultations with individual investors such as Arthur Montour, who does not purport to have been endowed with authority to represent the First Nations communities of which he is a member in regard to the matters at hand. At the hearing, the Claimants' counsel argued, without any written authority or testimony by someone with direct relevant knowledge, that in the customs of the Haudenosaunee, sovereignty resides with the individual. Hence, as relevant here, Arthur Montour should be seen as the beneficiary of the customary international law obligation for governments to consult with indigenous communities. Thus, the argument went, NAFTA entitled him to be directly consulted before the states took any action affecting his investment. The Tribunal finds this particular argument unpersuasive and unsubstantiated. [...] That said, the Tribunal believes that a good case could be made that consultations should have occurred with governments of the Indian tribes or nations in the United States whose members and sovereign interests could, and apparently are, being affected by the MSA and related measures to regulate commerce in tobacco [...].'¹³⁰⁰

As an individual investor, the Tribunal concluded, Mr. Arthur Montour could not avail himself of a customary rule on consultations between governments and indigenous peoples.¹³⁰¹ One might even criticize the Arbitral Tribunal's reasoning, which eventually afforded no right of consultations to indigenous communities. However, it should be noted that the Tribunal was faced with an extremely contentious question which has not been adequately addressed, much less answered, in human right milieux. As such, the Tribunal's reasoning, though by no means dispositive on the issue, might be useful to add further pieces to any debate regarding indigenous communities right to consultation.

The Tribunal in *Glamis Gold v. the United States* was confronted with a claim of breach of the fair and equitable treatment under Article 1105 of the NAFTA as well.¹³⁰² The Tribunal first referred to the agreement existing between the State parties to the NAFTA and the parties to the arbitration on the standard applicable:

'There is no disagreement among the State Parties to the NAFTA, nor the Parties to this arbitration, that the requirement of fair and equitable treatment in Article 1105 is to be understood by reference to the customary international law minimum standard of treatment of aliens. Indeed, the Free Trade Commission ("FTC") clearly states, in its binding Notes of Interpretation on July 31, 2001, that "Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens

¹³⁰⁰ *Ibid.*, paras.211-212.

¹³⁰¹ *Ibid.*, para.213.

¹³⁰² *Ibid.*, paras.537 ff.

*as the minimum standard of treatment to be afforded to investments of investors of another Party.”*¹³⁰³

The customary international law minimum standard of treatment has to be intended as a ‘floor’ below which conduct is not accepted by the international community.¹³⁰⁴ The Neer standard still applies today, i.e. a violation of the customary international law minimum standard of treatment under the NAFTA emerges when an act is ‘*sufficiently egregious and shocking - a gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination, or a manifest lack of reasons.*’¹³⁰⁵ This standard might protect foreign investors’ legitimate expectations under certain conditions, that is that ‘*a State may be tied to the objective expectations that it creates in order to induce investment.*’¹³⁰⁶ In the case at issue, the Tribunal concluded that no specific assurances had been made to create reasonable and justifiable expectations on the part of the Claimant.¹³⁰⁷ Also, though the FET obligation under the NAFTA included the obligation for NAFTA Parties not to treat investors from another State in a manifestly arbitrary manner, Glamis Gold had not substantiated its claim concerning the violation of this standard by the above-mentioned measures.¹³⁰⁸ Although Glamis Gold had requested that the measures be assessed by the Tribunal under Article 1105 of the NAFTA as a whole, and not individually, to determine whether there has been a breach of international law, Glamis presented its arguments with respect to each and every single measure that made up the whole, arguing that each and every single one contravened NAFTA Article 1105, and consequently also as a whole.¹³⁰⁹

In a similar fashion, in *Charles Lemire v. Ukraine*, where cultural industries rather than cultural heritage itself were at stake, the fairness of procedures adopted to award radio frequencies was at the center of the dispute. Mr. Lemire had alleged that by imposing the 50% Ukrainian music requirement, Ukraine through its 2006 LTR had breached article II.6 of the relevant BIT which prohibited a host state to impose performance requirements.¹³¹⁰ The Tribunal first clarified that the requirement concerned music where the author, composer and/or performer is Ukrainian and the LTR required that this music constitutes at least 50% of the general broadcasting time of each radio organization.¹³¹¹ The Tribunal went further:

‘As a sovereign State, Ukraine has the inherent right to regulate its affairs and adopt laws in order to protect the common good of its people, as defined by its Parliament and Government. The prerogative extends to promulgating regulations which define the State’s own cultural policy. The promotion of domestic music may validly reflect a State policy to preserve and strengthen cultural inheritance and national identity. The “high measure of deference that international law generally extends to the right

¹³⁰³ *Ibid.*, para.599.

¹³⁰⁴ *Ibid.*, para.615.

¹³⁰⁵ *Ibid.*, para.616.

¹³⁰⁶ *Ibid.*, paras.621-622.

¹³⁰⁷ *Id.*

¹³⁰⁸ *Ibid.*, para.626.

¹³⁰⁹ *Ibid.*, para.756.

¹³¹⁰ *Joseph Charles Lemire v. Ukraine*, Decision on Jurisdiction and Liability, *Op. Cit.* para.499.

¹³¹¹ *Ibid.*, para.501.

of domestic authorities to regulate matters within their own borders” is reinforced in cases when the purpose of the legislation affects deeply felt cultural or linguistic traits of the community. [...] The desire to protect national culture is not unique to Ukraine. France requires that French radio stations broadcast a minimum of 40% of French music, Portugal has a 25 – 40% Portuguese music quota and a number of other countries impose similar requirements. The Tribunal in Plama reasoned that a rule cannot be said to be unfair, inadequate, inequitable or discriminatory, when it has been adopted by many countries around the world. If one adds that the 50% Ukrainian music rule is applied to all broadcasters, the necessary conclusion is that it is compatible with the FET standard defined in the BIT.’¹³¹²

However, the Tribunal continued, Mr. Lemire had not challenged the 50% Ukrainian music requirement as a violation of the fair and equitable treatment obligation, but as a violation of the local content rule of the relevant BIT which prohibited performance requirements forcing foreign investors to purchase goods or services at the domestic level.¹³¹³ Interpreting the performance requirement provision in the relevant BIT, the Tribunal determined that, following the ordinary meaning of the BIT disposition on local requirements, the LTR did not specify that any goods or services had to be purchased locally, though *de facto* the market of music authored, composed and/or performed by Ukrainians is located in Ukraine.¹³¹⁴ Through an interpretation of the object and purpose of the relevant BIT, the Tribunal concluded that since the performance requirement provision was trade-related, while Ukraine 50% Ukrainian music requirement was not, no violation of the relevant BIT had occurred:

‘The object and purpose of Article II.6 shed more light on its correct interpretation. The object of the BIT is to “promote greater economic cooperation” between the Parties (Preamble II). And the purpose of Article II.6 is trade-related: to avoid that States impose local content requirements as a protection of local industries against competing imports. When in 2006 Ukraine amended the LTR, the underlying reasons were not to protect local industries and restrict imports, but rather to promote Ukraine’s cultural inheritance, a purpose which is compatible with Article II.6 of the BIT. [...] In conclusion, the Tribunal finds that Article 9.1 of the 2006 LTR, which requires that “[...] music produced in Ukraine shall constitute at least 50% of general broadcasting time of each ... radio organization” does not amount to a violation of the local content rule contained in Article II. 6 of the BIT which prohibits “performance requirements ... which specify that goods or services must be purchased locally”.’¹³¹⁵

Though the Tribunal merged together the object of the BIT with its purpose without duly distinguishing them, its reasoning clearly drew a line between economic law and policy

¹³¹² *Ibid.*, paras.505-506.

¹³¹³ *Ibid.*, para.507.

¹³¹⁴ *Ibid.*, para.509.

¹³¹⁵ *Ibid.*, paras.510-511.

and non-economic objective, such as cultural policies. Further allegations originally made by Mr. Lemire had been dropped or not substantively argued during the proceedings and the Tribunal found no violation of the BIT with regard to them.¹³¹⁶

Hence, the scrutiny and assessment of national procedures and the imposition of certain standards might be related to virtually every sort of provision under international investment agreement. As another case in point, besides claims of expropriation, claims of violation of the fair and equitable treatment are common in investment disputes. This might be due to the broad and flexible nature of such a standard of treatment, virtually able to cover any type of unjust conduct by host states. In *Parkerings v. Lithuania*, Parkerings claimed violation of the 'equitable and reasonable' treatment obligation, of the most-favored-nation treatment obligation and of the obligations concerning expropriation under the Lithuania-Norway BIT.¹³¹⁷ In particular, Parkerings argued that engaging in unfair, discriminatory, arbitrary and opaque conduct, and breaching Parkerings's legitimate expectations, Lithuania had breached its obligation to accord 'equitable and reasonable treatment,' under the relevant BIT.¹³¹⁸ According to Parkerings, the 'equitable and reasonable' treatment standard was stricter than the common 'fair and equitable treatment' standard.¹³¹⁹ Lithuania had further allegedly failed to protect Parkerings's investment.¹³²⁰ It had violated the most-favored-nation treatment obligation under the relevant BIT by treating Pinus Proprius (an investment of Litprop Holding BV, a Dutch investor) more favorably than its incorporated company BP.¹³²¹ Finally, it had destroyed BP's value by undermining and then terminating the Agreement, indirectly expropriating Parkerings's ownership interest in BP, without providing for compensation.¹³²² Lithuania, beyond submitting that the claims fell outside the jurisdiction of the arbitral tribunal,¹³²³ rejected the idea that 'equitable and reasonable treatment' was a stricter standard of treatment than the more common 'fair and equitable treatment.'¹³²⁴ In addition, and argued that it could not be held responsible for Parkerings's failure to conduct the required due diligence prior to signing the Agreement nor its failure to obtain other guarantees that investors typically demand in agreements with States or their agencies.¹³²⁵ While Parkerings's claims were only allegations of contract breach, Lithuania had clearly explained during the negotiations of the agreement that this contract was 'untested' and therefore liable of legal challenges.¹³²⁶ No expropriation had taken place since Parkerings had not been deprived of its ownership of BP and had only alleged a wrongful termination of an agreement.¹³²⁷ The protection granted under the BIT was not intended to generate an all-encompassing duty for the host State.¹³²⁸ Finally, in order to show that a discrimination in

¹³¹⁶ *Ibid.*, para.512.

¹³¹⁷ *Parkerings-Compagniet AS v. Republic of Lithuania*, Award, *Op. Cit.*, paras.196-197.

¹³¹⁸ *Ibid.*, paras198-200.

¹³¹⁹ *Id.*

¹³²⁰ *Ibid.*, para.201.

¹³²¹ *Ibid.*, para.204.

¹³²² *Ibid.*, para.204.

¹³²³ *Ibid.*, para.214.

¹³²⁴ *Ibid.*, paras.216-217.

¹³²⁵ *Id.*

¹³²⁶ *Ibid.*, para.218.

¹³²⁷ *Ibid.*, para.220.

¹³²⁸ *Ibid.*, para.222.

violation of the MFN obligation or the equitable and reasonable treatment standard had occurred the claimant had to show that two separate investors were similarly situated and that they were treated differently.¹³²⁹

The Tribunal first found that ‘equitable and reasonable’ was identical to ‘fair and equitable treatment.’¹³³⁰ Parkerings had claimed that the ‘equitable and reasonable’ standard of treatment had been breached by Lithuania for it had adopted a series of unfair and discriminatory measures, including the relinquishment by the Municipality of BP’s multi-storey car park project in Gedimino on the grounds of cultural heritage concerns and public opposition, the breach by the Municipality of the agreement with BP and the conclusion of a JAA with another contractor (Pinus Propius) to the detriment of BP.¹³³¹ Lithuania had adduced in turn that any claim of unfair and discriminatory treatment must establish that similar situations were treated differently by the host State, but the multi-storey car park built by Pinus and Parkerings’ multi-storey car park projects were different.¹³³² The two car parks were different in dimension and while the BP one encroached into the old town, Pinus’ car park was outside its perimeter.¹³³³ This had entailed a different assessment of the two projects by the Cultural Heritage Commission.¹³³⁴ The Tribunal hence addressed the question of what amounts to a ‘*discriminatory conduct*.’¹³³⁵ While the conduct of the City of Vilnius might have amounted to a contractual breach of the agreement with BP, the Tribunal noted that this did not necessarily amount to a breach of the BIT.¹³³⁶ It concluded that no arbitrary conduct by the City of Vilnius had taken place,¹³³⁷ and Article III of the BIT had not been breached.¹³³⁸

With regard to legitimate expectations, the Tribunal underscored that in principle an investor has a right to a certain stability and predictability of the legal environment of the investment.¹³³⁹ Various modifications of laws occurred in Lithuania and this had had an impact on Parkerings’ investment expectations, as it had been deprived of its right to receive part of its expected income.¹³⁴⁰ However, Lithuania had not given any explicit promise that the legal framework of the agreement would have remained unchanged.¹³⁴¹ The Tribunal summoned the historical situation of Lithuania at the time of the investment to stress that the foreign investor could have had no expectation that Lithuanian laws would have remained the same over time:

‘In 1998, at the time of the Agreement, the political environment in Lithuania was characteristic of a country in transition from its past being part of the Soviet Union to

¹³²⁹ *Ibid.*, para.225.

¹³³⁰ *Ibid.*, para.278.

¹³³¹ *Ibid.*, para.281.

¹³³² *Ibid.*, paras.283-284.

¹³³³ *Id.*

¹³³⁴ *Id.*

¹³³⁵ *Ibid.*, para.287.

¹³³⁶ *Ibid.*, para.289.

¹³³⁷ *Ibid.*, paras.309, 313.

¹³³⁸ *Ibid.*, para.320.

¹³³⁹ *Ibid.*, para.333.

¹³⁴⁰ *Ibid.*, para.334.

¹³⁴¹ *Ibid.*, para.334.

*candidate for the European Union membership. Thus, legislative changes, far from being unpredictable, were in fact to be regarded as likely. As any businessman would, the Claimant was aware of the risk that changes of laws would probably occur after the conclusion of the Agreement. The circumstances surrounding the decision to invest in Lithuania were certainly not an indication of stability of the legal environment. Therefore, in such a situation, no expectation that the laws would remain unchanged was legitimate.'*¹³⁴²

Thus, Parkerings legitimate expectations had not been frustrated under Article III of the BIT, also taking into consideration that some of these expectations had a contractual nature.¹³⁴³ The Tribunal also found that no violation of protection and security standard had occurred.¹³⁴⁴

The above-mentioned difference alleged by Lithuania between the two multi-storey car parks (Pinus Proprius' and BP's) was relevant also with regard to the Parkerings' claim of violation of the most-favored-nation treatment obligation. The Tribunal clarified that for a breach of this obligation to exist, three conditions had to be fulfilled: Pinus Proprius had to be a foreign investor, it had to be in the same economic or business sector of Parkerings, and the two had to have received a different treatment with no justification for such a differential treatment. While the two first conditions were met,¹³⁴⁵ for the third one Parkerings argued that two measures had resulted in a differential treatment without any justification. First, Pinus Proprius had been authorized to construct a multi-storey car park in Gedimino, while BP's project in the same area had been refused.¹³⁴⁶ Second, the Municipality of Vilnius had refused to conclude a JAA or a cooperation agreement with BP but had accepted to conclude one with Pinus Proprius.¹³⁴⁷ As for the first measure concerning the Gedimino multi-storey car park, both car park projects were located in the Old Town and were partly superimposed.¹³⁴⁸ But BP's project was much bigger than the one constructed by Pinus Proprius.¹³⁴⁹ Both projects were located in the administrative territory of the Old Town, which coincided with the area defined and inscribed in the World Heritage List under the UNESCO World Heritage Convention, and *'[t]he territory of the Old Town as defined by UNESCO is a protected area which requires the approval of various administrative Commissions in order, notably, to make any construction.'*¹³⁵⁰ Though the two projects shared some similarities,¹³⁵¹ the BP's project *'extends significantly into the Old Town as defined by UNESCO and especially near the historical site of the cathedral.'*¹³⁵² That is why several Departments and Commissions in Lithuania were opposed to the project, pointing, as the State Monument Commission had done in 2000, that

¹³⁴² *Ibid.*, para.335.

¹³⁴³ *Ibid.*, paras.345-346.

¹³⁴⁴ *Ibid.*, para.361.

¹³⁴⁵ *Ibid.*, paras.372-373.

¹³⁴⁶ *Ibid.*, para.374.

¹³⁴⁷ *Id.*

¹³⁴⁸ *Ibid.*, para.379.

¹³⁴⁹ *Ibid.*, para.380.

¹³⁵⁰ *Ibid.*, paras.381-382.

¹³⁵¹ *Ibid.*, para.381.

¹³⁵² *Ibid.*, para.385.

the project had an impact on the environment, on cultural properties and it would have changed the character of the Old Town and destroyed large areas of unexplored cultural layer.¹³⁵³ The Tribunal hence concluded that the difference between BP's and Pinus Propius' projects as for their encroachment in the Old Town was not relevant, nor was the different size of the projects decisive.¹³⁵⁴ However:

*'On the other hand, the fact that BP's MSCP project in Gedimino extended significantly more into the Old Town as defined by the UNESCO, is decisive. Indeed, the record shows that the opposition raised against the BP projected MSCP were important and contributed to the Municipality decision to refuse such a controversial project. The historical and archaeological preservation and environmental protection could be and in this case were a justification for the refusal of the project. The potential negative impact of the BP project in the Old Town was increased by its considerable size and its proximity with the culturally sensitive area of the Cathedral. Consequently, BP's MSCP in Gedimino was not similar with the MSCP constructed by Pinus Proprius.'*¹³⁵⁵

Parkerings had failed to show that Pinus Propius had benefitted from a more favorable treatment for the administrative requirements of the project, and the two investors were not *'in like circumstances.'*¹³⁵⁶ As for the second allegation of violation of the MFN treatment obligation, concerning the JAA or cooperation agreement, which the Tribunal understood as necessary to start the construction (of the car park, in the case) and to avoid the public auction,¹³⁵⁷ Pinus Propius situation differed from BP's one with regard to the differences in their projects.¹³⁵⁸ The Tribunal found that at least two differences were relevant to the BP and Pinus Proprius projects and therefore different treatment could be justified:¹³⁵⁹ stressing that the City of Vilnius is a public entity and thus has to act with the defence of public interest as its main yardstick, and thus it may have had legitimate motivations on its own at the time to exercise its discretion to contract or not to contract,¹³⁶⁰ the substance of the cooperation agreement signed with Pinus Proprius was different from the proposed JAA with BP, and while Pinus Proprius had a contractual obligation to sell the car parking to the Municipality fo Vilnius upon completion of the project, BP did not have such an obligation;¹³⁶¹ second, the Municipality never concluded any JAA with BP, while it did so with Pinus Proprius and changed the name into cooperation agreement for certain administrative purposes.¹³⁶² The

¹³⁵³ *Id.*

¹³⁵⁴ *Ibid.*, paras.390-391.

¹³⁵⁵ *Ibid.*, para.392.

¹³⁵⁶ *Ibid.*, paras.393-396.

¹³⁵⁷ *Ibid.*, para.401.

¹³⁵⁸ *Ibid.*, para.430.

¹³⁵⁹ *Ibid.*, para.410.

¹³⁶⁰ *Ibid.*, para.411.

¹³⁶¹ *Ibid.*, paras.413-427.

¹³⁶² *Ibid.*, paras.428-430.

decision of the Municipality of Vilnius to refuse the JAA or cooperation agreement with BP could be justified on those grounds.¹³⁶³

Taking all the cases mentioned into account, it seems safe to state that international investment law might foster 'good governance,' where reasonably appropriate standards and procedures are required for host states in their conduct affecting foreign investors. The 'reasonably appropriate' qualifier is necessary: an extremely stringent standard of transparency as the one required by the Tribunal in *Metalclad v. Mexico* would be unduly cumbersome and detached from the reality and conditions, not only of developing but also of developed countries. Following the idea that international investment arbitration may constitute a form of global administrative review, where cultural elements are taken into consideration in the adjudication of cultural disputes, were international investment law, international cultural law and national law converge, some scholars have hypothesized the emergence of a *lex administrativa culturalis*.¹³⁶⁴ In reality, though the rapid development that international law has experienced in the XXth century has expanded quantitatively (to new areas) and qualitatively (to new levels of regulation) the boundaries of international law rules, international courts, tribunals and adjudicative bodies, from the ICJ, to the WTO dispute settlement system and the ECtHR, have long applied different branches of law and revised the action of states in disputes. Whether a characterization of current cultural disputes before investment tribunals changes in practice the situation or provides a new perspective on these cases is doubtful. Still, it might simply be another way to state that international investment law might foster good governance with regard to cultural policies and cultural heritage-related measures.

¹³⁶³ *Id.*

¹³⁶⁴ V. S. Vadi, *Toward a Lex Administrativa Culturalis? The Adjudication of Cultural Disputes Before Investment Arbitral Tribunals*, Jean Monnet Working Paper 17/14, p.13, available at <http://www.jeanmonnetprogram.org/wp-content/uploads/2014/12/JMWP17Vadi.pdf>.

Part IV. Concluding Remarks

Chapter IV. International Investment Law and Cultural Heritage Between Current Trends and Future Perspectives

All the remarks above allow to safely go beyond the simple assertion that international investment law has a bearing for cultural heritage (law), and international cultural heritage law has a bearing for international investment (law). However, before approaching the concluding remarks, it is necessary to spell out a *caveat*. A high number of new disputes involving culture and cultural heritage is emerging or is already *in itinere*. As such, any conclusion reached in this thesis cannot have an absolute and definitive value. Any new consideration, clarification or nuance made by investment arbitral tribunals might require further reflection on these conclusions, if adopted in a jurisprudence *bien établie*.

The decisions in the cases *Bernhard von Pezold and others v. Republic of Zimbabwe* and *Border Timbers Limited and others v. Republic of Zimbabwe* might provide new guidance on the role of other branches of international law, namely human (cultural) rights, in investment arbitration.¹³⁶⁵ The *Al Jazeera v. Egypt* arbitration,¹³⁶⁶ where Al Jazeera is claiming a violation of its investor's rights as a result of the seizing of its properties, the attacks perpetrated against its journalists and the jamming to its signal,¹³⁶⁷ might be of interest for cultural industries-related arguments. Similarities between this case and *Charles Lemire v. Ukraine* or *Pey Casado v. Chile*, revolving around investment in cultural industries, appear straightforward. These cases might confirm, one more time, that investment arbitration is a suitable, last-resort mechanism for individuals and companies alike to challenge adverse host states conduct impacting cultural sectors.

Clearly, these disputes show that foreign investors are not happy with heritage-related measure adopted by states. However, though the filing of claims with investment arbitral tribunal might prevent in itself regulatory changes, with a 'regulatory chill' effect regardless of the real merits of the claims put forward, this also generate a review or scrutiny of state policies and conducts. In *Blue Bank v. Venezuela*, Blue Bank had some investment interests in *Inversora Turística Caracas, C.A.* (ITC), whose principal asset was a concession contract for the operation of an elevated cable car system providing access to the Ávila Mountain Range surrounding the city of Caracas.¹³⁶⁸ *Inter alia*, Blue Bank has alleged that the country's Institute for Cultural Heritage has stopped ITC's restoration work and prevented it from obtaining numerous permits, eventually leading the foreign investor to stop the restoration works and thus negatively affecting the investment.¹³⁶⁹ The Arbitral Tribunal in this case will certainly have to assess how Venezuelan public authorities, and Venezuela's Institute for Cultural Heritage among them, have performed their tasks. Likewise, on 24 June 2016,

¹³⁶⁵ *Bernhard von Pezold and others v. Republic of Zimbabwe and Border Timbers Limited, Border Timber International (Private) Limited, and Hangani Development Co. (Private) Limited v. Republic of Zimbabwe*, *Op. Cit.*

¹³⁶⁶ *Al Jazeera Media Network v. Arab Republic of Egypt*, ICSID Case no.ARB/16/1.

¹³⁶⁷ Stockholm Chamber of Commerce – ISDS Blog, *The First ICSID Case of 2016: Al Jazeera v. Egypt*, available at <http://isdsblog.com/2016/02/01/the-first-icsid-case-of-2016-al-jazeera-v-egypt/>.

¹³⁶⁸ *Blue Bank International and Trust (Barbados) Ltd. V. Bolivarian Republic of Venezuela*, ICSID Case No.ARB/12/20, Request for Arbitration, 22 June 2012, paras.18-21.

¹³⁶⁹ *Ibid.*, paras.33,

TransCanada has filed a *Request for Arbitration* against the United States of America over the construction of the Keystone XL Pipeline crossing the boundary between Canada and the United States.¹³⁷⁰ The dispute is based on alleged violations by the United States of its obligations under the NAFTA concerning TransCanada(s) attempts to obtain the necessary permits from the U.S. Department of States to construct cross-border oil pipelines.¹³⁷¹ Among others, TransCanada has argued that in 2010, the U.S. State Department issued a Draft Environmental Impact Statement where the assessment of the pipelines project's impact on wetlands, natural and cultural resources would have resulted in a limited environmental impact during construction and operation of the pipeline.¹³⁷² Also, in 2015, in a press statement, Mr. Kerry, Secretary of State, highlighted that the project had raised several concerns regarding its impact on local communities, on water supplies and cultural heritage sites.¹³⁷³ Though these disputes are at a too early a phase to make any conclusive remark, they testify to the unprecedented emergence of cultural and cultural heritage-related disputes in a number of unexpected contexts.

In this sense, any forecast on the use of cultural heritage defenses would be risky. Preliminary assessments of cases such as *Erbil Serter v. France*, an investment dispute regarding copyright,¹³⁷⁴ or *Global Telecom Holding S.A.E. v. Canada*,¹³⁷⁵ concerning the regulation of 'cultural industries' with no possibility for Canada to resort to the cultural provision under the NAFTA, being it the first non-NAFTA investment arbitration brought against Canada,¹³⁷⁶ appear as a leap in the dark. Similarly, in *John R. Andre v. Canada*, the American investor claimed that Canada, through its Territorial Government of the Northwest Territories (NWT), had breached a high number of its obligations under the NAFTA by discriminatorily lowering the number of Caribou 'quota tags' issued per corporation.¹³⁷⁷ This had affected its business in Canada, which was based on organizing hunting packages for tourists/hunters traveling from outside Canada to the Courageous Lake Caribou Camps in the NWT.¹³⁷⁸ The measure eventually excluded aboriginal caribou hunt, something related to, according to some scholars, to human rights and the need to preserve indigenous tribes' culture and subsistence based on caribou hunting in winter.¹³⁷⁹

In addition, new investment arbitrations where cultural heritage issues have emerged will finally help determine whether any path of recurring questions and claims exist or not.

¹³⁷⁰ *TransCanada Corporation & TransCanada Pipelines Limited v. The Government of the United States of America*, ICSID Case No.ARB/16/21, Request for Arbitration, 24 June 2016, para.10.

¹³⁷¹ *Ibid.*, paras.9 ff.

¹³⁷² *Ibid.*, para.26.

¹³⁷³ *Ibid.*, Footnote 96.

¹³⁷⁴ L. E. Peterson, *France Is Sued at ICSID by Turkish Investor in Relation to Ship Hull Design Controversy*, Investment Arbitration Reporter 11 September 2013, available at <http://www.iareporter.com/articles/france-is-sued-at-icsid-by-turkish-investor-in-relation-to-ship-hull-design-controversy/>.

¹³⁷⁵ *Global Telecom Holding S.A.E. v. Canada*, ICSID Case No.ARB/16/16.

¹³⁷⁶ C. H. Gibson, *GTH v. Canada May Sound Familiar to Media Entities*, Kluwer Arbitration Blog, 20 June 2016, available at <http://kluwarbitrationblog.com/2016/06/20/gth-v-canada-may-sound-familiar-media-entities/>.

¹³⁷⁷ *John R. Andre v. Government of Canada*, Notice of Intent to Submit Claim to Arbitration Pursuant to Chapter Eleven of the North American Free Trade Agreement, 19 March 2010, para.51.

¹³⁷⁸ *Ibid.*, para.12.

¹³⁷⁹ V. S. Vadi, *Cultural Heritage in International Investment Law and Arbitration*, (Cambridge University Press: 2014, U.K.), p.226.

Ont his line, the *Infinito Gold v. Costa Rica* case¹³⁸⁰ superficially recalls the *Santa Elena v. Costa Rica* and *Unглаube v. Costa Rica* cases. It remains to be seen whether comparable arguments and conclusions will be followed by the parties in disputes and the Arbitral Tribunal. The same observations apply to *Cervin investissements S.A. and Rhone Investissements S.A. v. Republic of Costa Rica*.¹³⁸¹ All these new cases push to be careful when drawing any conclusion. The conclusions of this thesis should be tested against the new, fast-paced developments of international law concerning foreign investment and cultural heritage. This is not however to say that new cases are not wished for. To the contrary, further cases will serve to confirm that, though any serious research work requires a continuous reflection, the concluding remarks hereafter are based on a 'stable ground'.

With this *caveat* in mind, one might approach the conclusions. Clearly, the degree of importance that the international regulation of foreign investment had for cultural heritage, and *vice versa* may vary depending on the investment, on the cultural heritage expression and on the circumstances underlying each specific case. However, a first point demonstrated by this research is that, regardless of the specific situation at hand, international investment agreements are key instruments to devise successful cultural policies and to adopt heritage-related measures. The relation between international investment law and cultural heritage is a symbiotic relationship. In symbiosis, two different beings interact with each other drawing benefits from this interaction. One (or both) of these beings might also represent a danger for the other one, but this is not a sufficient reason to exclude their 'vital' relation. The same might be said *mutatis mutandis* for international investment law and cultural heritage. International investment law might tie the hands of host states and create problems in respect of cultural policies or measures, but, as shown, it might also protect investors/investments in cultural sectors and cultural heritage, it might help them seek redress for cultural-related claims and, altogether, it might foster good governance with regard to cultural regulation. Concurrently, cultural heritage and cultural industries attract foreign investments: investment in the media sector or in tourist development projects are not 'casual'. Investing in these fields pay off significantly. The existence in practice of conflictual cases does not, and should not, lead to the conclusion of a conflictual connection *tout court*. Indeed, as a case in point, human rights conflict among themselves often and might conflict also with other branches of international law such as environmental law or cultural law. However, no one says that one rights are entertaining a conflictual relation altogether among themselves or that human rights are dangerous for the environment and for culture. Similarly, one should not deny the existence of potential contrasts between international investment law and cultural heritage, nor however should he make them absolute or disposing of this relation. The complexity and myriad of ways in which international investment law might benefit cultural heritage protection and safeguard allows to safely assert that a vital tie exist between the two.

The second salient point, connected to the first one, regards the possibility to adopt international investment arbitration as a suitable forum to litigate cultural and cultural heritage-related disputes. As previously indicated, though with its imperfections, international investment arbitration can be included among the cultural heritage dispute

¹³⁸⁰ *Infinito Gold Ltd. v. Republic of Costa Rica*, ICSID Case No.ARB/14/5.

¹³⁸¹ *Cervin investissements S.A. and Rhone Investissements S.A. v. Republic of Costa Rica*, ICSID Case No.ARB/13/2.

settlement methods with full rights. For the sake of clarity and in formal terms, one might still distinguish between international investment disputes and cultural heritage disputes, but these two concepts might well coincide and fully overlap. In light of the absence of a specialized international cultural heritage court, which is probably not even needed nor viable as highlighted at the beginning of this work, arbitration offers several advantages for cultural litigations. The possibility to choose as arbitrators seasoned and skilled individuals not only in international investment law but also in international cultural and cultural heritage law provides a competitive dispute settlement edge if compared to other adjudicative bodies. Though for the sake of any discussion and from a rigorous standpoint, one could refer to international investment disputes or arbitration involving, impacting on or affecting cultural heritage and cultural industries, the case law clearly shows that investment disputes involving culture fully overlap, and 'are', cultural disputes.

Thirdly, and symmetrically, the researches conducted here have proved that international investment agreements can be included among the sources of that complex and composite branch of international law that is nowadays called international cultural and cultural heritage law. As noted above, the need to know how international investment law works is key to devising effective cultural policies. Knowledge of the international regulation of foreign investment might make a significant difference between a successful cultural policy and an unsuccessful one. International cultural and cultural heritage law is a complex and composite branch of international law, comprising a number of different international law instruments and partly overlapping with other fields of international law, such as human rights, environmental law or humanitarian law. International investment agreements, and international investment law in general, might be safely included among those instruments and branches of international law contributing to the emergence of an international cultural and cultural heritage law. In order to understand how culture and cultural heritage is regulated nowadays at the international level, no scholar or practitioner has the luxury to overlook the impact of the regulation and protection of foreign investments on culture.

Lastly, all these remarks allow to strengthen the conclusion that international investment law impacting cultural industries and cultural heritage might also spur good governance. The intersection between the standards of due process, transparency and respect of the rule of law generally imposed by international investment agreements and the obligations to protect and transmit cultural heritage imposed by international cultural conventions and treaties, lead to more accountable (and thus also legitimate) systems of governance. Though some problems still persist, such as for the recognition and application in practice of the obligation to consult with indigenous communities whenever their interests are at stake, these problems should be first addressed by human rights bodies in dedicated fora. Some criticism might be legitimately expressed with regard to how investment tribunals have addressed and dealt with some of these open problems. However, one should not (and cannot) expect ready made solutions on a number of international law questions from investment arbitral tribunals, where any consensus is lacking at the international community level and where scholars, practitioners and institutions specialized in those fields have not found any generally acceptable reply.

These considerations highlight one final, relevant point. This thesis does not wish to discard the criticism on the impact of the international regulation of foreign investment on culture as such. Some negative effects exist. However, any potential criticism on the foreign investment protection regime should first be addressed to the community of states that has created it. The states that have taken specific obligations under international investment agreements are the same that then claim to have a legitimate regulatory space for cultural policies. Further, though international investment law has commanded attention for the possibility for foreign investors to challenge host states policies, some conclusions by human rights courts similar to those of reached by investment tribunals have not attracted the same amount of attention or criticism. A brief comparison between the ECtHR and investment tribunals determinations might well elucidate this point. While investment tribunals decisions to award compensation by host states to foreign investors in the case of expropriation of cultural and natural heritage has drawn criticism, no one seems to have noticed that the ECtHR has reached the same conclusion. The Court has indeed clearly stated that '*le but légitime de protéger le patrimoine naturel, aussi important soit-il, ne dispense pas l'État de son obligation d'indemniser les intéressés lorsque l'attente à leur droit de propriété est excessive.*'¹³⁸² An analysis of scholarly doctrine has clearly shown that there exists a rhetorical prejudice towards foreign investment regulation and their impact on culture and cultural heritage. This point should not be underrated – conversely, it should be present in any future assessment of both international agreements and international cases where the interaction of investments and heritage is at stake.

To conclude, any consideration on the subject under analysis should be cautious and, adapting what has been said in another context,¹³⁸³ any positive or negative judgment or assertion must be tempered with realism. The relationship between international investment law and cultural heritage has commanded 'meaningful attention' only recently and further elaboration and 'digestion' is certainly needed. This is even more so if one considers the inconsistencies existing among international investment tribunals positions and decisions. These discrepancies, which might appear even starker if compared to other international tribunals' judgments, shall nonetheless be tested against the above-mentioned ongoing or emerging investment disputes where cultural heritage is at stake. Here, it is hoped that any future cultural policy will take stock of these conclusions and that any new negotiation of investment agreements will consider duly cultural elements.

¹³⁸² *Affaire Theodoraki et Autres c. Grece*, ECtHR, Requête no.9368/06, Arrêt, 11 décembre 2008, para.61.

¹³⁸³ I. Sinclair, *The Vienna Convention on the Law of Treaties*, (Manchester University Press: 1984, Manchester), p.1.

Sources – Table of Instruments, Table of Cases and Bibliography

The following table of instruments, table of cases and bibliography regroup all the sources referred to in the thesis. As a general *caveat*, with regard to the the distinction between instruments, cases, books and book chapters, academic articles, papers and reports, newspapers and web pages and miscellaneous sources, the criteria chosen for the inclusion in one category rather than the others have referred not only to the 'form' and name of the source, but also to their substantive content. As a case in hand, though a text might have been written as a report for consideration within the United Nations, if it appears for its form and content as a scholarly contribution, it has been included under the section of academic articles. Website addresses of academic articles and papers, though sometimes signaled in the footnotes in the text of the thesis, have not been generally included in this bibliography, save for those articles which were not available in printed version. Lastly, when an international agreement was quoted or referred to by a tribunal or in a case alone, and not substantively consulted in the research, it was not included in the respective part of this section on sources.

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Accord entre le Gouvernement de la République française et le Gouvernement de la République argentine sur l'encouragement et la protection réciproques des investissements, signé le 3 juillet 1991.

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Convention de Coopération entre l'Organisation des Nations Unies pour l'Éducation, la Science et la Culture et le Gouvernement de la République Française sur la Protection et la Mise en Valeur du Patrimoine Monumental et Urbain, signée le 16 Octobre 1997.

Convention Establishing the World Intellectual Property Organization, adopted on 14 July 1967, as amended on 28 September 1979.

Convention for the Protection of Cultural Property in the Event of Armed Conflict, adopted on 14 May 1954, entered into force on 7 August 1956.

Convention for the Safeguarding of the Intangible Cultural Heritage, signed on 17 October 2003, entered into force on 23 April 2006.

Convention on Biological Diversity, adopted on 5 June 1995, entered into force on 29 December 1993.

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