Introductory Note

The second part of the book explores the complex interplay between cultural policies and economic development in practice by examining the jurisprudence of international economic courts. After mapping the legal framework governing cultural heritage on the one hand and free trade and foreign direct investment on the other in part I, the book now examines the disputes in the economic and cultural context adjudicated before investment treaty arbitral tribunals and the WTO adjudicative bodies.

In the light of the increasing global economic interdependence and the growing tension between the protection of cultural heritage and the promotion of trade and investment, it is of crucial importance to examine how this interaction takes place in practice. The recent proliferation of cultural heritage cases has brought such tension between economic globalization and cultural governance to the forefront of scholarly debate and public scrutiny because of their public policy implications. Therefore, the jurisprudence of international economic courts offers a fertile field of analysis.

Adjudication is a mode of governance and has a fundamental importance with regard to the concrete implementation of legal regimes. While the primary function of adjudication is resolving a given dispute thus benefitting the parties to the same proceedings, adjudication also incidentally produces certain public goods. In particular, it provides 'one forum for debate over social values' and produces 'publicly available judgments that clarify or develop international law … on an essentially universal scale.'[1] More importantly, 'in issuing their decisions, international courts shape fundamental norms about the sovereignty of states as well as the daily lives of countless individuals.'[2]

The interplay between the protection of cultural heritage and the pursuit of economic interests in international law has been approached adopting a variety of perspectives and methods. Yet, most have approached the relevant issues focusing on the relevant treaty provisions, leaving the critical assessment of relevant jurisprudence aside. Furthermore, when cultural heritage-related cases have been examined, they have been considered from a mere economic law standpoint, leaving cultural policy arguments aside.

1 Joshua Paine, 'International Adjudication as a Global Public Good?', (2019) 29 EJIL 1223–1249, 1226.

2 Suzanne Katzenstein, 'In the Shadow of Crisis: The Creation of International Courts in the Twentieth Century' (2014) 55 *Harvard International LJ* 151–209, 152.

Therefore, the time is ripe for a comprehensive investigation of the burgeoning jurisprudence in the field. As a comprehensive critical analysis of cultural heritage cases heard by international economic courts is yet to be written, this analysis fills a significant gap in contemporary legal studies. It critically assesses the relevant cases using both economic and cultural considerations. The underlying hypothesis of this research is that development should be conceived as a broad concept, inclusive of not only mere economic growth, but also human flourishing and well-being, to which cultural elements are crucial.

A number of questions arise in this context. First, is it legitimate for the state to adopt protectionist cultural policies? What are the limits, if any, to state intervention in cultural matters? Second, if the state adopts cultural policies, how do we set the boundaries between legitimate regulation (which is not compensable) and violation of treaty provisions (which is compensable)? To what extent do international economic law obligations collide with states' cultural policies? Third, how have adjudicators dealt with these crucial policy issues? Have international economic courts paid any attention to cultural heritage and if so, how have they balanced economic interests and the cultural policies of host States? What type of reasoning have such courts adopted? What values and interests are at the heart of their thinking and practice? This book aims to provide a fresh approach to these questions, offering an in-depth analysis of the relevant jurisprudence.

One might expect the embryonic field of cultural heritage law to be overwhelmed by the long-established and sophisticated field of international economic law—not least, given that international economic courts have limited jurisdiction and so cannot adjudicate on the violation of other norms of international law outside the realm of international economic law unless given the mandate to do so. However, this book shows that arbitrators have increasingly taken cultural concerns into consideration in deciding cases brought before them, refusing to limit themselves to purely economic standards of valuation. Nonetheless, concerns remain that unlike bodies with, for example, responsibilities for human rights, international economic courts are ill-suited to the task of protecting cultural entitlements. The next chapters verify whether international adjudicators take cultural concerns into account, and more generally, what impact cultural policies have on the structure of international law.

In scrutinizing the relevant cases, the methodology is multilayered and has three strands: (1) empirical/exploratory; (2) doctrinal; and (3) evaluative. The first empirical strand involves an impressive amount of detailed research of the corpus of cases. These cases are identified by ascertaining whether disputes

brought before international economic courts involved various elements of cultural heritage. A multiplicity of techniques are employed to detect relevant cases. One such tool is the use of some large databases that are already in digital form; keywords are used to identify the relevant cases. Cases are identified as relevant because of the inherent interest of the cases or the circumstances surrounding them which are of relevance to the interplay between the protection of cultural heritage and the promotion of free trade and foreign direct investment. Outlier cases (that is, those which are atypical) are scrutinized too, because they reveal additional information.

Much more difficult is detecting those cases that despite not making formal reference to cultural concerns, still reflect fundamental cultural choices. These cases are detected using the available literature, qualified newsletters, and newspapers. Take, for instance, cultural differences in attitudes toward risk arising from food. As noted by Voon, although 'disputes in this field are not typically framed in terms of culture, consumers' perception and tolerance of risk in connection with food safety often has cultural foundations.'[3] For instance, 'the culture and attitudes of European citizens have tended to favor traditional foods and minimal processing … In contrast, Americans have been more willing to accept new technologies.'[4] In the *EC–Hormones* case, the WTO panels and AB held that the EU had violated certain provisions of the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement)[5] in restricting the trade of meat treated with growth hormones.[6] Only ten years after the AB ruling have the parties eventually settled the dispute, 'demonstrating the extreme difficulty involved in resolving conflicts arising from deeply held cultural beliefs'.[7] A cultural understanding of such disputes is also demanded by parallel developments at the UNESCO level, where certain types of food have been considered forms of intangible cultural heritage.

The second doctrinal strand of the adopted methodology examines the relevant jurisprudence on the basis of textual reading, explanation, and exegesis. The cases are scrutinized, discerning the facts of the controversy, the legal issues that the court decides, and the reasoning used by the court. The analysis aims at understanding the inner logic of the decision. In this regard, particular

3 Tania Voon, 'Culture, Human Rights, and the WTO', in Ana Filipa Vrdoljak (ed.), *The Cultural Dimension of Human Rights* (Oxford: OUP 2013).

4 Id.

5 Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement), 15 April 1994, 33 ILM 1144.

6 WTO Appellate Body report, *EC–Measures Concerning Meat and Meat Products* (Hormones), WT/DS26/AB/R, WT/DS48/AB/R, circulated 16 January 1998, adopted 13 February 1998.

7 Voon, 'Culture, Human Rights, and the WTO'.

attention is paid to critical issues such as the standard of review, that is, the intensity of the scrutiny of the tribunal in reviewing state measures.

The third evaluative aspect of the work is based on the adoption of both cultural and economic law concepts. Almost invariably cultural heritage-related disputes involve a balance between the protection of cultural heritage and economic interests; albeit in some circumstances the arguments for protecting cultural heritage may be supported by economic reasoning. Traditionally scholars have adopted a single track—that is, they have used the traditional categories of cultural heritage law or economic law. Yet, because of their complexity and multidimensional nature, each case is assessed in light of both cultural and economic standards.

By bringing together the two aforementioned themes, the book is uniquely placed to assess whether different international economic 'courts' are adjudicating analogous cases in a similar fashion or whether there are significant divergences. The critical assessment of such jurisprudence may help detect common patterns, leading to the coalescence of general principles of law and/or customary law requiring the protection of cultural heritage in international law. While some research has been done with regard to the existence of such a principle in wartime,[8] the parallel question as to whether such a principle exists in times of peace has received limited scholarly attention. Finding out whether such a principle also exists in peacetime would be significant because general principles and customary international law are binding on states, irrespective of their adherence to specific treaties.

8 Roger O'Keefe, *The Protection of Cultural Property in Armed Conflict* (Cambridge: CUP 2001).

CHAPTER 4

Cultural Heritage in International Investment Law and Arbitration

The morning glory
Twined round the bucket:
I will seek elsewhere for water[1]

1 Introduction

The protection and sustainable use of cultural heritage may foster resilience and economic development, enabling individuals and communities to respond to major social and economic changes.[2] In parallel, the expansion of foreign direct investments facilitates the interaction between different societies and the free flow of ideas.[3] Both cultural heritage protection and the promotion of economic activities are important public interests that can contribute to economic growth and the common good. As a result, there can be mutual supportiveness between the promotion of foreign direct investment (FDI) and the protection of cultural heritage.

However, this is not always the case. Although economic globalization and international economic governance have spurred a more intense dialogue and interaction among nations—potentially promoting cultural diversity and providing the funds to recover and preserve cultural heritage—these phenomena can also jeopardize cultural heritage. Foreign direct investments in the extractive industries have the ultimate capacity to change cultural landscapes. In parallel, foreign investments in the cultural industries can induce cultural homogenization.

1 Fukuda Chiyo-Ni, 'The Morning Glory', in Fukuda Chiyo-Ni, *Il Colore dell'Acqua*, M. Contrini and L. Cerrisi (eds) (Roma: La Ruota 2019).

2 Amartya Sen, 'How Does Culture Matter?' in Vijayendra Rao and Michael Walton (eds), *Culture and Public Action* (Stanford University Press 2004) 37–58; Amartya Sen, *Development as Freedom* (Oxford: OUP 1999).

3 Barnali Choudhuri, 'International Investment Law as a Global Public Good', (2013) 17 *Lewis & Clark LR* 481–520 (conceptualizing the promotion of foreign direct investments as a public good worth of being protected.)

The law of foreign investment is one of the oldest and most complex areas of international law and has gained pre-eminence in the field. More than three thousand international investment agreements (IIAs) govern foreign investments and provide foreign investors with direct access to international arbitration. States have signed such treaties to attract foreign investment and accord adequate legal protection to their investors. Rare in international law, these treaties give private parties standing to arbitrate disputes under international law and then enforce any award in their favor before domestic courts. Investment treaties provide extensive protection to investor rights in order to encourage foreign investment and foster economic development. While investment treaties differ in their details, their scope and content have been standardized over the years, as negotiations have been characterized by an ongoing sharing and borrowing of concepts.[4]

At the substantive level, investment treaties broadly define the notion of FDI, which typically includes ownership in businesses operating outside the country of origin of the investor, and they provide protection against discrimination, fair and equitable treatment, full protection and security, and assurances that the host country will honor its commitments regarding the investment. Other common provisions in investment treaties concern the repatriation of profits and the prohibition of currency controls that are worse than those in place when the treaty was signed. Investment treaties generally guarantee compensation in the event of nationalization, expropriation, or indirect expropriation, and clarify what level of compensation will be owed in such cases.

At the procedural level, most IIAs provide investors with direct access to an international arbitral tribunal. In so doing, they create a set of procedural rights for the direct benefit of investors. This is a major novelty in international law, as customary international law does not provide such a mechanism. The rationale for internationalizing investor–state disputes lies in the intended depoliticization of such disputes. The home country is no longer involved in litigating international disputes on behalf of its affected citizens; the host country is no longer subject to the political and/or military pressures of the so-called gun-boat diplomacy. The affected investor is no longer subject to the vagaries of diplomatic protection. Such protection entitles the home state to file a claim against the host state for wrongs committed against the citizens of the former state; nonetheless, it is traditionally perceived to be a right of the home state rather than a duty of the same. Arbitral awards shape the relationship between the state on the one hand, and private individuals on the other. Arbitrators determine matters such as the legality of governmental activity, the degree to which individuals should be protected from regulation, and the appropriate role of the state.

4 Stephan Schill, *The Multilateralization of International Investment Law* (Cambridge: CUP 2009).

When countries pursue economic growth, their policymakers may have an incentive to lower cultural standards to promote economic activities. If states nonetheless maintain a high level of cultural heritage protection, disputes may arise as foreign investors can claim that such policies affect their economic interests thereby breaching investment treaty provisions. Given the extraordinary increase of FDI flows in recent years, the privileged regime created by international investment law within the boundaries of the host state has increasingly determined a tension between investors' rights and cultural heritage protection. In some cases, foreign investors have claimed that cultural policies negatively affected their investment, thereby amounting to indirect expropriation. In other cases, the investors alleged discrimination and/or violation of the fair and equitable treatment standard. In sum, there is a variety of potential conflict areas between investor rights and state cultural policies.

This chapter contributes to the existing literature by examining several arbitrations that have emerged in the past few years. This recent jurisprudence highlights that arbitral tribunals are increasingly taking cultural concerns into account. Yet, the interplay between the protection of cultural heritage and the promotion of FDI in international investment law and arbitration continues to pose three main problems: (1) an ontological problem concerning the essence of international investment law and international law more generally; (2) an epistemological problem concerning the mandate of arbitral tribunals; and (3) a normative problem concerning the emergence of general principles of international law requiring the protection of cultural heritage in times of peace.

With regard to the ontological problem, two main questions arise: Is international investment law a self-contained regime, or is it part of general international law? Is general international law a fragmented system, or are there tools to enhance its unity? With regard to the epistemological problem, arbitral tribunals have limited jurisdiction: they have a limited mandate to assess state compliance with international investment law. They do not have a specific mandate to ascertain the adequate protection of cultural heritage unless the applicable law provides otherwise. Therefore, the key question is whether they can consider cultural concerns in the adjudication of investment disputes, and if so, to what extent. As to the normative problem, ascertaining the existence of general principles of international law requiring the protection of cultural heritage would strengthen the existing protection of cultural heritage at the international law level.

To address these questions, the chapter unfolds as follows. First, it highlights the diaspora of cultural heritage-related disputes before arbitral tribunals. Second, it discusses several recent arbitrations, examining them on the basis of the select jurisdictional requirements (the notion of investment) and claims of action (expropriation, compensation, fair and equitable treatment, full protection and security, non-discrimination, and

performance requirements). Third, the chapter critically assesses the resulting jurisprudence. The chapter thus examines whether arbitral tribunals consider cultural interests when adjudicating investment disputes. Finally, some conclusions are drawn.

2 The Diaspora of Cultural Heritage-Related Disputes before Arbitral Tribunals

As cultural heritage-related disputes often lie at the heart of state sovereignty, states have not been able to agree on establishing dedicated courts and tribunals. The absence of a World Heritage Court determines a sort of 'diaspora' of cultural heritage-related disputes before other courts and tribunals which may lack the mandate to adjudicate on the violation of cultural heritage law. With the notable exception of the ICJ, which has general jurisdiction,[5] and the International Criminal Court, which has the mandate to adjudicate on the damages or the destruction of cultural sites,[6] other courts may not have the mandate to adjudicate on the eventual violation of cultural heritage law. This raises the question as to whether cultural heritage receives adequate consideration in adjudication before such tribunals.

Due to the structural imbalance between the vague and nonbinding dispute settlement mechanisms provided by the international instruments adopted by UNESCO and the highly effective and sophisticated dispute settlement mechanisms available under international investment law, a growing number of investment disputes related to cultural heritage have been brought before arbitral tribunals.

The next sections examine and critically assess several recent arbitrations. Given the impact that arbitral awards can have on cultural governance and the growing number of investment arbitrations, scrutiny of this jurisprudence is particularly timely and important. Such study illuminates the way that international investment law responds to cultural concerns in its operation, thus contributing to the ongoing investigation of the role of international investment law within its broader matrix of international law. Although this jurisprudence

5 United Nations, Statute of the International Court of Justice, 18 April 1946, 3 Bevans 1179. *Case Concerning the Temple of Preah Vihear* (*Cambodia v. Thailand*), 15 June 1962, Merits, 1962 ICJ Reports 6; *Case Concerning Certain Property* (*Liechtenstein v. Germany*), 10 February 2005, Preliminary Objections, 2005 ICJ Reports 6; *Request for Interpretation of the Judgment of 15 June 1962 in the Case Concerning the Temple of Preah Vihear* (*Cambodia v. Thailand*), 11 November 2013, Judgment, 2013 ICJ Reports 281.

6 Rome Statute of the International Criminal Court, done at Rome on 17 July 1998, in force on 1 July 2002, UNTS 2187, No. 38544, Article 8(2)(e)(IV).

is not homogenous, it can be scrutinized according to the taxonomy of select jurisdictional requirements (the notion of investment) and claims brought by foreign investors, including expropriation, compensation, fair and equitable treatment, full protection and security, non-discrimination, and performance requirements.

3 The Notion of Investment

International investment agreements are agreements concluded between states for the promotion and protection of reciprocal investments. Addressing the question as to whether certain economic activities relating to cultural heritage amount to a foreign investment is crucial for establishing an arbitral tribunal's subject-matter jurisdiction. Foreign individuals or companies are entitled to the substantive and procedural protections afforded by international investment treaties provided that such treaties classify them as 'investors' or their economic activities as 'investments.' If a given economic activity constitutes a protected investment, the investor will benefit from the substantive protections of the applicable IIA.

In order to ascertain whether cultural activities constitute a form of protected investment under a given IIA, one has to look at the specific text of the applicable treaty, as IIAs generally provide slightly different definitions of investment. If the parties have opted to resolve their dispute at the International Center for the Settlement of Investment Disputes (ICSID), then the ICSID Convention will be also applicable.[7] In this situation, the adjudicators must determine whether a given economic activity constitutes an investment under both the applicable IIA and the ICSID Convention.

With regard to the ICSID Convention, such an instrument does not provide a definition of investment.[8] Rather, it stipulates that ICSID jurisdiction extends 'to any legal dispute arising directly out of an investment.'[9] In practice, this has meant that commentators and arbitral tribunals have elaborated a number of criteria for defining the concept of investment.[10] Most notably, the leading test was articulated by *Salini v. Morocco*, which involved a dispute arising from the

7 Convention on the Settlement of Investment Disputes between States and Nationals of other States (ICSID Convention), 18 March 1965, 17 U.S.T. 1270, Article 25(1).

8 Alex Grabowski, 'The Definition of Investment Under the ICSID Convention: A Defense of Salini' (2014) 15 *Chicago JIL* 287–309, 293.

9 ICSID Convention, Article 25(1).

10 Grabowski, 'The Definition of Investment Under the ICSID Convention', 293.

construction of a highway. The Salini test includes four elements: (1) a contribution of money or other assets of economic value; (2) a certain duration; (3) an element of risk; and (4) a contribution to the host state's development.[11] These requirements embody a balance between the private interests of foreign companies and the public interest of the host state because they ensure that economic activities are protected as long as they contribute to the economic development of the host state.

While the ICSID Convention does not provide any definition of the term 'investment,' contemporary investment treaties tend to include broad and open-ended definitions of investment resting on the assumption that 'foreign investment tends to spur economic development.'[12] Yet, the quantitative tendency toward amplifying the definition of investment in IIAs has not necessarily lent more clarity to its qualitative understanding. To raise the quality of protected investments, several IIAs now require foreign investments to be made or owned 'in accordance with' or 'in conformity with' the laws of the host state, thus incorporating a 'legality requirement' in the definition of investment.[13] Whether the legality requirement should be presumed when the applicable treaty lacks such provision is contentious. Therefore, with regard to the notion of investment, the clarification of this concept has been left to the interpretation of arbitral tribunals.

In *Malaysian Historical Salvors v. Malaysia*, the arbitration centered on the question as to whether a salvage contract for the finding, identification, and recovery of an ancient shipwreck constituted an investment thus receiving protection under the UK–Malaysia BIT.[14] Malaysian Historical Salvors (MHS), a British salvage company, entered into a contract with the Malaysian Government to locate and salvage the cargo of the *Diana*, a vessel licensed by the East India Company that mysteriously sank in the Straits of Malacca on 5 March 1817.[15]

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11 *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 23 July 2001.

12 Barton Legum, 'Address at the ICSID, OECD, and UNCTAD Symposium: Defining Investment and Investor', 12 December 2005, at 2, available at http://www.oecd.org!dataoecdI51/10/36370461.pdf.

13 Michael Polkinghorne, 'The Legality Requirement in Investment Arbitration', (2017) 34 *Journal of International Arbitration* 149–168.

14 Agreement for the Promotion and Protection of Investments Malaysia–United Kingdom (Malaysia–UK BIT) 21 May 1981, 1989 U.K.T.S. No. 16.

15 The *Diana* vessel was used as one of the country's trading ships and exported cotton and opium to Canton, where the goods would be exchanged for silks, tea, and blue-and-white porcelain to bring back to India. See Dorian Ball, *The Diana Adventure* (Groningen: Kemper 1995) 29–35. For more information on the Indian trade, see K.N. Chaudhuri,

Under the terms of the contract, which was on a 'no finds, no pay' basis, all the costs of the salvage and its risks would be borne exclusively by the salvage company. Artifacts directly related to Malaysian history and culture would be retained by the government for study and exhibition in the National Museum, while the other recovered items would have been auctioned in Europe. The Malaysian Government would receive the sale proceeds, while paying a percentage of the sum to the company.[16] The salvage efforts took almost four years; when MHS found and salvaged the sunken vessel, it recovered nearly 24,000 complete pieces of Chinese blue-and-white porcelain. Divers discovered plates with fascinating patterns, featuring a splendid display of flowers, peacocks, and dragons.[17]

The dispute arose with regard to the proceeds of the auction and the number of items which Malaysia withheld from sale. As MHS contested the number of the salvaged items which were withheld from sale, the company commenced arbitration proceedings against the Malaysian government in Kuala Lumpur. The award dismissed the claim, and every challenge failed.

The claimant thus filed a Request for Arbitration at the ICSID in Washington DC, contending that there was a violation of the UK–Malaysia BIT. In particular, the claimant argued that its performance under the contract fell within the meaning of investment and that, accordingly, it was protected under the BIT. Substantially, the investor contended that the respondent had violated several investment treaty provisions, including the prohibition of unlawful expropriation.[18] For its part, the respondent objected to jurisdiction over the dispute, arguing that the contract was not an investment and that the subject matter of the agreement was purely contractual.[19]

This line of argument was upheld by the sole Arbitrator who dismissed the claim on jurisdiction.[20] The Arbitrator considered that the nature of the claimant's activities was largely similar to that of a commercial salvage contract, and concluded that, under ICSID practice and jurisprudence, 'an ordinary

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Trade and Civilisation in the Indian Ocean: An Economic History From the Rise of Islam to 1750 (Cambridge: CUP 1985); K.N. Chaudhuri, 'The Historical Roots of Capitalism in the Indian Ocean: A Comparative Study of South Asia, the Middle East, and China During the Pre-Modern Period', in Sugata Bose (ed.), *South Asia and World Capitalism* (Delhi: OUP 1990) 87.

16 *Malaysian Historical Salvors SDN, BHD v. Government of Malaysia*, ICSID Case No. ARB/05/10, Award on Jurisdiction, 17 May 2007, 11.

17 Ball, *The Diana Adventure*, at 142 and 149.

18 *Malaysian Historical Salvors v. Malaysia*, Award on Jurisdiction, paras 38–40.

19 Id. para. 41.

20 Id. para. 112.

commercial contract [could not] be considered as an investment.'[21] Of all the hallmarks defining the notion of investment (economic profit, duration, assumption of risk, and contribution to the economic development of the host state), the Arbitrator paid particular attention to the final criterion: whether the contract made a significant contribution to the economic development of the state. He ultimately held that the salvage contract did not materially benefit the Malaysian public interest, rather bringing benefits of a cultural and historical nature to the public.[22] Finally, the arbitrator held that a significant contribution to the economic development of the host state is necessary in order for an economic activity to be considered an investment under the ICSID Convention, otherwise any contract which enhances the Gross Domestic Product of an economy by any amount, however small, would qualify as investment.[23] The Arbitrator thus concluded that the contract was not an investment within the meaning of Article 25(1) of the ICSID Convention.[24]

The award raised some debate. First, the fact that the salvage contract was not easily recognizable as an investment weighed heavily in assessing whether there existed an investment at all. A salvage contract may seem an unthinkable type of investment, *vis-à-vis* more traditional investments such as oil exploration. Still, the notion of investment has evolved through time. Second, the salvage of ancient shipwrecks can contribute to the social, cultural, and economic development of host states.[25] Third, there is no minimum threshold for qualifying an economic activity as an investment. The fact that traditionally investment disputes have involved conspicuous investments does not exclude the possibility that smaller investments are protected by BITs. As an Arbitral Tribunal stated, 'the question whether an expenditure constitutes an investment or not is hardly to be governed by whether or not the expenditure is large or small.'[26]

Some of these criticisms were upheld by the *ad hoc* Annulment Committee, which annulled the award.[27] MHS challenged the award on the ground that the Tribunal manifestly exceeded its powers by failing to exercise jurisdiction,

21 *Malaysian Historical Salvors v. Malaysia*, Award on Jurisdiction, para. 112.

22 Id. para. 132.

23 Id. para. 132.

24 Id. para. 146.

25 Valentina Vadi, 'Investing in Culture: Underwater Cultural Heritage and International Investment Law' (2009) 42 *Vanderbilt Journal of Transnational Law* 853–904, 886.

26 *Mihaly International Corp. v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/00/2, Award, 15 March 2002, at 51.

27 *Malaysian Historical Salvors, Sdn, Bhd v. The Government of Malaysia*, Decision on the Application for Annulment, 16 April 2009.

which it possessed over the dispute. The Claimant contested the overly restrictive notion of investment adopted by the Tribunal on three grounds. First, on the basis of the *travaux préparatoires* of the ICSID Convention, the claimant highlighted that the drafters of the ICSID Convention decided against defining the notion of investment and setting any monetary floor for this concept. Second, the Claimant challenged the elevation of the hallmarks of an investment to the level of jurisdictional conditions. Third, the Claimant contested the introduction of a further jurisdictional requirement of contribution to the economic development of the host state and the quantitative assessment of such contribution. The Respondent countered that the ICSID annulment is a narrowly circumscribed remedy and that the Tribunal had not manifestly exceeded its powers.[28]

The majority of the *ad hoc* Annulment Committee established that a salvage contract is a form of investment on the basis of the broad definition of investment provided by Article 1 of the UK–Malaysia BIT. Such treaty defines 'investment' as 'every kind of asset' and includes in the definition 'claims to money or to any performance under contract having a financial value' and 'business concessions … including concessions to search for, cultivate, extract or exploit natural resources.'[29] Therefore, the majority of the Committee reached the conclusion that the Arbitrator exceeded its powers by failing to exercise jurisdiction and that he manifestly did so because he did not take into account the BIT mentioned above, elevated certain criteria to jurisdictional requirements, and did not consider the *travaux préparatoires* of the ICSID Convention.

In fact, the salvage activities had an economic rationale—thus constituting a type of human activity in which the profit sought was economic or monetary in nature. The project had a certain duration, as the salvage took years of research and development. It also involved an element of risk, as the contract was made on a 'no finds, no pay' basis, which is a well-established practice in marine salvage under which all the costs and risks of the salvage are borne exclusively by the salvage company. Finally, the operation had significance for the host state development. In fact, the conservation and exhibition of several cultural resources at a museum could contribute, albeit indirectly, to the country's cultural flourishing and sustainable development. Therefore, the Annulment Committee concluded that the Tribunal exceeded its powers by failing to exercise jurisdiction with which it was endowed by the UK–Malaysia

28 *Malaysian Historical Salvors, Sdn, Bhd v. Government of Malaysia*, Decision on Application for Annulment, para. 44.

29 Malaysia–UK BIT, Article 1.

BIT and the ICSID Convention, because it did not consider the definition of investment provided by the same BIT.

In other interesting cases, arbitral tribunals declined jurisdiction because the investors had not complied with the domestic law of the host state to safeguard important cultural concerns. In 2015, a Costa Rican company and several Dutch investors, all shareholders of an ecotourism project called Cañaveral in Bocas del Toro, Panama, filed a claim against Panama at the ICSID.[30] The investors contested decisions made by the domestic Land Management Agency about whether the claimants' property was located within the protected area inhabited by the Ngöbe Buglé Indigenous peoples.[31]

The Ngöbe have traditionally relied on subsistence activities such as farming, fishing, and hunting in their land, which originally extended from the Pacific Ocean to the Caribbean Sea.[32] Nowadays, they predominatly live in the Comarca Ngöbe Buglé, an area of Western Panama that is specifically designated to protect their cultural and political autonomy.[33] The 1997 law establishing the Comarca Ngöbe Buglé recognized the right of Indigenous persons to collective ownership of land and prohibited private property within these zones.[34] In the region, only land that has been privately held before 1997 can be sold to private parties, and Comarca's authorities retain a right of preferential acquisition of any privately owned land for sale.[35] Human rights scholars have interpreted this and similar laws to constitute 'one of the foremost achievements in terms of the protection of Indigenous rights in the world.'[36]

30 *Álvarez y Marín Corporación S.A. v. Republic of Panama*, ICSID ARB/15/14, Award, 12 October 2018.

31 Id. para. 14.

32 Cindy Campbell, 'Protecting the Ngäbe Buglé Community of Panama with Clean Development Mechanism Safeguards to Promote Culturally Sensitive Development' (2014) 2 *American Indian Law Journal* 547–588, 547.

33 *Álvarez y Marín Corporación S.A. y Otros c. República de Panamá*, ICSID ARB/15/14, Motivación de la Decisión sobre las Excepciones Preliminares de la Demandada en Virtud de la Regla 41(5) de las Reglas de Arbitraje del CIADI del 27 de Enero de 2016, para. 22; *Álvarez y Marín Corporación S.A., Bartus Van Noordenne, Cornelis Willem Van Noordenne, Estudios Tributarios AP SA, Stichting Administratiekantoor Anbadi c. República de Panamá*, ICSID ARB/15/14, Laudo, 12 October 2018, para. 206.

34 IACtHR, *Kuna Indigenous People of Madungandi v. Panama*, Preliminary Objections, Merits, Reparations and Costs, IACtHR (ser. C) No. 284, para. 59, Judgment, 14 October 2014; *Álvarez y Marín Corporación y Otros c. Panamà*, Laudo, para. 208.

35 *Álvarez y Marín Corporación y Otros c. Panamà*, Laudo, para. 209.

36 James Anaya, Special Rapporteur on the Rights of Indigenous Peoples, UN Human Rights Council, The Status of Indigenous Peoples' Rights in Panama, A/HRC/27/52/Add.1, 3 July 2014, para. 13.

The investment at the heart of the dispute comprised 'four farm properties situated along the Panamanian coast, which the investors planned to develop as an eco-tourist project.'[37] The investors bought these properties, supposedly belonging to the Comarca, from an intermediary. Because the press questioned the legitimacy of the acquisition, the National Authority for Lands Administration located two of the claimants' properties outside this special zone.[38] Reportedly, Indigenous peoples disliked the Report and 'this led to the invasion of these properties.'[39] The claimants alleged that Panama's treatment of their investment constituted an indirect expropriation and a breach of the fair and equitable treatment as well as the full protection and security standards.[40] Panama denied having violated the treaties and raised several jurisdictional objections, arguing mainly that the investments had been unlawfully acquired.

The Arbitral Tribunal declined jurisdiction over the case on the basis of the investors' lack of compliance with domestic law.[41] Although neither of the two treaties invoked by the investors contained an explicit legality requirement, the Tribunal held that such a requirement should be deemed implicit in all investment treaties, so that only investments acquired legally could benefit from a treaty's protection.[42] The Tribunal noted that the law establishing the Comarca and the Panamanian Constitution aimed at protecting Indigenous peoples' cultural, economic, and social well-being.[43] It also considered the commonality of land as a fundamental condition for the survival and continuity of the ethnic identity of Indigenous peoples.[44]

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37 Zoe Williams, 'Arbitrators in Panama Eco-Tourism BIT Dispute Weigh in With Ruling on Preliminary Objections', *Investment Arbitration Reporter*, 13 April 2016, 2.

38 *Álvarez y Marín Corporación S.A. y Otros c. República de Panamá*, Motivación de la Decisión sobre las Excepciones Preliminares, para. 26.

39 Id. para. 27.

40 Id. para. 28.

41 *Álvarez y Marín Corporación y Otros c. Panamà*, Laudo, para. 296 ('*El Tribunal ha decidido que no merecen protección ius-internacional aquellas inversiones en las que el inversor, al momento de realizarlas, haya incurrido en un incumplimiento grave de la legislación nacional.*').

42 Id. para. 118 (noting that '*el requisito de legalidad, aunque no expresado explícitamente en los Tratados, forma parte implícita del concepto de inversión protegida.*')

43 Id. paras 318–319.

44 Id. para. 327 ('*Las tierras comunales son consideradas elemento fundamental para.la supervivencia y perpetuación de la identidad étnica de los pueblos indígenas.*').

More recently, in *Cortec v. Kenya*,[45] an Arbitral Tribunal established under the 1999 Kenya–UK BIT held that it lacked jurisdiction to hear a dispute concerning a mining project that did not comply with domestic environmental law. The Tribunal found that to be protected under international investment law, the mining license at issue had to substantially comply with domestic law. Hence, the Tribunal determined that the license was not an investment for the purposes of the applicable investment treaty.

Cortec planned to develop a niobium and rare earths mine at Mrima Hill in Kenya from 2007.[46] Mrima Hill is located about 70 kilometers south of Mombasa and hosts forests (*kaya*) which are 'rich in biodiversity and rare species' and are sacred for, and revered by, the local Indigenous communities who consider such forests as the sacred abodes of their ancestors.[47] Cortec was initially granted a prospecting license for its project and subsequently granted a mining license for an area that included Mrima Hill. However, following a change of government, the mining license was revoked in 2013.[48] In Kenya's view, the conditions for the mining license had not been met, as Kenyan law prohibited mining in Mrima Hill. Cortec contended that this revocation of the mining license contravened multiple provisions in the BIT.

According to the government, 'the license was void *ab initio* for illegality and did not exist as a matter of law.'[49] In fact, under domestic law, 'a number of key approvals and consents were required and conditions were to be satisfied before [the investors] could be allowed to obtain a valid mining license.' Some of these requirements arose out of 'the special protected status of Mrima Hill as a forest reserve, nature reserve, and national monument.'[50] The same Kenyan *Mining Act* has prohibited all prospecting and mining at Mrima Hill since 1997.[51] Even domestic courts ruled that the mining license was 'void *ab initio* on the basis … that the mining of Mrima Hill was by statute prohibited' and that, in any event, the claimants had not complied with requirements under Kenyan law.[52]

45 *Cortec Mining Kenya Limited, Cortec (PTY) Limited, and Stirling Capital Limited v. Republic of Kenya*, ICSID Case No. ARB/15/29, Final Award, 22 October 2018.
46 Id. para. 1.
47 Id. para. 42.
48 Id. para. 2.
49 Id. para. 4.
50 Id. para. 5.
51 Id. para. 43.
52 Id. para. 7.

The Arbitral Tribunal concluded that the applicable BIT 'protects only lawful investments.'[53] In order to be protected, a mining license must be in compliance with the domestic law that establishes and governs it.[54] Instead, Cortec's mining license was procured by the claimants' successful lobbying but was void from the outset because it breached Kenyan law.[55] The Tribunal held that such a breach of domestic law could not be waived by politicians.[56] Since there was no mining license, there was no basis for Tribunal jurisdiction under the BIT.[57]

In 2019, Cortec sought an annulment of this award, arguing that regulatory compliance was not a jurisdictional issue as there was no legality requirement in the UK–Kenya BIT. According to the claimant, the reading of a legality requirement into the BIT and the resulting conclusion (that there was no investment because the mining license was nul and void) amounted to an extra-jurisdictional exercise of the Tribunal's powers. In parallel, the company also claimed that the Tribunal failed to exercise jurisdiction over Cortec's investments.

The *ad hoc* Annulment Committee dismissed each of these arguments.[58] For the Committee, reading an implicit legality requirement into the BIT is tenable; the Committee thus upheld the Tribunal's finding that the mining license was not a protected investment because it failed to comply with domestic law. As stated by the *ad hoc* Committee, 'while international law protects property rights, the existence and scope of those rights are determined by municipal law; and in this case no such rights existed to protect.'[59]

In conclusion, the *Cortec* Tribunal found that, even in the absence of a legality requirement in the text of the applicable BIT, the legality of the investment is a jurisdictional prerequisite for its protection under international investment law. While the jurisprudence of arbitral tribunals remains divided,[60] the

53 Id. para. 9.

54 Id. paras 222, 319, and 322.

55 Id. paras 11, 222, and 364–365.

56 Id. para. 105.

57 Id. para. 328.

58 *Cortec Mining Kenya Limited, Cortec (PTY) Limited, and Stirling Capital Limited v. Republic of Kenya*, ICSID Case No. ARB/15/29, Decision on Application for Annulment, 19 March 2021.

59 Id. para. 143.

60 See e.g. *Copper Mesa Mining Corporation v. Republic of Ecuador*, PCA Case No. 2012-2, Award, 15 March 2016, para. 5.29 (noting that the respondent challenged the lawfulness of the claimant's behaviour only after the commencement of the proceeding, and not when the investment was made).

Annulment Committee upheld the line of interpretation supporting the existence of implicit legality requirements.

In *South American Silver Limited* (*SAS*) *v. Bolivia*, the Bermudan subsidiary of a Canadian company had acquired ten mining concessions near the village of Malku Khota in the Bolivian province of Potosí.[61] The area of the concessions was inhabited by Indigenous communities, which accused the company of polluting the environment and disrespecting sacred spaces. Resulting tensions between the local communities and the investor culminated in violent clashes. Consequently, the Bolivian government intervened and issued a decree reversing the ownership of the mining concessions to Bolivia. SAS claimed that the reversion constituted unlawful expropriation under Article 5 of the Bolivia–United Kingdom BIT.

On jurisdictional grounds, Bolivia alleged that the claimant had violated both domestic and international law protecting the rights of the Indigenous communities that lived in the area, and that such violations operated as a jurisdictional or admissibility bar.[62] The Tribunal noted that the treaty did not contain a legality requirement of the investment. However, the parties seemed to agree that 'the requirement of legality of the investment is implicit in the international investment arbitration system and therefore operates even when a treaty provision is absent.'[63]

Nonetheless, the Tribunal noted that 'none of the alleged violations have the legal consequence, under the laws of Bolivia or international law, of depriving SAS of the ownership of … the corresponding assets, or of eliminating the existence of the investment.'[64] In the Tribunal's view, 'the Respondent has not shown that the alleged violations go to the essence of the investment such that it must be considered illegal.'[65] According to the Tribunal, the investment remained lawful and thus it was still protected under the BIT.

To sum up, assuming the existence of implicit legality requirements in all IIAs can favor the interpretation and development of investment law in a manner

61 *South American Silver Limited v. the Plurinational State of Bolivia*, PCA Case No. 2013-15, Claimant's Statement of Claim and Memorial, 24 September 2014, para. 9.

62 *South American Silver Limited v. the Plurinational State of Bolivia*, PCA Case No. 2013-15, Objections to Jurisdiction, Admissibility and Counter-Memorial on the Merits, 31 March 2015, para. 4.

63 *South American Silver Limited v. The Plurinational State of Bolivia*, PCA Case No. 2013-15, Award, 22 November 2018, para. 456.

64 Id. para. 463.

65 Id. para. 470.

that is compatible with domestic law and, albeit indirectly, general international law.[66] In addition to requiring compliance with international treaties (as incorporated by the domestic law of the host State), such a legality requirement has also been interpreted as broadly as to include compliance with customary international law, general principles, and peremptory norms of international law.[67] For instance, the *Phoenix* Tribunal held that 'jurisdictional requirements … cannot be read and interpreted in isolation from public international law, and its general principles. To take an extreme example, nobody would suggest that … protection should be granted to investments made in violation of the most fundamental rules of protection of human rights.'[68] As Moloo and Khachaturian further point out, 'in the investment law context, requiring that foreign investors be subjected to basic international legal principles when they are themselves asserting international legal rights against the host state is hardly unreasonable.'[69]

Finally, as mentioned, IIAs are agreements concluded between states for the promotion and protection of *reciprocal* investments. Addressing the question as to whether certain economic activities relating to cultural heritage amount to a *foreign* investment is crucial to establishing an arbitral tribunal's subject-matter jurisdiction. In *Renée Rose Levy and Gremcitel SA v. Republic of Peru*, the investors filed an investor–state arbitration claim under the France–Peru BIT relating to the proposed development of property in a protected historical district.[70] The investors had acquired oceanfront land on the periphery of

66 See e.g. *Plama Consortum Ltd. v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 August 2008, para. 138 (noting that although the Energy Charter Treaty does not include a legality requirement, it does not protect 'all kinds of investments, including those contrary to domestic or international law.'); *Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, para. 101 (affirming the principle that investments made in contravention of the laws of the host state cannot be protected by a BIT); *Toto Costruzioni Generali S.p.A. v. Republic of Lebanon*, ICSID Case No. ARB/07/12, Decision on Jurisdiction, 11 September 2009.

67 Eric De Brabandere, 'Human Rights and International Investment Law', in Markus Krajewski and Rhea Hoffmann (eds), *Research Handbook on Foreign Direct Investment* (Cheltenham: Edward Elgar 2019) chapter 20.

68 *Phoenix Action, Ltd. v. Czech Republic*, Award, para. 78.

69 Rahim Moloo and Alex Khachaturian, 'The Compliance with the Law Requirement in International Investment Law' (2011) 34 *Fordham International Law Journal* 1473–1501 (discussing the presence of an implicit obligation that an investment must accord with domestic and international legal principles for the claims related to that investment to be admissible.).

70 *Renée Rose Levy and Gremcitel SA v. Republic of Peru*, ICSID Case No. ARB/11/17, Award, 9 January 2015.

Lima and planned to develop a tourism business.[71] However, a few years later, the National Institute of Culture adopted a resolution precluding any form of construction on the property due to the historical significance of the place. In fact, the parcels of land were adjacent to the *Morro Solar*, the site of the 1881 battle of San Juan between Peruvian and Chilean forces during the War of the Pacific.[72] According to the investor, the resolution deprived the investment of any value.[73] Peru raised several objections to the claims, contending that the corporate restructuring by which a French national acquired shares in Gremcitel, a Peruvian company, was an abuse of process.[74] In Peru's view, the hurried transfer of shares, which allegedly made the investor the majority shareholder of Gremcitel, was carried out for the sole purpose of attracting the BIT protection at a time an otherwise domestic dispute was foreseeable.[75]

The Tribunal considered it 'now well-established … that an organization or reorganization of a corporate structure designed to obtain investment treaty benefits is not illegitimate as such, including where this is done with a view to shielding the investment from possible future disputes with the host state'.[76] It added, however, that corporate restructuring with the purpose of seeking treaty protection when a dispute is anticipated may constitute an abuse of process.[77] In the Tribunal's opinion, the Claimants could foresee that the Resolution was forthcoming, and it thus declined to exercise jurisdiction.[78]

4 Expropriation

International investment treaties provide, *inter alia*, for protection against unlawful expropriation. This raises two questions: whether a state action constitutes expropriation, and if it does, whether the expropriation is unlawful. Treaty provisions lack a precise definition of expropriation, and their languages encompass a potentially wide variety of state activities that may interfere with foreign investments. IIAs usually clarify that expropriatory measures are lawful if adopted: (1) for a public purpose; (2) on a non-discriminatory basis; (3) in accordance with due process of law; and (4) on payment of compensation.

71 Id. paras 11–18.
72 Id. para. 7.
73 Id. para. 65.
74 Id. para. 69.
75 Id. para. 85.
76 Id. para. 184.
77 Id. para. 185.
78 Id. paras 191 and 197.

Failure to satisfy any of these requirements will imply that the expropriation is unlawful and thus requires compensation and damages.

Expropriation includes both direct and indirect expropriation. Direct expropriation is usually done through formal transfer of title or overt seizure of property. Indirect expropriation indicates measures that do not directly take investment property but interfere with its use, depriving the owner of its economic benefit.[79] While the concept of direct expropriation coincides with the notion of taking, the precise boundaries of indirect expropriation remain unclear.[80] Under this rubric, regulation aimed at protecting cultural heritage may be classified as a form of indirect expropriation if it unduly affects the economic interests of foreign investors. While the difference between an illegitimate expropriation and a legitimate regulatory measure is easy to distinguish in theory, it is hard to identify in practice.

4.1 *Direct Expropriation*

The most severe form of interference with property, expropriation has traditionally involved the direct taking of property of a foreign investor.[81] Direct expropriation thus involves transfer of property, nationalization of an enterprise, or transfer of ownership to the state. Several cultural heritage-related arbitrations have involved direct expropriation claims.

The case of *Compañia del Desarrollo de Santa Elena SA v. Republic of Costa Rica* involved a particularly beautiful natural area including over thirty kilometers of Pacific coastline, as well as numerous rivers, springs, forests, and mountains in Costa Rica.[82] In addition to its geographical and geological features, the property was home to a dazzling variety of flora and fauna indigenous to the tropical forest habitat. Costa Rica directly expropriated the property of American investors to enlarge the Guanacaste Conservation Area, which was subsequently added to the World Heritage List. As the investors deemed that the compensation was inadequate, they filed a claim before the ICSID.

The ICSID Tribunal awarded compensation to the investors, based on the property's fair market value. In doing so, the Tribunal restated that international

79 Brigitte Stern, 'In Search of the Frontiers of Indirect Expropriation', in Arthur W. Rovine (ed.), *Contemporary Issues in International Arbitration and Mediation* (Leiden: Brill 2008) 29–52, 35.

80 Peter D. Isakoff, 'Defining the Scope of Indirect Expropriation for International Investments' (2013) 3 *Global Business LR* 189–209, 196.

81 Rudolf Dolzer, Ursula Kriebaum, and Christoph Schreuer, *Principles of International Investment Law*, 3rd edition (Oxford: OUP 2022) chapter 6.

82 *Compañia del Desarrollo de Santa Elena SA v. Republic of Costa Rica*, Award, 17 February 2000, ICSID Case No ARB/96/1, 39 ILM (2000) 1317.

law permits the host state to expropriate foreign-owned property for a public purpose and against prompt, adequate, and effective compensation. However, the legitimate public purpose of the state measure does not affect either the nature or the measure of the compensation. The Tribunal expressly noted that 'the international source of the obligation does not alter the legal character of the taking for which adequate compensation must be paid.'[83]

The Tribunal famously held that '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.'[84] Therefore, such a ruling reflects the concept that any direct expropriation requires a public purpose and adequate compensation to be lawful.

In *South American Silver Limited* (SAS) *v. Bolivia*, the investor alleged that the host state expropriated the company's mining concessions near the village of Malku Khota in the Bolivian province of Potosí.[85] The company had acquired ten mining concessions in an area inhabited by Indigenous communities since time immemorial. As tensions between the local communities and the company culminated in violent clashes, the Bolivian government reversed the ownership of the mining concessions to Bolivia. The investor claimed that the reversion constituted unlawful expropriation under Article 5 of the Bolivia–United Kingdom BIT. For the company, the government pressed for the nationalization of the project for economic reasons, namely, for appropriating the benefits associated with the discovery of a large deposit of silver, indium, and gallium.[86] For the claimant, the expropriation did not have a public purpose as 'it b[ore] no logical or proportional relationship with the stated objective of pacifying the area.'[87]

For Bolivia, the reversion of the concessions to state ownership was justified by a public interest: the need to restore public order in the area and to protect the rights of the Indigenous communities.[88] Bolivia noted that according

83 Id. para. 71.

84 Id. para. 72.

85 *South American Silver Limited v. the Plurinational State of Bolivia*, PCA Case No. 2013–15, Claimant's Statement of Claim and Memorial, 24 September 2014, para. 9.

86 Id. para. 96.

87 Id. para. 144.

88 *South American Silver Limited v. the Plurinational State of Bolivia*, PCA Case No. 2013–15, Objections to Jurisdiction, Admissibility and Counter-Memorial on the Merits, 31 March 2015 (unofficial English translation) paras 6–7.

to the Bolivian Constitution, Indigenous communities have the right to land and the right to prior and informed consultation and benefit-sharing for the exploitation of the natural resources that are located in their territory.[89] Moreover, they have autonomy and the power to define their development 'in accordance with their cultural criteria.'[90] Bolivia also noted that Indigenous peoples consider Malku Khota as a sacred place, despite the fact that it has been exploited since Spanish colonization, and 'consider themselves ancestral owners of the minerals of the Andean mountains.'[91] Accordingly, Indigenous communities opposed the project perceiving it as contrary to their ancestral beliefs and harmful to the environment on which their survival depended.[92] From its perspective, the government 'did not have any other option but to … re-establish the public order.'[93]

The Tribunal acknowledged that the claimant's community relations program had 'serious shortcomings', and that the reversion decree thus had a public purpose and social function. Nonetheless, the Tribunal concluded that the host state's annulment of mining concessions amounted to an unlawful expropriation because it failed to compensate the company.[94] The Tribunal found that Bolivia did not breach any other treaty standard of protection, and only awarded the investor its sunk costs.[95]

4.2 *Indirect Expropriation*

Several investment treaty arbitrations have dealt with the question of whether state measures allegedly aimed at protecting cultural heritage may be deemed an indirect expropriation. For instance, in *Southern Pacific Properties v. Egypt*, the dispute arose after Egypt cancelled the development of a tourist residential complex near the pyramids, arguing that it had an obligation to do so under the World Heritage Convention.[96] The claimant contended that the cancellation had resulted in an uncompensated and thus unlawful expropriation not truly based on the WHC.[97] Rather, according to the claimant, Egypt used the WHC as

89 Id. para. 47.
90 Id.
91 Id. paras 90, 71–2.
92 Id. para. 80.
93 Id. para. 84.
94 Id. para. 610.
95 Id. para. 932.
96 *Southern Pacific Properties* (*Middle East*) *Limited v. Arab Republic of Egypt*, Award on the Merits, 20 May 1992, ICSID Case No ARB/84/3, paras 150–158.
97 Id. paras 150–153.

a 'post-hoc rationalization', since the pyramids had been included in the World Heritage List only *after* the cancellation of the project.[98]

The Arbitral Tribunal held that the WHC 'by itself [did] not justify the measures taken by the Respondent to cancel the project, nor [did] it exclude the Claimants' right to compensation.'[99] In fact, for the Tribunal, only after the pyramids fields were nominated and inscribed on the World Heritage List did the obligations stemming from the WHC become binding on Egypt. Accordingly, only after this listing, 'a hypothetical continuation of the claimant' activities interfering with antiquities in the area could [have] be[en] considered as unlawful from the international point of view.'[100]

Experts in international cultural heritage law criticized the award, as the WHC requires protection of cultural sites of outstanding and universal value irrespective of their inscription on any list. The state obligation to protect world heritage rather flows from ratification of the WHC.[101] In fact, states should protect cultural sites because of their outstanding and universal value rather than postponing such protection until the site is inscribed on the World Heritage List. Other international courts have upheld such a line of interpretation, including the *Glamis Gold* Tribunal.[102]

In *Glamis Gold v. United States of America*,[103] a Canadian mining company planned to mine gold on federal land in southeastern California (the Imperial Project). Nonetheless, the area in and around the Imperial Project was used by pre-contact Native Americans as a pilgrimage route. Therefore, the Quechan, a Native American tribe, opposed the project as it would destroy the Trail of Dreams, a sacred path still used for performing ceremonial practices.[104] Although the area was not listed on the World Heritage List, its cultural importance for the tribe was similar to the importance of Mecca or Jerusalem

98 Id.

99 Id. para. 154.

100 Id.

101 Patrick O'Keefe, 'Foreign Investment and the World Heritage Convention' (1994) 3 *International Journal of Cultural Property*, 259–266, 259–261 (referring to Article 12 of the WHC: '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 in does not have an outstanding universal value for purposes other than those resulting from inclusion in these lists.')

102 Patrick J. O'Keefe and Lyndell Prott, *Cultural Heritage Conventions and Other Instruments* (London: Institute of Art and Law 2011); Vadi, *Cultural Heritage in International Investment Law and Arbitration*, 121–123.

103 *Glamis Gold, Ltd. v. United States of America*, Award, 8 June 2009, available at http://www.state.gov/documents/organization/125798.pdf.

104 Id. para. 107.

for other believers.[105] The Department of the Interior withdrew the Imperial Project from further mineral entry for 20 years to protect historic properties. However, when permission for the project was granted, the State Mining and Geology Board enacted emergency regulations requiring the backfilling of all open-pit mines to recreate the approximate contours of the land prior to mining.[106]

The investor filed an investment treaty arbitration claiming that state measures amounted, *inter alia*, to an indirect expropriation of its investment in violation of Article 1110 of the NAFTA.[107] According to the claimant, the expropriation began with the federal government's refusal to approve the claimant's plan of operations and continued with the backfilling requirement. In particular, backfilling would be uneconomical and arbitrary, since it would make the mining operation unprofitable and it would not be rationally related to its stated purpose of protecting cultural resources.[108] The claimant argued that whereas taking gold out of the ground destroys any cultural resources on the surface, 'putting the dirt back in the pit actually does not protect those resources' but may lead to the burial of more artifacts and cause greater cultural loss.[109]

In its award, the Arbitral Tribunal held that the complained measures did not amount to an indirect expropriation.[110] To distinguish a non-compensable regulation and a compensable expropriation, the Tribunal established a two-tiered test to ascertain: (1) the extent to which the measures interfered with reasonable economic expectations; and (2) the purpose and character of the governmental actions. First, the Tribunal determined that the claimant's investment remained profitable and that the backfilling requirements did not cause a sufficient economic impact on the investment to constitute an expropriation.[111] Second, the Tribunal considered the measures to be rationally related to their stated purpose.[112] The Tribunal admitted that 'some cultural artifacts will indeed be disturbed, if not buried, in the process of excavating and backfilling,' but concluded that, without such measures, significant pits and waste piles in the near vicinity would harm the landscape.[113] Therefore, it concluded

105 Id. paras 103–108.
106 Id. para. 183.
107 Id. para. 359.
108 Id. para. 321.
109 Id. para. 687.
110 Id. para. 360.
111 Id. paras 366 and 536.
112 Id. para. 803.
113 Id.

that there was a reasonable connection between the harm and the proposed remedy.

In the *Glamis Gold* case, the arbitrators took the WHC into account when considering the protection that the US afforded to Indigenous cultural heritage. The Tribunal pointed out that 'The Convention makes special note that the fact of a site's non-inclusion on the register does not signify its failure to possess outstanding universal value.'[114] Remarkably, the Arbitral Tribunal also referred to Article 12 of the WHC, which requires States to protect their cultural heritage even if it is not listed in the World Heritage lists provided that it satisfies the requirements for being considered of outstanding and universal value.[115] This is a welcome move as Article 12 of the WHC covers a wide range of cultural sites including those of minorities, Indigenous peoples, and historically disadvantaged sectors of society – heritage that historically has not featured prominently in the lists, despite its outstanding and universal significance.

The relevance of the WHC, irrespective of whether and, if so, when a given site has been inscribed on the World Heritage List, will likely be debated in a pending case concerning a world heritage site that was inscribed on the World Heritage List in 2021. In 2015, Gabriel Resources Ltd. and Gabriel Resources (Jersey) Ltd. initiated a claim against Romania under the Romania–Canada BIT and the Romania–United Kingdom BIT.[116] The claimants planned to develop a gold mine in *Roşia Montană*, a historic mining district which is located in the Apuseni Mountains of Transylvania, Romania, and has been mined intermittently since Roman times.[117] The project envisaged the exploitation of gold and silver deposits at *Roşia Montană* using a conventional open-pit mine with the use of cyanide in the extraction process.[118] However, the state reportedly rejected the claimants' environmental impact assessment and did not allow exploration at the *Roşia Montană* site. The claimant alleged that the government had breached its treaty obligations by preventing implementation of the project without compensation and effectively depriving the investors of their investment's value.[119]

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114 *Glamis Gold Ltd. v. United States of America*, ICSID Award, NAFTA Chapter 11, 8 June 2009, footnote 194.

115 Federico Lenzerini 'Article 12: Protection of Properties Not Inscribed on the World Heritage List' in Francesco Francioni (ed.), *The 1972 World Heritage Convention: A Commentary* (OUP Oxford 2008) 201–18, 205.

116 *Gabriel Resources Ltd. and Gabriel Resources (Jersey) Ltd. v. Romania*, ICSID Case No. ARB/15/31, Request for Arbitration, 21 July 2015.

117 Id. para. 4.

118 Id. para. 24.

119 Id. paras 7 and 37.

In 2017, Romania applied to UNESCO to have the *Roşia Montană* site listed on the World Heritage List. In 2021, the mining landscape was inscribed on the UNESCO World Heritage in Danger List.[120] In fact, UNESCO noted that the current mining proposal risks affecting the integrity of the property and requested the Romanian government to prevent the extension of active mining licenses on the site. As the arbitration is still pending at the time of writing, it is unclear what effects, if any, the UNESCO inscription will have on the dispute.

In *Gosling v. Mauritius*, British investors planned to build a resort at *Le Morne*, a UNESCO World Heritage site. A rocky mountain overlooking the Indian Ocean in the southwest of Mauritius, *Le Morne* was used as a shelter by runaway slaves, the so-called maroons, through the 18th and the 19th centuries.[121] Protected by the mountain's almost inaccessible cliffs, the maroons formed small settlements on the summit of Le Morne. The landscape thus constitutes a symbol of the slaves' fight for freedom and heroic resistance to slavery. As the government denied a building permit to safeguard the site, the investors filed an investment treaty claim, contending that such denial amounted to an indirect expropriation of their investment as no compensation had been paid.[122]

The respondent counterargued that the investors had never acquired the right to develop the area, as no permission had been granted.[123] It also contended to have exercised its police powers in good faith when pursuing 'its paramount policy objective' of inscribing *Le Morne* on the World Heritage List. Moreover, the claimants admitted to knowing this objective before making plans to develop the property.[124] As the state clarified, 'it was impossible for Mauritius to have both the UNESCO inscription of *Le Morne* and the claimants' project' because 'the World Heritage Committee requested that the government not allow more development at *Le Morne*.'[125] Finally, for the government, there was no expropriation, because the area was not deprived of its entire economic value; rather, it retained at least a quarter of its market value.

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120 UNESCO, World Heritage Convention, List of World Heritage in Danger, <https://whc.unesco.org/en/danger/> (last visited on 18 February 2022).

121 UNESCO, World Heritage Convention, Le Morne Cultural Landscape, <https://whc.unesco.org/en/list/1259/> (last visited 18 February 2022).

122 *Thomas Gosling, Property Partnerships Development Managers* (*UK*), *Property Partnerships Developments* (*Mauritius*) *Ltd, Property Partnerships Holdings* (*Mauritius*) *Ltd, and TG Investments Ltd v. Republic of Mauritius* (*Gosling v. Mauritius*) ICSID Case No. ARB/16/32, Award, 18 February 2020, paras 167–8.

123 Id. para. 242.

124 Id. para. 209.

125 Id. para. 210.

The Arbitral Tribunal held that the investors had never obtained the necessary permits and authorizations and thus did not have any rights to develop the area.[126] Had the claimants acquired development rights, then interference with such rights would have given rise to a justifiable claim for compensation.[127] Nonetheless, as 'no Investment Certificate was ever issued' nor did the Claimants acquire development rights, the Tribunal dismissed the claim of indirect expropriation.

In another pending case, *Elitech and Razvoj Golf v. Croatia*, the investors planned the construction of a luxury resort on a hill overlooking Dubrovnik, a World Heritage Site. The project included the construction of golf courses, hotels, and villas. Reportedly, the tourist complex would have significantly changed the city, having a massive size in comparison to the city proper. Local residents opposed the project complaining that it would damage the environment and threaten Dubrovnik's World Heritage Site status. Therefore, they filed claims before domestic administrative courts that put the project on hold. The company thus filed an investor–state arbitration against Croatia for obtaining compensation under the Croatia–Netherlands BIT.[128] As the case is still in an early phase, it is not possible to foresee whether the case will be settled or how the arbitral tribunal will decide it.

Indirect expropriation claims relating to state measures concerning Indigenous cultural heritage also deserve scrutiny. Among the groups that are often disproportionately affected by the adverse impact of business activities are Indigenous peoples, peasants, and minorities.[129] Indigenous peoples' cultural values and rights associated with their ancestral lands are particularly at risk.[130] Under human rights law, states are required to adopt appropriate measures to ensure effective protection against rights violations linked to business activities.[131] Nonetheless, investors can claim that such measures constitute a form of indirect expropriation. Therefore, it is worth examining whether, and if so how, arbitrators have considered the rights of

126 Id. para. 242.

127 Id.

128 *Elitech B.V. and Razvoj Golf D.O.O. v. Republic of Croatia*, ICSID Case No. ARB/17/32, pending.

129 United Nations, Economic, and Social Council, General Comment No. 24 (2017) on State Obligations under the International Covenant on Economic, Social, and Cultural Rights in the Context of Business Activities, 10 August 2017, E/C.12/GC/24, para. 8.

130 Id. para. 12.

131 Id. para. 14.

Indigenous peoples in adjudicating cultural heritage-related indirect expropriation claims.

In *Bear Creek v. Peru*,[132] the claimant, a Canadian company, contended that Peru had unlawfully expropriated its investment.[133] The *Santa Ana* silver mining project was located in a border region and under Peruvian law, 'a foreign national can only gain rights to natural resources in border regions ... for a public necessity.'[134] After the *Santa Ana* project was declared 'a public necessity', the company was authorized to acquire mining concessions.[135]

However, the project was in a region traditionally inhabited by the Aymara peoples, pre-Inca communities who have been in Peru for centuries.[136] For the Aymara, 'the guardian mountains (*Apus*) ... represent extremely important spiritual sanctuaries.'[137] Therefore, some Indigenous communities protested against the project, requiring its cancellation.[138] After the protest became violent,[139] Peru revoked the finding of a public necessity, thereby annulling the legal condition for the claimant's mineral concessions.[140]

The claimant contended that it obtained the communities' support for the *Santa Ana* project, that is, the 'social license' to operate.[141] The company also stressed that it was the state's duty to consult with local communities before granting rights over their lands.[142] For the claimant, Peru's action amounted to an indirect expropriation because it permanently deprived the company of 'its ability to own and operate its mining concessions'.[143] For the company, there was disparity between such deprivation and 'the stated goal of quelling political pressure and social protests'.[144]

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132 *Bear Creek Mining Corporation v. Republic of Peru*, ICSID Case No. ARB/14/21, Award, 30 November 2017.
133 Id. para. 113.
134 Id. para. 124.
135 Id. para. 149.
136 *Bear Creek Mining Corp. v. Peru*, Partial Dissenting Opinion, para. 25.
137 Id. para. 16.
138 *Bear Creek Mining Corp. v. Peru*, Award, paras 152, 155, 183, and 186.
139 Id. paras 189–190.
140 Id. para. 202.
141 Id. para. 235.
142 Id. para. 246.
143 Id. para. 347.
144 Id.

The Tribunal acknowledged the 'strong political pressure' on Peru due to 'social unrest.'[145] It also questioned whether the claimant took 'the appropriate and necessary steps to engage all of the relevant and likely to be affected local communities, and whether its approach contributed significantly to the nature and extent of the opposition that followed.'[146] It then noted that 'support for the project came from communities that were receiving some form of benefits (*i.e.* jobs and direct payments for land use) and that those communities that … objected were either not receiving benefits, were uninformed, or both.'[147]

Yet, the Tribunal noted that 'the ILO Convention 169 imposes direct obligations only on States … [It] adopts principles on how community consultations should be undertaken, but does not … grant communities veto power over a project.'[148] Therefore, the Tribunal concluded that the company 'complied with all legal requirements with regard to its outreach to the local communities.'[149]

Instead, the Tribunal found that Peru's conduct amounted to an indirect expropriation of the company's investment.[150] The Tribunal noted that 'those members of the Indigenous population that opposed the Santa Ana Project have achieved their wishes: the Project is well and truly at an end. However, this does not relieve Respondent from paying reasonable and appropriate damages for its breach of the FTA.'[151]

In his Partial Dissenting Opinion, Arbitrator Professor Sands largely agreed with the conclusions of the Tribunal.[152] In his view, 'the circumstances which the Peruvian government faced—massive and growing social unrest caused in part by the Santa Ana Project—left it with no option but … to protect the well-being of its citizens'; however, the government could have adopted 'other and less draconian options.'[153]

Nonetheless, Arbitrator Professor Sands disagreed with the other members of the Tribunal on how to assess damages, arguing that the amount of damages should be reduced.[154] For the Arbitrator, 'the project collapsed because of the investor's inability to obtain a social license', the necessary understanding

145 Id. para. 401.
146 Id. para. 406.
147 Id. para. 407.
148 Id. para. 664.
149 Id. para. 412.
150 Id. paras 416, 447–448.
151 Id. para. 657.
152 *Bear Creek Mining Corporation v. Republic of Peru*, ICSID Case No. ARB/14/21, Partial Dissenting Opinion, Professor Philippe Sands, QC, 12 September 2017.
153 Id. para. 2.
154 Id. para. 4.

between the company and the local communities most likely to be affected by the project.[155] As the Arbitrator pointed out, 'the viability and success of a project such as this, located in the community of the Aymara peoples … necessarily depende[d] on local support.'[156] However, for the Arbitrator, the company 'did not … take … sufficient steps … to engage the trust of all potentially affected communities' and this 'contributed, at least in part, to some of the population's general discontent with the Santa Ana Project.'[157] The Arbitrator concluded that '[t]he Canada–Peru FTA is not, any more than ICSID, an insurance policy against the failure of an inadequately prepared investor to obtain such a license.'[158]

Referring to the preamble of the ILO Convention 169, to which Peru is a party, Sands highlighted the fact that the said preamble 'recognizes the aspirations of [Indigenous] peoples to exercise control over their own institutions, ways of life, and economic development and to maintain and develop their identities, languages, and religions, within the framework of the States in which they live.'[159] For him, the preamble also highlights 'the distinctive contributions of Indigenous and tribal peoples to the cultural diversity … of humankind.' For Professor Sands, this preamble encourages any investor to consider 'as fully as possible the aspirations of Indigenous and tribal peoples.'[160]

Although Article 15 of the ILO Convention 169 imposes the duty to consult Indigenous peoples on governments, rather than investors, 'the fact that the Convention may not impose obligations directly on a private foreign investor as such does not, however, mean that it is without significance or legal effects for them.'[161] Rather, the Arbitrator pointed out that human rights 'are complemented by an obligation on all parts, public and private parties, not to engage in activity aimed at destroying such rights.'[162] He further added that '[a]s an international investor, the Claimant has legitimate interests and rights under international law; local communities of Indigenous and tribal peoples also have rights under international law, and these are not lesser rights.'[163]

155 Id. para. 6.
156 Id.
157 Id. para. 19.
158 Id. para. 37.
159 Id. para. 7.
160 Id. para. 7.
161 Id. para. 10.
162 Id.
163 Id. para. 36.

Analogously, in a pending arbitration, *Cosigo Resources and others v. Colombia*,[164] the claimants contend that the creation of a national park in an area including their gold mining concession amounted to an unlawful expropriation of their investment.[165] Reportedly, 'the prospect of extractive activity in the area sparked conflict among local Indigenous groups.'[166] Although state authorities had approved the project, the creation of the Yaigojié Apaporis national park led to the suspension of all mining activities in the same.[167]

In its response, Colombia relied on its constitutional and international law obligations to protect biodiversity and Indigenous peoples' rights, referring to both the 1992 Convention on Biological Diversity[168] and the 1989 ILO Convention 169.[169] The state highlighted the fact that the Amazonian forest is one of the richest areas of the world in biological and cultural diversity and that the establishment of a natural park was intended to protect such values.[170] The respondent then raised a number of jurisdictional and substantive objections. As the case is still in an early phase, it is not possible to foresee whether the case will be settled or how the arbitral tribunal will decide it.

In *Ras al-Khaimah Inv. Authority v. India*, an Emirati investor in an aluminum refinery project served India with a notice of arbitration under the United Arab Emirates–India BIT.[171] The company had signed a Memorandum of Understanding (MoU) with the state of Andhra Pradesh, under which the latter would supply the former with bauxite in order for the investor to operate an aluminum refinery.[172] However, local communities opposed the project, reportedly because the government planned to mine the bauxite on reserved tribal land.[173] After the government cancelled the MoU, the company filed a formal notice.[174]

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164 *Cosigo Resources, Ltd., Cosigo Resources Sucursal Colombia, Tobie Mining and Energy, Inc. v. Republic of Colombia*, UNCITRAL, Notice of Demand and Demand for Arbitration and Statement of Claim, 19 February 2016.

165 Id. para. 1.

166 Id. para. 11.

167 Id. para. 12.

168 United Nations Convention on Biological Diversity, 5 June 1992, in force 29 December 1993, 31 ILM 818.

169 *Cosigo Resources, and Others v. Colombia, Respuesta de la República de Colombia a la Solecitud de Arbitraje de las Demandantes*, 16 March 2016, paras 8–9.

170 Id. para. 11.

171 Zoe Williams, 'Emirati Investor Files UNCITRAL BIT Arbitration Against India', *Investment Arbitration Reporter*, 12 January 2017.

172 Id.

173 Id.

174 Id.

According to an international development scholar, '[t]wo dominant discourses' have emerged with regard to bauxite mining in Eastern India.[175] On the one hand, the 'life-giving discourse' opposes mining because it favors the conservation of 'holistic ecosystems in support of traditional lifestyles.'[176] In fact, bauxite hills have geological features that can be 'life-giving'; because the bauxite ore has a porous structure and the unique ability to store water from the previous monsoon, it 'slowly release[s] it into hill streams' throughout the year.[177] On the other hand, 'treasure chest' discourse considers the exploitation of bauxite hills as pivotal for the economic development of the state.[178] This materialistic vision of mineral extraction builds on an ideology of progress, economic development, and industrialization that has been 'present in top policymaking circles ever since independence.'[179]

Yet, under the 2006 Indian Forest Rights Act (FRA), 'tribal people are the natural owners of minerals available in reserve forests.'[180] Moreover, in the landmark 1997 Samata judgment, the Supreme Court of India held that the grant of mining leases to non-tribals, companies, and partnerships in Scheduled Areas, is nul and void, unconstitutional, and ineffective.[181] Rather, the Court held that the lands in the scheduled areas should be preserved for the social and economic empowerment of the tribals. Reportedly, the Arbitral Tribunal ruled in favour of India on jurisdictional grounds. However, the award has not been published yet, and it is not possible to examine its reasoning at the time of this writing.[182]

5 Compensation Claims

After an expropriation has taken place, compensation must be paid. Investment treaty compensation provisions may be more beneficial to the investor than both domestic and international human rights law. Customary

175 Patrik Oskarsson, 'Diverging Discourses on Bauxite Mining in Eastern India: Life-Supporting Hills for Adivasis or National Treasure Chests on Barren Lands?' (2017) 30 *Society & Natural Resources* 994–1008.

176 Id. at 996.

177 Id. at 1002.

178 Id. at 994.

179 Id. at 997.

180 Santosh Patnaik, 'Agitation Brewing Against Move on Bauxite Mining', *The Hindu*, 9 August 2015, http://www.thehindu.com/news/cities/Visakhapatnam/agitation-brewing-against-move-on-bauxite-mining/article7517531.ece.

181 Supreme Court of India, *Samata v. State of Andhra Pradesh and Others*, 11 July 1997, AIR 1997 SC 3297, JT 1997 (6) SC 449, 1997 (4) SCALE 746.

182 *Ras-Al-Khaimah Investment Authority v. India*, ad hoc arbitration, Award, 11 May 2022, unpublished (as of 21 September 2022).

compensation rules, uniformly enshrined in investment protection treaties, do not differentiate among the various public purposes of expropriations, but instead pose a single standard: in the case of expropriation, investors must be fully compensated. Several investment treaties further require compensation to be prompt, adequate, and effective, according to the so-called Hull formula.[183]

For instance, in *Santa Elena v. Costa Rica*, concerning the direct expropriation of land to enlarge a world heritage site, the Tribunal awarded compensation to the investors, based on the property's fair market value. In doing so, the Tribunal restated that international law permits the host state to expropriate foreign-owned property for a public purpose and against prompt, adequate, and effective compensation. However, for the Tribunal, the legitimate public purpose of the state measure does not affect either the nature or the measure of the compensation. The Tribunal expressly noted that 'the international source of the obligation does not alter the legal character of the taking for which adequate compensation must be paid.'[184] It thus famously held that '[e]xpropriatory 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.'[185]

Analogously, in *Unglaube v. Costa Rica*, when an indirect expropriation occurred in the same Guanacaste province a decade later, the Arbitral Tribunal held that the creation of a national park was a legitimate goal; however, the expropriation was unlawful due to the failure to pay compensation.[186] The Unglaubes had purchased land in Playa Grande, a beach on which female leatherback turtles lay their eggs. Given the endangered status of these turtles, the government adopted measures to protect this nesting habitat, creating the Las Baulas National Marine Park.[187] The 1995 law creating the Park indicated that some private lands would be subject to expropriation and considered part of the park.[188] Preliminary steps to expropriate lands began in 2003;

183 The Hull formula is named after the American Secretary of State, Cordell Hull (1871–1955), who described a full compensation standard as 'prompt, adequate, and effective' in a diplomatic exchange of notes with Mexico in 1930.

184 *Compañia del Desarrollo de Santa Elena v. Costa Rica*, Case No. ARB/96/1, Award, 17 February 2000, 39 ILM (2000) 1317, para. 71.

185 Id. para. 72.

186 *Marion Unglaube and Reinhard Hans Unglaube v. Republic of Costa Rica*, ICSID Case No. ARB/09/20, Award, 16 May 2012, paras 210 and 305.

187 Id. para. 37.

188 Id. para. 57.

however, the Unglaubes challenged the measures before national courts. In its 2008 decision, the Supreme Court of Costa Rica ordered the Ministry of Environment and Energy 'either to proceed with the expropriation' of the property 'within a reasonable period of time, or if there were not funds available to do so, to grant the permits … to private owners to exercise their property rights'.[189] However, three years later, the government had not purchased the property nor had it granted the permits to allow the claimants to enjoy their property rights.[190] The claimants alleged that these facts among others amounted to an indirect expropriation of their property.[191]

The Tribunal held that 'while there can be no question concerning the right of the government of Costa Rica to expropriate property for a *bona fide* public purpose, pursuant to law, and in a manner which is neither arbitrary nor discriminatory, the expropriatory measure must be accompanied by compensation for the fair market value of the investment.'[192] The Tribunal added that if the state had properly provided for and paid compensation, 'Costa Rica's legal position would have been unassailable and this dispute might never have occurred.'[193] However, the Tribunal concluded that this had not been the case. Rather, it held that the measures adopted by Costa Rica amounted to indirect expropriation and awarded compensation to the claimants.[194]

A slightly different approach was adopted in *Southern Pacific Properties* (*Middle East*) *Limited v. Arab Republic of Egypt*,[195] which involved the denial of a construction project in front of the Pyramids for understandable cultural reasons. While the Tribunal awarded compensation to the investor, it reduced the amount of such compensation, stating that only the actual damage (*damnum emergens*) and not the loss of profit (*lucrum cessans*) could be compensated.[196] The Tribunal stated that 'sales in the areas [inscribed on the World Heritage List] … would have been illegal under … international law' and, therefore, '[t]he allowance of *lucrum cessans* may only involve those profits which are legitimate.'[197] Furthermore, the fact that 'the project was located in an area where the claimants should have known there was a risk that antiquities would

189 Id. para. 73.
190 Id para. 74.
191 Id. para. 97.
192 Id. para. 205.
193 Id. para. 210.
194 Id. para. 298.
195 *Southern Pacific Properties* (*Middle East*) *Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Award on the Merits, 20 May 1992, reprinted in (1993) 8 *ICSID Review* 328 ff.
196 Id. para. 157.
197 Id. para. 190.

be discovered' was 'reflected in the method used by the Tribunal to value the claimants' loss.'[198] The Tribunal thus displayed sensitivity to the tenets of the WHC in determining the amount of compensation.

Compensation may also be due in case of breach of other investment treaty provisions. Given that most IIAs lack guidance on how to quantify damages for non-expropriation claims, customary law plays a prominent role in this regard.[199] Under customary international law, if a state breaks an international obligation, it has the duty to repair the harm caused. Reparation 'must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.'[200] The three principal forms of reparation are restitution, compensation, and satisfaction.[201] Restitution refers to the reestablishment of the situation that existed before the wrongful act was committed. If restitution is impossible, compensation – that is, 'payment of a sum corresponding to the value which a restitution in kind would bear' – is provided.[202] Satisfaction is a residual remedy and 'may consist in an acknowledgment of the breach, an expression of regret, a formal apology or another appropriate modality.'[203] It applies only insofar as restitution or compensation do not provide a remedy.[204]

In investment arbitration, restitution in kind is rarely (if ever) granted; rather, compensation is the primary remedy in practice.[205] After establishing state liability for breach of an investment treaty standard, a number of cultural heritage-related arbitrations centered on the amount (*quantum*) of compensation that host states owed to foreign investors. Compensation aims at 'eliminat[ing] all [the] negative consequences of the wrongful act, through the payment to the injured party of an amount sufficient to cover any financially

198 Id. para. 251.

199 Pieter Bekker and Fatima Bello, 'Reimagining the Damages Valuation Framework Underlying Fair and Equitable Treatment Standard Violations' (2021) 36 *ICSID Review–Foreign Investment Law Journal* 339–365, 347.

200 PCIJ, *Factory at Chorzów*, (*Germany v. Poland*) Indemnity, Judgment, 13 September 1928, PCIJ Series A No 17, p. 47.

201 International Law Commission (ILC), Draft Articles on Responsibility of States for Internationally Wrongful Acts, November 2001, Supplement No. 10 (A/56/10), chapter IV.E.1, Article 34; UNGA Resolution, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, 21 March 2006, A/RES/60/147 (also including rehabilitation and guarantees of non-repetition among the forms of reparation)

202 PCIJ, *Factory at Chorzów*, Judgment, p. 47.

203 ILC, Draft Articles on Responsibility of States for Internationally Wrongful Acts, Article 37.

204 James Crawford, *State Responsibility* (Cambridge: CUP 2013) 527–8.

205 Christoph Schreuer, 'Alternative Remedies in Investment Arbitration', (2016) 3 *Journal of Damages in International Arbitration* 1–30, at 4.

assessable damage including loss of profits insofar as it is established.'[206] As a Tribunal put it, 'valuation is not an exact science'[207] and the calculation of damages 'inevitably requires a certain amount of conjecture'; however, such difficulty in calculation 'cannot … deprive an investor, who has suffered injury, from his fundamental right to see his losses redressed.'[208] Rather, the specific nature of valuation makes it 'a highly technical task', that 'calls for the input of quantum experts who apply modelling and simulation techniques and who use objective criteria to produce relatively reliable estimates.'[209]

Factors such as contributory fault are often weighted by arbitral tribunals. In *Bear Creek Mining Corporation v. Republic of Peru*, the Dissenting Arbitrator, Professor Philippe Sands, argued that compensation should be reduced because the investor had not obtained the social license to operate, referring to a particular set of interactions between investors and affected communities. Some scholars have argued that 'tribunals should thoroughly analyse the relationship between the investor and the affected community'[210] and review the investor's conduct to check whether it constituted 'reasonable business conduct.'[211]

In some recent arbitrations, arbitral tribunals have admitted counterclaims brought by the host state against the investors. In fact, some broadly-worded BITs permit either an investor or the state to bring an arbitral claim. Also, the investor claimant can always consent to a counterclaim. In some instances, tribunals have thus ordered investors to pay compensation to the host state for environmental damage.[212] Yet, any strictly pecuniary quantification of damages is likely to favor foreign investors at the expense of the competing interests of local communities. In fact, any permanent change to landscape or alteration of traditional cultural practices can constitute an irreparable harm to local communities that is difficult, if not impossible, to quantify.

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206 *Joseph Charles Lemire v. Ukraine*, Award, ICSID Case No. ARB/06/18, 28 March 2011, para. 151. The award was upheld in a subsequent Annulment proceeding. *Joseph C. Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Annulment Proceeding, Decision on Ukraine's Application for Annulment of the Award, 8 July 2013.

207 *Lemire v. Ukraine*, Award, para. 248.

208 Id. para. 249.

209 Bekker and Bello, 'Reimagining the Damages Valuation Framework', 348.

210 Raùl Zúñiga Peralta, 'The Judicialisation of the Social License to Operate: Criteria for International Investment Law' (2021) 22 JWIT 92–128.

211 Catherine Kessedjian, 'Rebalancing Investors' Rights and Obligations' (2021) 22 JWIT 645–649, 646.

212 See *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Reconsideration and Award, 7 February 2017 (ordering Burlington to pay USD 41 million in compensation to Ecuador for environmental and infrastructure damage).

In *Lemire v. Ukraine*, the claimant asked for moral damages alleging that 'the constant rejections [of his bids] … eroded his image.'[213] The Tribunal acknowledged that 'moral damages could only be awarded in exceptional circumstances.'[214] Referring to a number of cases,[215] the Tribunal concluded that 'as a general rule moral damages are not available to a party injured by the wrongful acts of a state, but can be awarded in exceptional cases provided that the state actions imply physical threat, illegal detention or other analogous situations … [and that] the state's actions cause a deterioration of health, stress, anxiety, [or] other mental suffering … and both cause and effect are grave or substantial.'[216] The Tribunal concluded that in the instant case, 'the gravity required under the standard [wa]s not present.'[217]

In conclusion, these cases show that states may lawfully regulate and/or expropriate private property to protect cultural heritage. This is particularly the case if the cultural heritage in question has outstanding and universal value for humankind as a whole. The issue becomes whether the amount of compensation for the economic loss suffered by the owner should be reduced *vis-à-vis* the public purpose of the measure. While in the *Santa Elena* case, concerning the expropriation of seafront property, the Tribunal ultimately did not take cultural values into account, the SPP Tribunal adopted a more nuanced approach that has been further developed in more recent cases. Furthermore, these cases show that the state's pursuit of legitimate goals such as cultural heritage protection is not unbounded; rather, policymakers and adjudicators need to achieve an appropriate balance between the promotion of the public interest and the protection of economic freedoms.

6 Fair and Equitable Treatment

The fair and equitable treatment (FET) standard is at the heart of investment arbitration, having become the most often invoked provision in the same.[218]

213 *Lemire v. Ukraine*, Award, para. 315.

214 Id. para. 311.

215 Mixed Claims Commission (*United States v. Germany*), *Lusitania* cases, 1 November 1923–30 October 1930, UN RIAA vol. VII; *Desert Line Projects LLC v. Republic of Yemen*, ICSID Case No. ARB/05/17, Award, 6 February 2008; *Waguih Elie George Siag and Clorinda Vecchi v. Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award, 1 June 2009.

216 *Lemire v. Ukraine*, Award, para. 333.

217 Id. para. 339.

218 See Rudolf Dolzer, 'Fair and Equitable Treatment: Today's Contours' (2014) 12 *Santa Clara JIL* 7–32, 10.

Due to its deliberate vagueness, it constitutes a catch-all provision covering the situations where there is no finding of expropriation or any other breach of investment treaty standards. The FET standard is an absolute standard of treatment, designed to provide a basic safeguard upon which the investor can rely at any time, as opposed to the relative standards embodied in both the national treatment and most favored nation principles, which, in contrast, define the required treatment by reference to the treatment accorded to other investments.

In an attempt to delimit the perimeters of the standard, the United States-Mexico-Canada Agreement (USMCA) states that the minimum standard of treatment owed to foreign investors is expressly tied to customary international law, thus consolidating a position adopted by the NAFTA Free Trade Commission in an interpretation of a similar NAFTA provision.[219] Traditionally, the minimum standard of treatment protected investors only in instances of 'egregious and shocking' or 'manifestly unfair or inequitable conduct.'[220] Accordingly, in the USMCA and former NAFTA context, arbitral tribunals still consider the FET standard to be the customary international law minimum standard of treatment. Therefore, the FET standard has not presented much of a viable claim in the NAFTA context.

For instance, the *Glamis Gold* Tribunal held that 'the customary international law minimum standard remains as apparently articulated in the 1926 *Neer* award: to violate the customary international law minimum standard of treatment codified in Article 1105 of the NAFTA, an act must be 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 – so as to fall below accepted international standards.'[221]

Outside the NAFTA milieu, arbitral tribunals have broadened the notion of the standard significantly. The standard has exceeded the customary minimum standard of treatment and comprises various additional requirements,

219 USMCA, Article 14.6(2). See also NAFTA Free Trade Commission, Notes of Interpretation of Certain Chapter 11 Provisions, 31 July 2001, at B.2.

220 Mexico–United States Claims Commission, *L. Fay Neer and Pauline Neer (USA) v. United Mexican States*, 15 October 1926 (1926) 4 RIIA 60–62, para. 4 (holding that 'the treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to willful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency. Whether the insufficiency proceeds from deficient execution of an intelligent law or from the fact that the laws of the country do not empower the authorities to measure up to international standards is immaterial.').

221 *Glamis Gold, Ltd. v. The United States of America*, UNCITRAL, Award, 8 June 2009, para. 22.

such as transparency, consistency, non-arbitrariness, due process, good faith, and the protection of legitimate expectations. Under this broader conceptualization, the FET standard has figured prominently in a number of investment arbitrations.

For instance, in *Railroad Development Corporation* (*RDC*) *v. Guatemala*, a Dominican Republic–Central America-United States Free Trade Agreement (CAFTA)[222] arbitration, the ICSID Tribunal found that Guatemala breached the minimum standard of treatment under Article 10.5 of CAFTA as its conduct was 'arbitrary, grossly unfair, and unjust.'[223] In 1997, the company won a government bid to operate Guatemala's rails for fifty years.[224] For the following decade, RDC reopened several rail lines, but did not restore the rail network to the extent the government had envisioned. The dispute commenced when Guatemala's executive branch declared the contract to be harmful (*lesivo*) and thus 'not in the interest of the country.'[225] For the government, RDC failed to deliver the promised rehabilitation of Guatemala's railway system and used railway equipment it should not have used. Before this declaration, the investor contended that it 'had no reason to believe that it was not adequately protecting Guatemala's historical and cultural patrimony interest' in certain trains and rail equipment 'because the Government never officially declared or designated under its Cultural Patrimony Law' any of the relevant items.[226] In this case, the company claimed that the *lesivo* declaration was arbitrary, unfair, and unjust, and harmed its investment.[227]

The Tribunal held that 'the manner in which and the grounds on which Respondent applied the *lesivo* remedy in the circumstances of this case constituted a breach of the minimum standard of treatment' by being 'arbitrary, grossly unfair, and unjust.'[228] In fact, among other things, 'the railway equipment in question had been used since the initiation of the rail service … with full knowledge of the Government and without which claimant could not have performed its obligations under contract.'[229]

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222 Dominican Republic–Central America–United States Free Trade Agreement (CAFTA), signed on 5 August 2004, in force between the United States of America and Guatemala on 1 July 2006.

223 *Railroad Development Corporation v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Award, 29 June 2012, para. 235.

224 Id. para. 30.

225 Id. para. 35.

226 Id. para. 46.

227 Id. para. 157.

228 Id. para. 235.

229 Id. para. 235.

The *Lemire* case also involved several claims related to the fair and equitable treatment standard.[230] After investing in Gala Radio, a radio company in Ukraine, a US investor, Mr Lemire, planned to increase the size and audience of his radio company and participated in several tenders for the awarding of broadcasting licenses.[231] Although Gala Radio 'presented more than 200 applications for all types of frequencies, [it] was only able to secure a single license (in a small village in rural Ukraine).'[232] The claimant argued that the Ukrainian legal procedure for the allocation of frequencies was in itself unfair and inequitable, and was applied in an arbitrary and discriminatory fashion.[233] As the Ukrainian Law on Television and Broadcasting required the National Council to take into account the objective of freedom of speech, the claimant argued that 'Since [the competitor] already had a radio network, pluralism could arguably be better served if the new channel was awarded to a different company'.[234]

Although the Arbitral Tribunal did not comment on media pluralism, it acknowledged that 'informational channels … are politically more sensitive because they are important elements for the formation of public opinion' and that the presence of Gala Radio 'as an independent broadcaster … would reinforce freedom of speech.'[235] The Tribunal found that the legal and administrative procedures for the issuance of radio frequencies presented some shortcomings which could facilitate arbitrary decision-making and 'resulted in an arbitrary advantage to local investors with greater political clout'.[236] These shortcomings involved, *inter alia*, the absence of clearly established criteria for the evaluation of the tenders, the absence of reasoning concerning National Council decisions, and the lack of transparency with regard to who were the ultimate owners of radio companies.[237] Since the National Council did not reason or explain its decisions, it was impossible to verify whether Gala's applications were rejected because its programming concept was worse than that of its competitors.[238]

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230 *Joseph Charles Lemire v. Ukraine*, Decision on Jurisdiction and Liability, ICSID Case No. ARB/06/18, 14 January 2010, and *Joseph Charles Lemire v. Ukraine*, Award, ICSID Case No. ARB/06/18, 28 March 2011.

231 *Lemire v. Ukraine*, Decision on Jurisdiction and Liability, para. 420.

232 Id.

233 Id. para. 42.

234 Id. para. 354.

235 *Lemire v. Ukraine*, Award, paras 60 and 179.

236 Id. para. 64

237 *Lemire v. Ukraine*, Decision on Jurisdiction and Liability, paras 315–16.

238 Id. para. 420.

However, if Gala was an 'average radio station' as the respondent admitted, the Arbitral Tribunal inferred it 'should have had an average success rate in its tenders.' Yet, the record showed that 'it had a success rate which was much below average.'[239] While the Tribunal acknowledged that Gala Radio was not a 'large company', it recognized that 'throughout its lifetime, Gala Radio ha[d] been a reasonably successful broadcaster' and 'had won a number of awards for the quality of its broadcasting.'[240] Therefore, the Tribunal analyzed each particular tender. With regard to the first tender under consideration, the Tribunal found that politically motivated interference with independent and impartial decision-making violated the FET standard.[241] Other tenders were similarly held to be arbitrary and discriminatory because foreign and national companies were treated differently in similar cases.[242] The majority of the Arbitral Tribunal clarified that 'not every violation of domestic law necessarily translates into an arbitrary or discriminatory measure under international law and a violation of the FET standard,' holding that 'for this to happen, it is necessary that the state incur a blatant disregard for applicable tender rules, distorting fair competition among tender participants.'[243] The Tribunal concluded that in the instant case, Ukraine 'acted in blatant disregard of applicable tender rules'.[244]

Cultural heritage-related FET claims have raised three main questions. What type of state representations create legitimate expectations an investor may rely upon? Can an investor rely upon international cultural heritage law as a source of legitimate expectations? Does investment treaty arbitration provide a new means to enforce international cultural heritage law? The next subsections address these questions.

6.1 *Legitimate Expectations*

The concept of 'legitimate expectations' allows foreign investors to claim compensation in situations where the host state makes specific representations to them, the investors relies on such promises in making their investments, and the state then frustrates the expectations it previously

239 Id. paras 315–6.
240 *Lemire v. Ukraine*, Award, paras 206–207
241 *Lemire v. Ukraine*, Decision on Jurisdiction and Liability, para. 356.
242 Id. para. 369 and paras 384–5.
243 *Lemire v. Ukraine*, Award, para. 43.
244 Id.

raised.[245] Legitimate expectations are not an independent cause of action. Whether or not the fair and equitable treatment standard protects the legitimate expectations of foreign investors has been answered in various ways.[246] The question is really about the level of protection that should be granted to foreign investors and their investments. While investors prefer strong investment protections, host states are not eager to restrict the exercise of their sovereign powers.

Can investors legitimately expect an absolute protection of their economic interests? In general terms, investors' expectations cannot prevent states from regulating the exercise of individual rights in the pursuit of legitimate public policy objectives. Moreover, in assessing whether legitimate expectations exist, arbitral tribunals must scrutinize the relevant circumstances in the respondent country at the time the investment was made 'including not only the facts surrounding the investment, but also the political, socioeconomic, cultural, and historical conditions prevailing in the host state'.[247]

For instance, in the *Glamis Gold* case, the claimant contended, *inter alia*, that the review process of the Imperial Project violated the fair and equitable treatment standard, as 'numerous other projects with significant and similar cultural characteristics were approved without complete backfilling and despite severe impacts to their cultural resources.'[248] The Tribunal rejected this claim, holding that the acts of the Federal Government and the state of California did not violate the respondent's obligations under Article 1105 of NAFTA.[249] The Tribunal recognized that 'It is not the role of this Tribunal or any international tribunal, to supplant its own judgment of underlying factual material and support for that of qualified domestic agency,'[250] and stated that the cultural review of the claimant's plan of operations was undertaken by qualified professionals. Furthermore, California legislation was of general application.[251] The Tribunal concluded that the claimant's property was impacted because of the high number of cultural artifacts found there.

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245 See e.g. *Grand River Enterprises Six Nations Ltd et al. v. United States of America*, Award, 12 January 2011, para. 140.

246 Michele Potestà, 'Legitimate Expectations in Investment Treaty Law: Understanding the Roots and the Limits of a Controversial Concept' (2013) 28 *ICSID Review* 88–122.

247 *Suez, Sociedad General de Aguas de Barcelona SA, and Vivendi Universal SA v. Argentine Republic*, Decision on Liability, ICSID Case No. ARB/03/19, 30 July 2010, para. 230.

248 *Glamis Gold* Award, paras 639 and 277.

249 Id. para. 824.

250 Id. para. 779.

251 Id. para. 765.

Conversely, if a host state grants specific assurances to investors regarding the exploitation of their investment in the host state, the adoption of measures affecting the economic value of the investment might amount to a breach of fair and equitable treatment. In fact, 'a State may be tied to the objective expectations that it creates in order to induce investment.'[252] For instance, in *MTD v. Chile*, concerning the denial of a zoning modification allegedly necessary for the development of a residential project, the Arbitral Tribunal held that Chile had breached the fair and equitable treatment standard due to the incoherent behavior of its authorities.[253] While the Foreign Investment Commission had approved the investment plan of the investor, the Minister of Urban Development had denied the application, deeming that the project was not in conformity with the zoning policy of Santiago. The Tribunal held that Chile had 'an obligation to act coherently and apply its policies consistently,'[254] and that approval of an investment by the relevant authorities for a project that was against the urban policy was 'a breach of the obligation to treat an investor fairly and equitably.'[255]

In *Crystallex v. Venezuela*,[256] a Canadian company that had invested in one of the largest gold deposits in Venezuela, claimed that the conduct of the host state in relation to the *Las Cristinas* mine amounted to, *inter alia*, a violation of the fair and equitable treatment standard.[257] The state authorities denied the permit that Crystallex needed for the exploitation of the mine because of environmental concerns.[258] Venezuela pointed out that the project could affect the Imataca Forest reserve, a world heritage site and 'a fragile rainforest with an extremely varied biodiversity and a significant Indigenous population'.[259] Yet, the claimant pointed out that the Ministry of Environment had never raised concerns for the environment and Indigenous peoples during the four-year approval process and no study supported such concerns or demonstrated that the project would adversely affect the Imataca region.[260] While Crystallex claimed that it had consulted

252 *Glamis Gold* Award, para. 766.
253 *MTD Equity Sdn Bhd and MTD Chile SA v. Republic of Chile*, ICSID Case No. ARB/01/ 7, Award, 25 May 2004.
254 Id. para. 165.
255 Id. para. 166.
256 *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016.
257 Id. para. 187.
258 Id. paras 204 and 378.
259 Id. para. 214.
260 Id. para. 277.

the relevant Indigenous communities,[261] Venezuela argued that the company had inadequately addressed issues concerning 'local Indigenous culture and traditions'.[262]

The Tribunal found that Venezuela breached the fair and equitable treatment standard when it denied the environmental permit. In fact, a letter from the state authorities had created legitimate expectations that the project would proceed.[263] Moreover, the Tribunal found that state authorities did not sufficiently elucidate reasons for denial; rather, their reasoning 'extend[ed] to a mere two and a half pages' and vaguely referred to 'serious environmental deterioration' in the plot.[264] While the Tribunal did not contest the state's responsibility to raise environmental issues in respect of the Imataca Reserve, it held that the specific way the state put forward such concerns 'present[ed] significant elements of arbitrariness.'[265]

Analogously, in *Bilcon v. Canada*,[266] involving the rejection of a project to develop and operate a quarry in Nova Scotia, the Tribunal found a breach of the FET standard. The investors planned to mine basalt and build a maritime terminal in Digby Neck, a peninsula adjacent to the Bay of Fundy, a UNESCO biosphere reserve. After conducting an environmental assessment and noting the significant and adverse environmental effect on the 'community core values', a panel of experts advised the government to reject the project. Accordingly, Nova Scotia and the Canadian government rejected the investors' project proposal.[267] The investor claimed that the environmental assessment 'departed substantially from the expected scientific and technical focus' of an environmental impact assessment, as it included reference to the Kyoto Protocol,[268] the need to consider traditional knowledge, and sustainable development.[269]

Canada argued that its measures did not breach the FET standard. Rather, it emphasized 'the importance and uniqueness of the biophysical and human environment in Digby Neck and the adjacent Bay of Fundy.' In fact, Digby

261 Id. para. 289.
262 Id. para. 351.
263 Id. para. 588.
264 Id. para. 590.
265 Id. para. 591.
266 *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton, and Bilcon of Delaware Inc. v. Government of Canada*, UNCITRAL, Permanent Court of Arbitration (PCA) Case No. 2009-04, Award on Jurisdiction and Liability, 17 March 2015.
267 Id. para. 117.
268 Kyoto Protocol to the United Nations Framework Convention on Climate Change, 11 December 1997, in force 16 February 2005, 2303 UNTS 162.
269 *Bilcon v. Canada*, Award, para. 201.

Neck, the place where the project would be developed, is an integral part of a UNESCO biosphere reserve, the Bay of Fundy, which hosts many endangered species and ecological assets that are crucial to the economy of the local area.[270] Biosphere reserves are internationally recognized ecosystems for the sustainable use of biological diversity and the safeguarding of the cultural values associated with such areas, nominated by national governments and remaining under sovereign jurisdiction of the states where they are located. Biosphere reserves constitute innovative projects of 'ecological humanism' or 'humanist ecology' in which human beings, culture, and nature are conceived holistically. Since their inception, biosphere reserves have been governed by soft law instruments. Governments, local communities, and private individuals all participate and collaborate in the management of biosphere reserves in experimenting models of sustainable development.[271] Accordingly, Canada stressed that the law required the environmental assessment to 'evaluate any change that the project may cause in the environment including … on … socio-economic conditions and … cultural heritage'.[272] Such an inquiry necessarily included 'consideration of whether the effects of the project would be consistent with the community's core values'.[273]

The Arbitral Tribunal held that the government's rejection of the project was in breach of the investors' legitimate expectations. In the Tribunal's view, the investors reasonably relied on domestic law and on specific encouragements, at the political and technical level, to pursue the project.[274] For the Tribunal, the panel's reference to community core values was unprecedented and unique.[275] In its assessment of legitimate expectations, the Tribunal did not consider the broader public policy concerns or weigh the investors' expectations against the objectives of sustainable development, as demanded by the designation of the Bay of Fundy as a UNESCO biosphere reserve.

On the other hand, reasonable expectations cannot be unilateral.[276] Rather, claimants 'must demonstrate reliance on specific and unambiguous State

270 Id. para. 130.

271 *See generally* Agnès Michelot, 'Les Réserves de Biosphère du Programme sur l'Homme et la Biosphère de l'UNESCO: au Delà des Aires Protegées, un Modèle de Société Durable?' in Jon Engel, Laura Westra, and Klaus Bosselmann (eds), *Democracy, Ecological Integrity, and International Law* (Newcastle upon Tyne: Cambridge Scholars Publishing 2010) 389–408.

272 *Bilcon v. Canada*, Award, para. 203.

273 Id. para. 203.

274 Id. paras 447–8.

275 Id. paras 450–1.

276 *Unglaube v. Costa Rica*, Award, para. 270.

conduct, through definitive, unambiguous, and repeated assurances, and targeted at a specific person or identifiable group'.[277] In the situation where the host state has made no assurance or representation, and there is no stabilization clause in the contract between the investor and the host state, the state's right to regulate cannot be considered frozen or restricted. The protection of investors' legitimate expectations cannot mean that the host state will never be able to modify its legal framework.[278]

In *Parkerings v. Lithuania*, which related to the construction of a parking area in the city of Vilnius, the Tribunal remarked that 'It is each State's undeniable right and privilege to exercise its sovereign legislative power … Save for the existence of an agreement, in the form of a stabilization clause or otherwise, there is nothing objectionable about the amendment brought to the regulatory framework existing at the time an investor made its investment.'[279] The Tribunal also noted that in countries in transition—that is, emerging from a socialist-type centralized economy toward a market-based economy—investors could not legitimately expect a stable legal framework;[280] rather, legislative changes should be seen as a normal business risk. In this case, Lithuania was transitioning from being a state of the former Soviet Union to becoming a candidate for EU membership. Nonetheless, any transition does not exempt states from a general duty of good faith and transparency. *In casu*, the Tribunal admitted that: 'Even if no violation of the BIT or international law occurred, the conduct of the city of Vilnius was far from being without criticism.'[281] Therefore, the Arbitral Tribunal dismissed all the claims in their entirety, requiring each party to bear its own costs.[282]

In *Gosling v. Mauritius*, a group of British property developers brought a claim against Mauritius, alleging, *inter alia*, breach of the fair and equitable treatment standard under the 1986 UK–Mauritius BIT.[283] Gosling and other investors planned to develop property at *Le Morne*, a world heritage site.[284]

277 Id.

278 *Sergei Paushok et al. v. Mongolia*, Award on Jurisdiction and Liability, 28 April 2011, para. 253; *Impregilo S.p.A. v. Argentina*, ICSID Case No. ARB/07/17, Award, 21 June 2011, para. 291.

279 *Parkerings-Compagniet AS v. Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007, para. 332.

280 Id. paras 335–6.

281 Id. para. 464.

282 Id.

283 *Thomas Gosling, Property Partnerships Development Managers* (*UK*)*, Property Partnerships Developments* (*Mauritius*) *Ltd, Property Partnerships Holdings* (*Mauritius*) *Ltd, and TG Investments Ltd v. Republic of Mauritius* (*Gosling v. Mauritius*) ICSID Case No. ARB/16/32, Award, 18 February 2020.

284 Id. para. 41.

A peninsula of outstanding beauty and cultural and historical significance, *Le Morne* had been a place of refuge for escaped slaves in the 19th century.[285] Because of its natural beauty and significance, Mauritius had pursued its inscription as a cultural landscape on UNESCO's World Heritage List since 2003 and finally obtained it in 2008.[286] To achieve this public objective, the government refused the investors permission to build on the site. The investors, *inter alia*, claimed that the government was in breach of the fair and equitable treatment standard because it 'frustrated their legitimate expectations by failing to honor specific assurances received from Government officials at the highest level.'[287]

The Tribunal noted that 'the level of treatment required to breach the [fair and equitable treatment] standard has evolved.'[288] While the standard 'must be adapted to the circumstances of each case, … flexibility does not mean that treatment will be determined by the subjective expectations of the investors. To be protected, [their expectations] must rise to the level of legitimacy and reasonableness.'[289] In fact, such a standard must be interpreted 'in a balanced manner,' considering 'both state sovereignty and … the necessity to protect foreign investment.'[290]

In casu, the Tribunal noted that the investors knew of the state's objective to inscribe *Le Morne* on the World Heritage List.[291] The government 'was entitled to change its policy' and had given no assurance that it would allow development of the investor's project while listing of *Le Morne* on the UNESCO World Heritage List.[292] As noted by the Dissenting Arbitrator, Professor Stanimir Alexandrov, 'it is undisputed that the inscription of *Le Morne* as a UNESCO World Heritage Site was in the public interest of Mauritius and its people, and that it was a noble goal consistent with the objective of preserving the history of the place, honoring the dignity of the slaves who lived and died there, creating a symbol of freedom and human dignity, and – last but not least – preserving the physical beauty of *Le Morne*. In sum, [the] [r]espondent was fully entitled to prohibit any development at *Le Morne* … in the interests of the people of Mauritius – and it did so.'[293]

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285 Id. para. 42.
286 Id.
287 Id. para. 168.
288 Id. para. 243.
289 Id. para. 244.
290 Id. para. 245.
291 Id. para. 249.
292 Id. para. 249.
293 *Thomas Gosling, Property Partnerships Development Managers (UK), Property Partnerships Developments (Mauritius) Ltd, Property Partnerships Holdings (Mauritius) Ltd and TG*

The government never promised or assured the claimants that their proposed development project would be compatible with its overriding policy objective of inscribing *Le Morne* as a UNESCO World Heritage Site. Since there was no documented evidence of such an alleged promise, the Tribunal held that the investors had no legitimate expectations of proceeding with their development project at *Le Morne*.

6.2 *International Law as a Source of Legitimate Expectations*

Can investors legitimately expect that international instruments to which a host state is a party will not be violated by the said state? In several investment arbitrations, investors claimed that measures adopted by the host state and affecting their investments were illegal under various international agreements and therefore violated the FET standard. According to this line of argument, if the host state is a party to international agreements, an investor has legitimate expectations that the state will not violate such agreements. If the state breached its international law obligations and deviated from the investor's legitimate expectations, it would also violate the FET standard.

The argument that a state's adhesion to other treaties gives rise to legitimate expectations that the state will not breach such treaties relies on an expansive and evolving interpretation of the FET standard. Under the USMCA and the former NAFTA, it seems that such a claim lacks merit, as the United States, Mexico, and Canada have adopted a restrictive approach to the interpretation of the standard, analogizing it to the minimum standard of treatment under customary international law.

For instance, in *Grand River v. United States*,[294] a Canadian tobacco distribution company owned and operated by Indigenous peoples contended that the Master Settlement Agreement—an agreement between tobacco companies and major tobacco producers in the United States—was being applied to their business without their input. For the company, this allegedly violated the fair and equitable treatment standard by violating customary international law requiring the consultation, if not consent, of Indigenous peoples on measures potentially affecting them.[295] As the individual claimants were members of the Six Nations of the Iroquois Confederacy, they argued that the tobacco business was their traditional activity.

Investments Ltd v. Republic of Mauritius (*Gosling v. Mauritius*), ICSID Case No. ARB/16/32, Dissenting Opinion of Arbitrator Stanimir Alexandrov, 14 February 2020, para. 27.

294 *Grand River Enterprises Six Nations, Ltd. v. United States*, Award, NAFTA Tribunal, 12 January 2011.

295 Id. para. 182(3).

The Arbitral Tribunal, however, did not find any violation of the fair and equitable treatment standard under Article 1105 of NAFTA,[296] albeit admitting, in passing, that Indigenous peoples should be consulted on matters potentially affecting them.[297] For the Tribunal, NAFTA Article 1105 required a uniform standard of treatment for all foreign investments, rather than admitting specialized procedural rights owing to some categories for investors *qua* Indigenous persons.[298] According to the *Grand River* Tribunal, the fair and equitable treatment standard 'does not incorporate other legal protections that may be provided to investors or classes of investors under other sources of law.'[299] 'To hold otherwise'—argued the Tribunal—'would make Article 1105 a vehicle for generally litigating claims based on alleged infractions of domestic and international law and thereby unduly circumvent the limited reach of Article 1105 as determined by the NAFTA Free Trade Commission in its binding directive.'[300] In reaching this outcome, the Tribunal was guided by the NAFTA Free Trade Commission's statement that 'determination that there has been a breach … of a separate international agreement does not establish that there has been a breach of Article 1105.'[301] In another case, the Tribunal similarly held that the applicable law 'does not incorporate the universe of international law into the BITs or into disputes arising under the BITs.'[302]

The arbitrators did not discuss the role that Article 31(3)(c) of the Vienna Convention on the Law of Treaties (VCLT) can play in investor–state arbitration as a tool to defragment international law.[303] Such provision requires adjudicators to consider 'any relevant rules of international law applicable in the relations between the parties.' Although Article 31(3)(c) cannot trigger the

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

297 Id. para. 210 (noting that 'It may well be, as the Claimants urged, that there does exist a principle of customary international law requiring governmental authorities to consult Indigenous peoples on governmental policies or actions significantly affecting them.').

298 Id. para. 213 (arguing that '[t]he notion of specialized procedural rights protecting some investors, but not others, cannot readily be reconciled with the idea of a minimum customary standard of treatment due to all investments.').

299 Id. para. 219.

300 Id.

301 NAFTA Free Trade Commission, Notes of Interpretation of Certain Chapter 11 Provisions.

302 *Bernhard von Pezold v. Republic of Zimbabwe* (ICSID Case No. ARB/10/15) and *Border Timbers Ltd. v. Republic of Zimbabwe* (ICSID Case No. ARB/10/25), Procedural Order No. 2, para. 57, 26 June 2012.

303 Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331, Article 31(3)(c).

importation of external norms into a given treaty system or provide the claimants with the capacity to claim for the breach of such external obligations, it enables such external rules to shape an arbitral tribunal's interpretation of a given investment treaty provision.

Beyond the NAFTA context, some tribunals have considered that the protection of legitimate expectations constitutes part of the FET standard. However, it remains uncertain whether arbitral tribunals can consider that legitimate expectations include an expectation that the host state will not breach its international commitments. The argument, if adopted, would impose a powerful constraint on states for which the state did not bargain for in the negotiation of IIAs. However, reference to the host state international obligations could also delimit the reasonableness of investor's expectations.

6.3 *A New Tool to Enforce International Cultural Heritage Law?*

Can investment treaty arbitration constitute a new tool to enforce international cultural heritage law? Can it provide investors with an alternative venue to challenge the consistency of domestic regulations with international cultural heritage law? In some exceptional cases, foreign investors have attempted to use international investment law to indirectly protect other values by requiring a state to respect its international law obligations that are critical to the success of the investment.[304]

In *Allard v. Barbados*, a Canadian investor filed an investment treaty claim against Barbados, alleging that the host state's failure to enforce its domestic law implementing international environmental law violated the FET standard under the 1996 Canada–Barbados BIT.[305] The investor acquired wetlands and subsequently developed them into a wildlife sanctuary and ecotourism facility in Barbados.[306] Nonetheless, raw sewage reached the wetlands and such events allegedly forced him to cease operating this business. The investor claimed, *inter alia*, that Barbados denied the investor FET 'by making representations that it would … uphold its environmental policies, particularly those that reflected a commitment to conservation and protection of the biodiversity of the Sanctuary, and then failing to act in accordance with those representations.'[307]

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304 Valentina Vadi, *Cultural Heritage in International Investment Law and Arbitration* (Cambridge: CUP 2014) 129–131.

305 *Peter A. Allard v. Barbados*, UNCITRAL, Notice of Dispute, 8 September 2009, para. 16 http://graemehall.com/legal/papers/BIT-Complaint.pdf.

306 *Peter A. Allard v. the Government of Barbados*, PCA Case No. 2012-06, Award, 17 June 2016, para. 33.

307 Id. para. 172.

The Claimant invoked Article 31(3)(c) of the VCLT, which provides that, in the interpretation of a treaty, 'there shall be taken into account, together with the context … any relevant rules of international law applicable in the relation between the parties.' In the claimant's view, in interpreting the scope of the FET standard, the Tribunal should consider 'the obligations … that Barbados assumed in its environmental treaties.' The claimant emphasized that he did not allege a breach of any treaties other than the BIT but argued that the state's environmental treaty obligations confirmed the reasonableness of the claimant's expectations that are protected under the FET standard.[308] Specifically, the claimant referred to Barbados' obligations under the Convention on Biological Diversity[309] and the Ramsar Convention,[310] in accordance with which Barbados designated the sanctuary as a 'wetland of international importance.'[311]

With respect to the Claimant's reliance on the Convention on Biological Diversity and the Ramsar Convention, the Respondent contended the following: (i) the Tribunal did not have jurisdiction to consider alleged breaches of these treaties; (ii) the Tribunal should apply the rule explicitly stated in Article 1105(1) of NAFTA and in all of Canada's recent BITs that a breach of any other treaty does not amount to a breach of the FET standard; (iii) Barbados ratified the Ramsar Convention in 2006, long after Mr. Allard made his investment; and, (iv) in any event, Barbados complied with its obligations under these treaties.[312]

The Tribunal held that the Claimant had 'failed to establish that his decision to cease operating the Sanctuary as an ecotourism attraction arose out of any relevant degradation of the environment at the Sanctuary.'[313] It also concluded that, 'even if it had found that there was a degradation of the environment at the Sanctuary … (which it did not), it would not have been persuaded that such degradation was caused by any actions or inactions of Barbados.'[314] With regard to the FET standard, the Tribunal held that none of Barbados' statements constituted specific representations capable of creating legitimate expectations.[315]

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308 *Allard v. Barbados*, Award, para. 177.

309 Convention on Biological Diversity, open for signature on 5 June 1992, in force 29 December 1993, 1760 UNTS 69.

310 Convention on Wetlands of International Importance especially as Waterfowl Habitat, open for signature on 2 February 1971, in force 21 December 1975, 996 UNTS 245.

311 *Allard v. Barbados*, Award, para. 178.

312 Id. para. 190.

313 Id. para. 139.

314 Id. para. 166.

315 Id. para. 199.

Unfortunately, the Tribunal did not address the question of whether Barbados' international obligations arising from its environmental treaties confirmed or reinforced the reasonableness of the Claimant's expectations.[316] However, it admitted that '[t]he fact that Barbados is a party to the Convention on Biological Diversity and the Ramsar Convention does not change the standard under the BIT, although consideration of a host state's international obligations may well be relevant in the application of the standard to particular circumstances.'[317]

When adjudicating cultural heritage-related investment disputes, the question arises as to whether arbitral tribunals can consider other international law in addition to international investment law. A breach of international cultural heritage law cannot provide the basis for an independent claim in investor-state arbitration. Arbitral tribunals cannot rule on violations of international cultural heritage law, unless the relevant investment treaty or contract requires them to do so. If an international investment agreement does not refer to other treaty obligations, it appears difficult to assume that the IIA parties wished to interpret the FET standard in such a wide-ranging manner. In fact, had the IIA parties wished to expand the scope of protection to cover violations of other treaties, they could have included explicit reference to these other instruments.

Yet, when interpreting a treaty, a tribunal can consider other international obligations of the parties according to customary rules of treaty interpretation as restated by the Vienna Convention on Law of Treaties (VCLT).[318] Article 31(3)(c) of the VCLT provides that there shall be taken into account, together with the context, '[a]ny relevant rules of international law applicable in the relations between the parties.' Therefore, the host state's obligations under other international treaties can come into play in investment arbitrations by providing interpretive background and informing investment treaty standards.

7 Full Protection and Security

Customary international law and most IIAs require full protection and security for foreign investors and their investments. This standard 'requires, *inter alia*, that the host state use due diligence in protecting the investor against

316 *Allard v. Barbados*, Award, para. 208.

317 Id. paras 243–244.

318 Vienna Convention on the Law of Treaties, adopted on 22 May 1969, in force 27 January 1980, 1155 UNTS 331.

injuries from host state nationals', take reasonable measures to protect the investments, and compensate investors for any violations of their rights by its nationals.[319] The obligation to afford full protection and security for investments is one of means, not of result, and calls for states to take appropriate measures to safeguard foreign investment.[320]

Foreign investors can thus file claims against a host state contending that it failed to protect their investments against actions of local communities. Arbitral tribunals have adopted diverging approaches when dealing with social protests. Some disputes did not reach the merits phase of the proceedings or were settled. While some tribunals have considered public campaigns leading up to state measures to be a mitigating factor favoring the state, others have approached the role of public protests with caution. Despite its presence in most IIAs, the full protection and security standard has been used sparingly by arbitral tribunals.[321]

Some disputes did not reach the merits phase of the proceedings. For instance, in *Burlington v. Ecuador*, the claimant sought, among other things, to hold Ecuador liable for failing to provide physical protection and security for the company's hydrocarbon concession in two blocks of the Amazonian rain forests.[322] Burlington complained that the opposition of Indigenous communities to oil development had impeded its business and that Ecuador's purported failure to provide physical security violated the standard of full protection and security under the US–Ecuador BIT.[323] In its award, the Arbitral Tribunal dismissed this specific claim on jurisdictional grounds, stressing the importance of notifying states of disputes so that they have the opportunity to remedy a possible breach and thereby avoid arbitration proceedings.[324] Since Burlington failed to give clear notice to Ecuador of its claims for denial of full protection and security, arbitrators ruled that the treaty's mandatory six-month waiting period before the initiation of arbitration had not passed. As a result, the claim was declared inadmissible.[325]

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319 George K. Foster, 'Investors, States, and Stakeholders: Power Asymmetries in International Investment and the Stabilizing Potential of Investment Treaties' (2013) 17 *Lewis & Clark LR* 361–421, at 382.

320 *South American Silver Limited v. The Plurinational State of Bolivia*, PCA Case No. 2013–15, Award, 22 November 2018, para. 686.

321 Christoph Schreuer, 'Full Protection and Security' (2010) 1 JIDS 1–16, 16.

322 *Burlington Resources, Inc. v. Republic of Ecuador*, Decision on Jurisdiction, ICSID Case No. ARB/08/5, 2 June 2010, paras 27–37.

323 Id. paras 26 and 53.

324 Id. para. 315.

325 Id. paras 317 and 336.

The case was also subject to parallel consideration by the Inter-American Court of Human Rights. In 2012, the Court ruled that the failure to consult the Indigenous peoples and obtain their free, prior, and informed consent (FPIC), as well as the state's use of force had jeopardized the Indigenous peoples' survival.[326] The finding of the Inter-American Court of Human Rights that the State used unnecessary force against the Indigenous peoples, thereby threatening their life, starkly contrasts with the claim by the investor involved in the parallel investor–State arbitration that the State had not used sufficient force to protect its investment from those Indigenous peoples.[327]

Certain arbitrations were settled in the aftermath of successful public campaigns.[328] For instance, in *Aguas del Tunari S.A. v. Republic of Bolivia*, the Bolivian government had privatized the water sector in the town of Cochabamba.[329] Nonetheless, the contract was terminated after major violent protests.[330] After the so-called 'Bolivian Water War' attracted public attention worldwide, the case was withdrawn.[331]

Other full protection and security claims have not been addressed on the basis of judicial economy. In *Bear Creek Mining Corp. v. Peru*, after Aymara Indigenous peoples' protests determined the withdrawal of the investor's mining concession, the company alleged, *inter alia*, lack of full protection and security.[332] In the claimant's view, the host state attempted to placate political pressure, rather than pursue a legitimate public policy objective.[333] The State responded that the violent social unrest had been due to the Indigenous community's strong opposition to mining activities.[334] For the Aymara, land 'is not only a geographical space but represents a spiritual bond'.[335] The company

326 Inter-American Court of Human Rights, *Case of the Kichwa Indigenous People of Sarayaku v. Ecuador*, Judgment, 27 June 2012.

327 Human Rights Council, Report of the Special Rapporteur on the Rights of Indigenous Peoples, A/HRC/33/42, 11 August 2016, para. 61.

328 See e.g. *Aguas del Tunari S.A. v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Order, 28 March 2006 (taking note of the settlement agreed by the parties and discontinuing the proceeding).

329 *Aguas del Tunari S.A. v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction, 21 October 2005, paras 52–56.

330 Id. para. 73.

331 Damon Vis-Dunbar and Luke Eric Peterson, 'Bolivian Water Dispute Settled, Bechtel Forgoes Compensation', *Investment Treaty News*, 20 January 2006.

332 *Bear Creek Mining Corp. v. Peru*, Award, ICSID Case No. ARB/14/21, 30 November 2017, para. 113.

333 Id. para. 349.

334 Id. para. 367.

335 *Bear Creek Mining Corp. v. Peru*, Amicus Curiae Brief Submitted by the Association of Human Rights and the Environment, 10 June 2016, p. 7.

had failed to consult with, and obtain the consent of, all the affected Indigenous communities, as it had been required to do under relevant international human rights law and municipal law.[336] Moreover, its selective and divisive approach to consultation fueled discontent and conflict.[337] Since the Tribunal found that state measures constituted an indirect expropriation, it held that there was no need to examine whether such measures also constituted a breach of the full protection and security standard.[338]

In *South American Silver Mining v. the Plurinational State of Bolivia*, the investor claimed, *inter alia*, that the host state failed to afford full protection and security to the company's investments pursuant to the UK–Bolivia BIT.[339] The company maintained that it attempted to obtain the consent of Indigenous communities and that opposition to the project came from a small group of illegal gold miners. In the company's view, the state failed to provide full protection and security, as it 'did not did not take the necessary measures to prevent an escalation of the social conflict', 'encouraged opposition to the Project', failed to militarize the area surrounding the project when the conflict became unsustainable, and 'granted immunity to opposition leaders'.[340]

Bolivia argued that it had acted in the public interest, attempting to maintain peace in the area by holding mediation meetings and sending the police when the conflict escalated.[341] It added that 'military repression [wa]s not a reasonable solution, as … incompatible with a free and democratic society.'[342] More fundamentally, the state argued that the opposition of Indigenous peoples to the project was legitimate as the project violated Indigenous peoples' rights. Moreover, the state argued that customary international law recognizes the primacy of human rights over investor protections.[343] It concluded that prosecution of the opposition leaders 'was simply determined to be subject to the Indigenous justice system'.[344]

The Tribunal found that, given the circumstances of the case, Bolivia's conduct had met the full protection and security standard under the treaty. Several

336 *Bear Creek Mining Corp. v. Peru*, Award, para. 261.
337 Id.
338 Id. para. 544.
339 *South American Silver Limited v. The Plurinational State of Bolivia*, PCA Case No. 2013–15, Award, 22 November 2018, para. 182.
340 Id. para. 677.
341 Id. para. 680.
342 Id.
343 Id. para. 196 (citing the *Sawhoyamaxa v. Paraguay* Judgment of the Inter-American Court of Human Rights and Article 103 of the Charter of the United Nations) and para. 680.
344 Id. para. 682.

meetings were held 'for the purpose of resolving the social conflict.'[345] The police were sent to maintain public order. The Tribunal agreed with Bolivia that the militarization of the area was not an adequate measure conducive to resolving the social conflict.[346] Finally, the Tribunal held that there was no evidence that Bolivia had promoted opposition to the project.[347]

In conclusion, the full protection and security standard, which quintessentially aims to ensure the physical security of investors and their investments, has been rarely upheld by arbitral tribunals. On the one hand, arbitral tribunals have found that social protests do not necessarily legitimize state conduct. On the other hand, they have not applied a standard of strict liability, rather requiring due diligence on the part of the host State.

8 Non-Discrimination

Equality and non-discrimination are complex notions rooted in international law. Non-discrimination is a central provision of IIAs. It expresses the principle of equality and the idea that 'like cases should be treated alike (whereas different cases may be treated differently).'[348] The non-discrimination principle is typically reflected in the provisions of national treatment (NT) and most-favored-nation (MFN) treatment. These two standards do not guarantee a specific level of protection but are relative standards that require a state to treat a foreign investor in the same way that a domestic investor or an investor from another country would be treated.[349] The determination of non-discrimination is based on three steps: first, assessing whether the investments being compared are similar; second, scrutinizing whether the treatment they receive is also similar; finally, if the investments are similar but receive a different treatment, then arbitrators must investigate whether the justification for differentiation is reasonable and objective.

The ascertainment of non-discrimination is a crucial element of cultural heritage-related investment disputes; in such disputes, the key question is whether foreign investments are regulated because the activity in question poses certain risks to cultural heritage, or whether they are regulated simply

345 Id. para. 689.
346 Id. para. 690.
347 Id. para. 692.
348 Andrew D. Mitchell, David Heaton, and Caroline Henckels, *Non-Discrimination and the Role of Regulatory Purpose in International Trade and Investment Law* (Cheltenham: Edward Elgar Publishing 2016) 2.
349 Ortino, 'Non-Discriminatory Treatment in Investment Disputes', 346–347.

because they are foreign investments.[350] Discrimination and non-discrimination 'are not polar opposites in a static system,'[351] as 'there may be several ways in which the notion of … discrimination may be understood.'[352]

Difficulties arise in ascertaining discrimination in the cultural sector: while states may have legitimate reasons for adopting cultural policies that differentiate foreign investors from other actors, it may be difficult to distinguish cultural motives from economic protectionism.[353] As Voon highlights, identifying the true motive for a governmental measure can be difficult not only because such a measure may be influenced by a number of factors, but also because the true reasons may diverge from the official narratives.[354] In order to detect discrimination, Voon suggests the use of criteria such as those of efficiency and/or effectiveness of the given regulatory measure.[355] Craufurd Smith analogously argues that proportionality 'could guide the application of [cultural policy] measures and serve to prevent more blatant forms of protectionism'.[356]

Nonetheless, the use of such criteria risks prioritizing economic considerations over cultural concerns. Although proportionality seems to endorse elegant structures of analysis and mathematical precision, it can fail to deliver what it promises.[357] Rather than asking 'what is right and wrong', adjudicators investigate whether something is proportionate.[358] Proportionality – like any conceptual framework – is not a neutral process; rather, it is based on the primacy and priority of individual entitlements over the exercise of public powers.

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350 See Howard Mann and Konrad von Moltke, 'NAFTA Chapter 11 and the Environment: Addressing the Impacts of the Investor–State Process on the Environment', IISD Working Paper (1999) 25.

351 Konrad Von Moltke, *Discrimination and Non-Discrimination in Foreign Direct Investment Mining Issues* (Paris: OECD 2002) 7.

352 Federico Ortino, 'Non-Discriminatory Treatment in Investment Disputes', in Pierre-Marie Dupuy, Francesco Francioni, and Ernst-Ulrich Petersmann (eds), *Human Rights in International Investment Law and Arbitration* (Oxford: OUP 2009) 344–366, 349.

353 Tania Voon, 'State Support for Audiovisual Products in the World Trade Organization: Protectionism or Cultural Policy?' (2006) 13 *International Journal of Cultural Property* 142–3.

354 Id. 144.

355 Id. 144–5.

356 Rachel Craufurd Smith, 'The UNESCO Convention on the Protection and Promotion of Cultural Expressions: Building a New World Information and Communication Order?' (2007) 1 *International Journal of Communications* 24–55, at 40–1.

357 Stavros Tsakyrakis, 'Proportionality: An Assault on Human Rights?' (2009) 7 *International Journal of Constitutional Law* 468–93, 482

358 Id. 487.

Moreover, references to proportionality in arbitral jurisprudence remain uncommon and lead to suboptimal results.[359] In *Myers v Canada*, a rare case in which an arbitral tribunal has used elements of proportionality analysis to detect discrimination, a dispute arose out of Canada's ban on the export of polychlorinated biphenol (PCB) waste from Canada to the United States.[360] The claimant, a US company, specializing in the remediation of PCB waste, argued that the ban applied in a discriminatory manner, favoring Canadian operators who were not involved in transborder activities.[361] The Tribunal used the concept of proportionality to assess whether Canada had breached the national treatment provision of the NAFTA. It investigated whether the ban on the export of PCB had a legitimate aim, and whether it disproportionately benefitted nationals over foreign investors.[362] The Tribunal regarded the ability to process PCB within Canada as a legitimate objective in light of the Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (Basel Convention).[363] However, the Tribunal found that the ban infringed the national treatment provisions because there were other less restrictive ways to achieve the same objective.[364] While the Tribunal did not explain why it used the proportionality analysis, it paid very little attention to the Basel Convention. However, one may wonder whether, by being a signatory to the Basel Convention, the host state was legitimately entitled, and in fact required, to ensure the availability of adequate in-country disposal facilities for PCB.[365] The use of proportionality analysis in detecting discrimination has remained relatively isolated in investment arbitration.[366]

As a valid alternative, reasonableness belongs to the lexicon of treaty interpretation.[367] Its open-endedness makes it particularly fit for use in evolving

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359 Valentina Vadi, *Proportionality, Reasonableness, and Standards of Review in International Investment Law and Arbitration* (Cheltenham: Edward Elgar 2018) 99.

360 *SD Myers Inc v. Canada*, UNCITRAL/NAFTA, Partial Award, 13 November 2000.

361 For a discussion of the case, see Valentina Vadi, *Public Health in International Investment Law and Arbitration* (Abingdon: Routledge 2012) 145.

362 *SD Myers Inc v. Canada*, Partial Award, para. 252.

363 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (Basel Convention), adopted on 22 March 1989, in force 5 May 1992, 28 ILM 656 (1989).

364 *SD Myers Inc v. Canada*, Partial Award, para. 255.

365 Vadi, *Public Health in International Investment Law and Arbitration*, 145.

366 Vadi, *Proportionality, Reasonableness, and Standards of Review in International Investment Law and Arbitration*, 101.

367 See e.g. ICJ, *Judgment No. 2867 of the Administrative Tribunal of the International Labour Organization Upon a Complaint Filed Against the International Fund for Agricultural Development*, Advisory Opinion, 1 February 2012, [2012] ICJ Reports 27, para. 39 (holding that 'if

legal systems because it enables such systems to adapt to emerging circumstances. Reasonableness is a flexible, pragmatic, and contextual standard with a distinct evaluative character that can deliver 'just results in individual cases.'[368] The reasonableness review does not assess whether the state measure is the most effective or efficient; it does not question whether the adverse economic impact of a given measure on the foreign investment is disproportionate *vis-à-vis* its purported benefits. Rather, it determines whether a given measure is rationally related to its objectives and adequate to achieve them. It also assesses whether such a measure does not unreasonably prejudice the legitimate interests of the foreign investors. Therefore, it avoids the most intrusive prongs of review of the proportionality test. While proportionality is a demanding standard of review, reasonableness accords states more latitude in the implementation of their international obligations and accommodates some legal pluralism.[369]

Moreover, '[i]n the investment context, the concept of discrimination has been defined to imply unreasonable distinctions between foreign and domestic investors in like circumstances.'[370] To detect whether a state action is discriminatory, arbitral tribunals first consider whether two circumstances are like; if they are similar, arbitrators will assume that their likeness requires the same treatment. Therefore, any state conduct that treats similar situations differently is considered to be *prima facie* discriminatory. However, such measures can be justified if there are reasonable grounds to differentiate the treatment

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procedural rights are accorded, they must be provided to all the parties unless distinctions can be justified on objective and reasonable grounds.'); *Certain Aspects of the Laws on the Use of Languages in Education in Belgium*, Judgment, 23 July 1968, ECtHR, Series A No. 6, p. 31 ('following the principles which may be extracted from the legal practice of a large number of democratic States, [the Court] holds that the principle of equality of treatment is violated if the distinction has no objective and reasonable justification.'); *Observer and Guardian v. United Kingdom*, Judgment, 26 November 1991, ECtHR, Series A No. 216, para. 73 (defining discrimination as 'different treatment, without an objective and reasonable justification, of persons in similar situations.'); *Karlheinz Schmidt v. Germany*, Judgment, 18 July 1994, ECtHR, Series A No. 291-B, para. 24 (holding that 'a difference of treatment is discriminatory if it has no objective and reasonable justification.'); *Belli and Arquier-Martinez v. Switzerland*, Judgment, 11 March 2019, https://hudoc.echr.coe.int/eng?i=001-188649 (visited on 24 April 2022), para. 90 (holding that 'According to the Court's case-law, a difference of treatment is discriminatory within the meaning of Article 14 if it has no objective and reasonable justification').

368 Vadi, *Proportionality, Reasonableness, and Standards of Review in International Investment Law and Arbitration*, 184.

369 Id.

370 *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award, para. 170.

of investments.[371] Reasonableness can legitimize distinctions between investors. As an Arbitral Tribunal put it, '[o]nce unequal treatment has been proved, the State has to show the existence of reasonable grounds for such treatment; otherwise, it would be a discriminatory measure violating the national treatment standard.'[372]

The open-endedness of the reasonableness criterion is particularly suited to ascertain non-discrimination in the cultural domain. Cultural policies often present internal tensions, as different tools are available in order to achieve a given legitimate cultural objective. For instance, in order to preserve linguistic diversity, states may encourage expression, creation, and dissemination in as many languages as possible. On the other hand, in order to protect a certain language from extinction, states might restrict the dissemination of other languages. The appropriate cultural policy is thus contingent on a number of factors.

8.1 *Direct Discrimination*

Discrimination can be direct or indirect. Direct or formal discrimination denotes openly discriminatory language in state measures. It occurs when a measure explicitly discriminates on the basis of the nationality of the investor.[373] Indirect or material discrimination occurs when the use of apparently neutral criteria affects a particular group of people. This section focuses on direct or formal discrimination in cultural governance.

Cultural policies often use language that is openly discriminatory. If a measure makes distinctions on the basis of origin, such direct differentiation constitutes a factor pointing toward illegal discrimination. However, the respondent has the opportunity to justify the measure by proving its legitimate policy objective and the rational/reasonable link between the measure and the objective under scrutiny. While the complainant seeks to show protectionism, the respondent can try to demonstrate that the measure was adopted to protect a genuine cultural interest.

For instance, since most East European countries gained their independence after the fall of the Soviet Union, they have limited newspapers and broadcasts

371 *Saluka Investments BV* (*The Netherlands*) *v. Czech Republic*, UNCITRAL Partial Award, 17 March 2006, para. 307 (holding that 'any differential treatment of a foreign investor must not be based on unreasonable distinctions and demands, and must be justified by showing that it bears a reasonable relationship to rational policies not motivated by a preference for other investments over the foreign-owned investment.')

372 *Renée Rose Levy de Levi v. The Republic of Peru*, ICSID ARB/10/17, Award, 26 February 2014, para. 215.

373 Ortino, 'Non-Discriminatory Treatment in Investment Disputes', 349.

in foreign languages in order to reverse the effects of historical Russianization.[374] These countries now face an additional challenge—the challenge of contemporary patterns of linguistic erosion due to economic globalization. In fact, globalization is 'characterized by the dominance of a few so-called international languages over the rest.'[375] Can foreign broadcasters challenge national policies that purport to preserve national language and music?

In the *Lemire* case, a US investor challenged the fact that a tender for a radio channel required it to broadcast in Ukrainian only. The claimant argued that the 100 percent Ukrainian language content requirement favored national vis-à-vis foreign investors. It was no surprise that the foreign investor who was participating in the bidding process was not awarded the license. The Arbitral Tribunal dismissed the arguments in support of cultural freedom brought by the investor that 'we should allow the audience to determine what it wants' and that 'since Ukraine is seeking the status of a country with a market economy, it should not introduce Ukrainian culture by force.'[376] Instead, the Arbitral Tribunal held that this condition of the bidding process 'was a legitimate decision, based on a public interest choice to extend the use of Ukrainian in the media', arguably contributing to the preservation and diffusion of Ukrainian culture.[377]

In the UPS case,[378] United Parcel Service of America (UPS), a US company providing courier and package delivery services both throughout Canada and worldwide, claimed that Canada's Publications Assistance Program (PAP) – a policy designed to promote the wider distribution of Canadian periodicals – was discriminatory to foreign investors.[379] This policy 'provide[d] financial assistance to the Canadian magazine industry but only on the condition that any magazines benefitting from the financial assistance [we]re distributed through Canada Post [an institution of the Government of Canada], and not through companies such as UPS Canada.'[380] The investor did not challenge the cultural policy measure as such (that is, the financial assistance to

374 UNDP, *Cultural Liberty in Today's Diverse World* (New York: UNDP 2004) 65.

375 UNESCO, *Investing in Cultural Diversity and Intercultural Dialogue* (Paris: UNESCO 2009) 85.

376 *Lemire, Joseph Charles v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010, para. 407.

377 Id.

378 *United Parcel Service of America Inc. v. Government of Canada,* Award on the Merits, 24 May 2007, 46 ILM 922 (2007).

379 Id. paras 8 and 156–160.

380 Id. para. 80.

the Canadian magazine industry) because the measure arguably fell within the cultural exception clause set out in Article 2106 and Annex 2106 of the NAFTA.[381]

Rather, the investor challenged the design and implementation of the cultural policy. According to UPS, the preferential treatment received by Canada Post 'ha[d] nothing to do with protecting cultural industries and so f[ell] outside the scope of the cultural industries exception'.[382] UPS maintained that the cultural industries exception 'applie[d] only to cultural industries themselves, not to their delivery mechanism, and that there [wa]s no connection between the program's objective and Canada Post's involvement.'[383]

Canada objected, arguing that the PAP was a part of a larger Canadian cultural policy and therefore fell within the cultural industries exception outlined in Article 2106 and Annex 2106 of NAFTA.[384] According to Canada, this cultural policy had 'two main purposes: (1) to connect Canadians to each other through the provision of accessible Canadian cultural products; and (2) to preserve and develop the Canadian publishing industry'.[385] Against this background, Canada also added that in any case Canada was not breaching the national treatment standard as Canada Post and UPS were not in 'like circumstances'.[386] According to Canada, Canada Post has played an essential role in the cultural life of Canadians, 'through its provision of an accessible, effective system of national communication' to all addresses in Canada (the so-called 'universal service obligation').[387] In so doing, Canada Post has assisted in the formation 'of a literate, educated, and aware citizenry, providing inexpensive, reliable, and timely delivery of newspapers, books, and information.'[388] Accordingly, Canada deemed that 'delivery through Canada Post [wa]s the best and most effective means of meeting its policy objectives,' which '[we]re not governed solely by commercial considerations.'[389]

The Tribunal upheld Canada's argument that PAP was exempted from review under NAFTA by virtue of the cultural industries' exception which removed from the scope of the NAFTA any measure adopted or maintained 'with respect

381 North American Free Trade Agreement (NAFTA), 17 December 1992, in force 1 January 1994 (1993) 32 ILM 289.
382 *UPS v. Canada*, Award on the Merits, para. 157.
383 Id. para. 159.
384 Id. para. 137.
385 Id. paras 146–9.
386 Id. para. 138
387 Id. para. 140.
388 Id. para. 57.
389 Id. paras 155 and 161.

to cultural industries.'[390] The Tribunal noted that the language of the cultural exception was intentionally broad and that 'it was clearly understood by the Parties … that a Party's ability to pursue its domestic cultural policies would be virtually unimpaired by these trade and investment instruments.'[391] The Tribunal acknowledged that not every measure that appears to refer to some cultural objective would fall within the cultural exception clause; there is indeed a 'point in which the cultural connection is sufficiently tangential that a tribunal could say this is outside the cultural exemption.'[392] However, it determined that the involvement of Canada Post was 'rationally and intrinsically connected to assisting the Canadian publishing industry,'[393] as delivery through Canada Post was 'the best and most effective way' to reach even the remotest areas and thus strengthen Canada's cultural identity.[394]

Finally, the Tribunal concluded that the PAP did not breach the national treatment provision of NAFTA Chapter Eleven because UPS Canada and Canada Post were not 'in like circumstances.'[395] As the Canadian market for publications was characterized by a high percentage of home-delivered subscription sales as opposed to newsstand sales, the PAP aimed to achieve the widest possible distribution of Canadian publications at affordable prices throughout the country. While Canada Post was capable of delivering to individual readers across the country, UPS Canada had a different delivery capacity.[396]

8.2 *Indirect Discrimination*

In most cases, state measures do not openly discriminate against foreign investors, albeit some may result in *de facto* or indirect discrimination. It is generally accepted in international investment law that the policy objective pursued by the measure under scrutiny may be taken into consideration to ascertain whether two investments are similar or whether the regulatory purpose may justify differential treatment that would be otherwise discriminatory.[397]

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390 *UPS v. Canada*, Award on the Merits, para. 167.
391 Id. para. 162.
392 Id. para. 167.
393 Id. para. 168.
394 Id. para. 166.
395 Id. para. 173.
396 Id. paras 175–6.
397 Ortino, 'Non-Discriminatory Treatment in Investment Disputes', 350–351.

For instance, in *Parkerings v. Republic of Lithuania*,[398] Parkerings, a Norwegian enterprise, filed a claim before an ICSID Tribunal, claiming that Lithuania breached the MFN clause by allegedly preferring a Dutch competitor.[399] Parkerings had concluded an agreement with the Municipality of Vilnius for the construction of parking facilities.[400] The investor's project submission included an excavation under the Cathedral of the city's Old Town, a World Heritage site.[401] Cultural heritage impact assessments, which were required by law, revealed that the project could have jeopardized such monuments.[402] Because of technical difficulties and the growing public opposition due to the cultural impact of the investor's project, the municipality terminated the agreement and subsequently signed another contract with a Dutch company to complete the project; the successful contractor would not excavate beneath the Old Town.[403]

Was it legitimate for the Municipality of Vilnius to prefer another contractor in order to limit the perceived risk of endangering world heritage? The Tribunal dismissed the claim of discrimination, finding that Parkerings and the Dutch competitor were not in *like* circumstances.[404] The project presented by Parkerings included excavation works under the Cathedral.[405] Not only did the Tribunal pay due attention to cultural heritage matters, but it also stated that compliance with the obligations flowing from the World Heritage Convention (WHC)[406] *justified* the refusal of the project,[407] concluding that 'The historical and archaeological preservation and environmental protection could be, and in this case were, a justification for the refusal of the [claimant's] project.'[408] Although the Tribunal did not establish a hierarchy of various obligations under international law, it did reach a clear balance between the various provisions.

398 *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/08, Award, 11 September 2007.
399 Id. para. 203.
400 Id. para. 204.
401 Id. paras 378 and 380.
402 Id. para. 388.
403 Id. para. 284.
404 Id. para. 396.
405 Id. para. 392.
406 Convention Concerning the Protection of the World Cultural and Natural Heritage, Paris, 16 November 1972, 1037 UNTS 151, 11 ILM 1358.
407 *Parkerings-Compagniet AS v. Republic of Lithuania*, Award, para. 385 and paras 381–382.
408 Id. para. 392.

In *Empresas Lucchetti v. Peru*,[409] a Chilean company owning a pasta factory constructed close to a protected wetland, *Pantanos de Villa*, complained that, notwithstanding its compliance with all the environmental requirements, its license was revoked and that the measures adopted by Peru, *inter alia*, discriminated against the foreign company and indirectly expropriated its investment. As the Tribunal found that it lacked jurisdiction over the dispute, there was no award on the merits.

In conclusion, there are several ways in which the notion of discrimination may be understood. In cultural governance, direct or formal discrimination is not uncommon and can be justified on cultural policy grounds (e.g. to preserve a minority language such as Welsh in the UK, Sanskrit in India, or Native American languages in the US). Similarly, if a measure that has a disparate impact on foreign investors is justified on cultural policy grounds, it does not constitute indirect or material discrimination.[410] Exceptions provisions of IIAs can expressly provide justification for such measures on cultural policy grounds. Although these exceptions are uncommon in elder treaties, arbitral tribunals 'have given relevance to public policy justifications' even in the absence of such clauses in the applicable treaties.[411] In doing so, they have attempted to strike the appropriate balance between restraining governmental conduct in order to protect foreign investments on the one hand, and allow host states enough regulatory space to pursue cultural policies on the other hand.

8.3 *Positive Measures*

The notion of positive or affirmative action refers to state measures that seek to address historical injustices that a human group has experienced.[412] Under human rights law, states can treat groups differently in order to remedy factual inequalities between them; in certain circumstances, a failure to do so may in itself result in discrimination.[413] In other words, the equality principle not only permits but, in certain circumstances, even requires, states to adopt

409 *Empresas Lucchetti, SA, and Lucchetti Peru, SA v. Republic of Peru*, ICSID Case No. ARB/03/4, Award, 7 February 2005.

410 Ortino, 'Non-Discriminatory Treatment in Investment Disputes', 351.

411 Id. 360.

412 Miguel Alfonso Ruiz, 'Discriminación Inversa e Igualdad', in Amelia Varcárcel (ed.), *El Concepto de Igualdad* (Madrid: Editorial Iglesias 1994) 77–93.

413 European Court of Human Rights, *Guide on Article 14 of the European Convention on Human Rights and on Article 1 of Protocol No. 12 to the Convention, Prohibition of Discrimination* (Strasbourg: Council of Europe 2021) para. 40.

affirmative action in order to uphold the equality principle.[414] In examining state practice across the world, it seems that an increasing number of states has gradually endorsed positive measures to further compelling state interests.[415]

Critics see affirmative action as unfairly affecting 'those who are not biased themselves and who have enjoyed no personal benefit from discrimination', while patronizing those who would benefit from affirmative action. They oppose the idea of attempting to end discrimination by discriminating, arguing that two wrongs do not make a right.[416] Attachment to formal equality concepts has sometimes prevented the adoption of positive action.[417] International economic courts have tended to remain attached to the 'traditional version of the equality paradigm', that is, formal equality, based on individual rights.[418]

Yet, positive action is an important tool in the fight against discrimination. It does not merely redress historical injustice, but can change attitudes, facilitate integration, and help to overcome hidden barriers.[419] It departs from formal equality in order to achieve substantive equality. It involves the use of special and temporary measures to enable certain groups to overcome structural inequality and fully participate in society.[420]

The question as to whether positive measures comply with the principle of non-discrimination in international investment law remains open to debate. For the time being, three arbitrations have raised the issue of government's ability, under domestic and international law, to implement measures

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414 Convention on the Elimination of All Forms of Racial Discrimination, opened for signature 7 March 1966, 660 UNTS 195, Article 1(4) and Article 2(2); Convention on the Elimination of All Forms Discrimination Against Women, open for signature on 18 December 1979, in force 3 September 1981, 1249 UNTS 13 (1981), Article 4(1); Human Rights' Committee, CCPR General Comment No. 18: Non-discrimination, adopted 10 November 1989, para. 10 ('the principle of equality sometimes requires States parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination.').

415 *See generally* Ockert Dupper, 'Affirmative Action in Comparative Perspective' in Ockert Dupper and Kamala Sankaran (eds), *Affirmative Action. A View from the Global South* (Stellenbosch: Sun Press 2014) 7–42.

416 Louis Menand, 'The Changing Meaning of Affirmative Action', *The New Yorker*, 20 January 2020 (reporting these criticisms).

417 Colm O'Cinneide, 'Positive Action and the Limits of Existing Law' (2006) 13 *Maastricht Journal of European and Comparative Law*.

418 Daniela Caruso, 'Limits of the Classic Method: Positive Action in the European Union after the New Equality Directive' (2003) 44 *Harvard International Law Journal* 331.

419 Dupper, 'Affirmative Action in Comparative Perspective.'

420 *See generally* Erica Howard, Elvira Dominguez Redondo, and Narciso Leandro Xavier Baez (eds), *Affirmative Action and the Law—Efficacy of National and International Approaches* (Abingdon: Routledge 2020).

designed to address past social injustices. In *Foresti v. South Africa*, a group of Italian investors and a company incorporated in Luxembourg challenged South Africa's Black Economic Empowerment (BEE) policies, which were designed to alleviate the effects of racial discrimination from the apartheid era.[421] In 2004, South Africa adopted the *Petroleum Resource Development Act* (MPRDA) to 'substantially and meaningfully expand opportunities for historically disadvantaged persons, including women and communities, to enter the mineral and petroleum industries and to benefit from the exploitation of the nation's mineral and petroleum resources.'[422] To achieve this objective, the Act eliminated all old order mineral proprietary rights requiring companies to apply for new order temporary mineral concessions.[423] Additionally, the MPRDA contained many BEE provisions requiring companies who wished to obtain new order rights to grant 26 percent ownership to historically disadvantaged South Africans.[424] The investors alleged that not only did companies never recover their proprietary rights through the conversion process, but the additional regulatory requirements effectively deprived their investment of its economic value.[425] In the claimants' view, this amounted to unlawful indirect expropriation and discrimination in breach of relevant investment treaty provisions.[426] The Tribunal never reached a decision on the merits as the claim was discontinued.[427]

In *John Andre v. Canada*, a US-based businessman lodged a notice of intent to arbitrate, alleging losses arising from legislative measures affecting his business in Northern Canada.[428] The claimant used to have 360 caribou hunting licenses (called 'caribou quota tags') and organized hunting camps for tourists and hunters who would travel from locations outside Canada to the aboriginal land in Canada's North West Territories (NWT).[429] In 2007, the government of NWT decided to grant only seventy-five caribou quota tags per outfitter.[430] Outfitters with commitments to clients would be required to buy

421 *Piero Foresti, Laura de Carli and Others v. Republic of South Africa*, ICSID Case No ARB(AF)/07/1, Award, 4 August 2011.

422 *Mineral and Petroleum Resources Development Act*, Section 2(d) (S.Africa).

423 *Foresti v. South Africa*, Award, paras 54–55.

424 Id. para. 56.

425 Id. paras 69–72.

426 Id. para. 66.

427 Id. paras 79 and 111.

428 *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. 8.

429 Id. para. 12.

430 Id. para. 51.

caribou quota tags from their competitors.[431] The claimant complained that the relevant authorities cut the number of hunting licenses in a discriminatory manner.[432] As many of the local outfitters only used seventy-five to one hundred caribou quota tags or less per year, the claimant alleged that the government developed a strategy to minimize the negative effect on local outfitters and maximize the negative effects on the investor.[433] Moreover, special provisions benefitted Aboriginal hunters. The investor thus claimed to have been discriminated against on the basis of his US nationality.[434] It is unclear whether the case was settled; the facts underlying the dispute nonetheless highlight several different clashes: the clash between international investment law and domestic regulatory autonomy; the clash between an international economic culture and local Indigenous culture; and the clash between the conservation of endangered species and traditional cultural practices.

In *Grand River v. United States*,[435] a Canadian tobacco company owned and operated by Indigenous peoples contended that tobacco control measures adopted by the United States had been applied to their business without their input. For the company, this allegedly violated international customary law requiring the consultation, if not consent, of Indigenous peoples on regulatory matters potentially affecting them.[436] The Arbitral Tribunal admitted, in passing, that Indigenous peoples should be consulted on matters potentially affecting them.[437] Nonetheless, for the Tribunal, NAFTA required a uniform standard of treatment for all foreign investments, rather than admitting specialized procedural rights owing to some categories for investors *qua* Indigenous persons.[438]

Yet, mainstream policies at both national and international levels already embrace techniques for redressing inequality that conventional approaches are incapable of capturing. Such positive measures 'seem no longer at odds with tradition, but rather placed on a continuum of plausible institutional choices.'[439] At the national level, states have adopted cultural policies addressing historical

431 *Andre v. Canada*, Notice of Intent to Submit Claim to Arbitration, para. 51.
432 Id. para. 35.
433 Id. para. 51.
434 Id. para. 35.
435 *Grand River Enterprises Six Nations, Ltd. v. United States*, NAFTA Tribunal, Award, 12 January 2011.
436 Id. para. 182(3).
437 Id. para. 210.
438 Id. para. 213.
439 Caruso, 'Limits of the Classic Method', 331.

injustice.[440] Under international human rights law, 'the enjoyment of [cultural] rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions that affect them … The protection of these rights is directed to ensure the survival and continued development of the cultural, religious, and social identity of the minorities concerned, thus enriching the fabric of society as a whole.'[441] Multilateral environmental agreements that protect certain species often include aboriginal exemptions, thus protecting Indigenous peoples' hunting practices and ways of life as expressing their cultural identity.[442] Nonetheless, the question as to whether positive cultural measures can be considered to be compatible with non-discrimination in international investment law remains open.

9 Performance Requirements

Performance requirements are host state regulatory measures that impose certain obligations on investors to act in ways considered beneficial for the host economy. The most common requirements relate to local content, joint ventures, technology transfer, and employment of nationals. Performance requirements aim to ensure that FDI in the host state will contribute to domestic development, and can be vital tools of state policy.[443] From an economic perspective, however, the case for the imposition of performance requirements upon foreign investors remains controversial; a growing number of IIAs prohibit a broad range of these measures.[444]

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440 See e.g. Supreme Court (United States), *Regents of the University of California v. Bakke*, 438 US 265 (1978); *Grutter v. Bollinger*, 539 US 306 (upholding the admission program of the University of Michigan Law School); *Fisher v. University of Texas* (*Fisher I*) 570 U.S. 297 (2013); *Fisher v. University of Texas* (*Fisher II*) (2016) (upholding the admissions policy of the University of Texas at Austin, which incorporated a limited program of affirmative action to increase ethnic diversity among its students.).

441 UN Human Rights Committee, General Comment No. 23: The Rights of Minorities (Article 27), UN Doc. CCPR/C/21/Rev.1/ Add.5, 8 April 1994, paras 7 and 9.

442 Convention on Conservation of Migratory Species, 23 June 1979, 19 ILM 11, Article 3(5); Interim Convention on Conservation of North Pacific Fur Seals, 9 February 1957, 314 UNTS 105, Article 7; International Convention for the Regulation of Whaling, 2 December 1946, 161 UNTS 72, Article III(13)(b).

443 *See generally* David Collins, *Performance Requirements and Investment Incentives Under International Economic Law* (Cheltenham: Edward Elgar 2015).

444 Alexandre Genest, *Performance Requirement Prohibitions in International Investment Law* (Leiden: Brill 2019).

In *Lemire v. Ukraine*, the Ukrainian Law on Television and Radio Broadcasting required that at least 50 percent of the general broadcasting of each radio company should be comprised of music produced in Ukraine including any music where the author, the composer, and/or the performer was Ukrainian.[445] The claimant argued that the 50 percent local music requirement amounted to a performance requirement prohibited under Article 11.6 of the US–Ukraine BIT.[446] In the claimant's opinion, the high level of the requirement caused significant damages, because the program concept of his radio company was based entirely on hits.[447] As there were too few music hits in Ukrainian music, the radio station had to continuously replay the same few Ukrainian songs.[448] Thus, the claimant alleged a loss of advertising revenue.[449]

In the opinion of the respondent, however, local music requirements were justified on 'public policy grounds' due to 'the State's legitimate right to organize broadcasting'.[450] In the Annex to the BIT, both states reserved the right to make or maintain limited exceptions to the national treatment principle with regard to radio broadcasting stations.[451] More importantly, Ukraine claimed that in all jurisdictions, radio and TV are special sectors subject to specific regulations. There are two reasons for this: first, radio frequencies are by technical nature scarce assets, and consequently the law must articulate systems for allocating licenses to prospective bidders; second, when regulating private activity in the media sector, states can, and frequently do, pursue a number of public policy objectives: thus, media companies can be subject to specific regulation and supervision in order to guarantee transparency, political and linguistic pluralism, protection of children or minorities, and other similar factors.[452]

The Arbitral Tribunal upheld Ukraine's line of argument. To start with, it considered that the local music requirement applied to all broadcasters in Ukraine.[453] Then, it recognized that '[a]s 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

445 *Lemire v. Ukraine*, Decision on Jurisdiction and Liability, para. 227.
446 US–Ukraine BIT, Article 11.6.
447 *Lemire v. Ukraine*, Decision on Jurisdiction and Liability, para. 499.
448 Id. para. 503.
449 Id. para. 499.
450 Id. paras 218 and 227.
451 Id. para. 242.
452 Id. para. 251.
453 Id. para. 218.

State policy to preserve and strengthen cultural inheritance and national identity. The high measure of deference that international law generally extends to the right 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.'[454]

The Arbitral Tribunal investigated international society's prevailing ideas about ways to protect national culture, acknowledging that 'the desire to protect national culture is not unique to Ukraine.' The Arbitral Tribunal also considered that many other countries adopt similar cultural policies.[455] For instance, France requires that radio stations broadcast at least 40 percent French music, and Portugal has a 25–40 percent Portuguese music quota.[456] Therefore, the Tribunal held that this requirement could not be deemed to be unfair.[457]

The Tribunal then asked whether the ban on performance requirements was applicable to a cultural restriction like the 50 percent Ukrainian music requirement. To answer this question, the Tribunal applied two different interpretation criteria to Article 11.6 of the BIT: textual interpretation and teleological interpretation.[458] Looking at the ordinary meaning of Article 11.6 of the BIT, this provision clearly prohibited local law requirements that 'goods or services … [should] be purchased locally.'[459] While the Ukrainian law did not specify that radio stations should purchase local songs, in practice Ukrainian music was produced and commercialized locally.[460] With regard to the object and purpose of Article 11.6 of the BIT, the Arbitral Tribunal held that it was 'trade-related: to avoid that states impose local content requirements as a protection of local industries against competing imports.'[461] Since the objective of the Law on Radio Broadcasting was 'not to protect local industries and restrict imports, but rather to promote Ukraine's cultural inheritance,' it was deemed to be 'compatible with Article 11.6 of the BIT.'[462]

454 *Lemire v. Ukraine*, Decision on Jurisdiction and Liability, para. 505 (internal references omitted).
455 Id. para. 506.
456 Id.
457 Id.
458 Id. para. 508.
459 Id. para. 509.
460 Id. para. 509.
461 Id. para. 510.
462 Id. para. 511.

10 Critical Assessment

These arbitrations took place in different locations and concerned facts taking place in the Americas, Africa, Asia, and Europe respectively. They were conducted by different arbitral tribunals under different international investment treaties, and concerned different matters and claims. One may legitimately wonder whether there is any commonality between these awards. One may also question the relevance of discussing previous awards, given the fact that there is no binding precedent in international (investment) law.

Nonetheless, the study of previous awards is useful because patterns of consistent use can and do influence subsequent awards. In fact, investment arbitrations – while not binding on each other – have become an important source of international investment law. Moreover, these awards have increasingly referred to cultural heritage protection while delimiting jurisdictional grounds, clarifying substantive standards of protection, and even quantifying damages.

The examined jurisprudence shows a tension between state obligations under investment treaty provisions and state cultural policies. In fact, most IIAs allow investors to challenge cultural policies that they believe violate their rights before international arbitral tribunals.[463] Arbitral tribunals can find state measures to be indirect expropriation or violations of the fair and equitable treatment that states owe to investors. Indigenous protests against certain investments near cultural resources have resulted in claims of violation of the full protection and security standard under applicable IIAs.

What is the relevance of these and similar arbitrations to international investment law, international cultural heritage law, human rights law, and international law more generally? From an international investment law perspective, these cases illustrate how arbitral tribunals have dealt with cultural concerns. Arbitral tribunals have demonstrated some qualified deference to state regulatory measures aimed at protecting cultural heritage when the host state has raised such cultural concerns.[464] However, arbitral tribunals have adopted a more cautious stance when cultural arguments were presented by the claimants or by the communities affected by the given investment through

463 August Reinisch, 'The Scope of Investor-State Dispute Settlement in International Investment Agreements' (2013) 21 *Asia Pacific LR* 3–26, 8.

464 *Glamis Gold Ltd v. United States*, Award, 8 June 2009, 48 ILM 1035.

friend-of-the-court (*amicus curiae*) briefs.[465] Arbitral tribunals are not legally obligated to consider *amicus curiae* briefs; rather, they have the ability to do so should they deem it appropriate.

At the procedural level, arbitral tribunals constitute an uneven playing field: while foreign investors have *locus standi* – that is, the right to act or be heard – before these tribunals, local communities do not have direct access to these dispute-settlement mechanisms. Rather, their arguments need to be espoused by their home state. Nonetheless, for a variety of reasons, states do not always adequately represent local communities.[466] In fact, the cultural entitlements of local communities often compete with the economic development plans of both investors and states. Therefore, despite the formal premise of equality between the parties, there is structural inequality between investors and local communities that governments may not mitigate.

From an international cultural heritage law perspective, cultural heritage-related investment disputes can affect the implementation of international cultural heritage law. Arbitral tribunals can contribute to good cultural governance by expressing the need to govern cultural phenomena according to due process and the rule of law.[467] As Pulkowski points out, 'cultural policies are no longer part of a sovereign *domaine reservé*.' Rather, 'states must justify their domestic cultural policies … at the international level.'[468] The possibility of such disputes can prevent institutions from adopting protectionist or opportunistic behavior. If private property is expropriated—whether directly or indirectly—compensation must be paid.[469] While states have the right to protect cultural heritage, they must treat foreign investors fairly and equitably.

At the same time, the interplay between the promotion of FDI and the protection of cultural heritage highlights the power imbalance between the two fields of international law, and makes the case for rethinking and strengthening the current regime protecting cultural heritage. Even if there is no inherent

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465 *Grand River Enter. Six Nations Ltd. v. United States*, UNCITRAL/NAFTA Chapter 11, Award, 12 January 2011.

466 William Shipley, 'What's Yours is Mine: Conflict of Law and Conflict of Interests Regarding Indigenous Property Rights in Latin American Investment Dispute Arbitration' (2014) 11 TDM 1.

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

468 Dirk Pulkowski, *The Law and Politics of International Regime Conflict* (Oxford: OUP 2014) 11.

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

tension between these two subfields of international law in theory, tensions often arise in practice. While international investment law is characterized by binding, timely, and effective dispute settlement mechanisms, there is no dedicated specialized international court empowered to adjudicate violations of international cultural heritage law.

From a human rights law perspective, the interplay between international investment law and human rights law exposes the disparity between the two areas and gives reasons for revising the current regime protecting human rights.[470] While development analysts consider extractive projects as anti-poverty measures and advocate FDI as a major catalyst for development,[471] 'for the most part, the peoples in the areas where the resources are located tend to bear a disproportionate share of the negative impacts of development through reduced access to resources and direct exposure to pollution and environmental degradation.'[472] In particular, rising investment in the extractive industries can have a devastating impact on the livelihood of Indigenous peoples.[473]

While the international investment regime is characterized by binding, efficient, and effective dispute settlement mechanisms to assess the eventual breach of investor's rights under IIAs, the human rights system is characterized by diverse mechanisms for assessing violations of human rights. Human rights mechanisms usually require the exhaustion of internal remedies, which is often time-consuming.[474] Even where regional human rights courts exist, enforcement of their rulings can be challenging.[475] In other words, Indigenous peoples' rights face far more erratic enforcement than investors' rights.[476] Even if Indigenous peoples affected by a given investment can raise human rights issues through *amicus curiae* briefs, arbitral tribunals have no duty to admit such submissions or to consider these briefs in their awards. To sum up, investor–state arbitrations

470 Kleinfeld, 'The Double Life of International Law', 1757.

471 See OECD, *Foreign Direct Investment for Development* (Paris: OECD 2002) at 3.

472 Lila Barrera Hernández, 'Indigenous Peoples, Human Rights, and Natural Resource Development: Chile's Mapuche People and the Right to Water' (2005) 11 *Annual Survey of International and Comparative Law* 1–29, 6.

473 *See generally* Kyla Tienhaara, 'What You Don't Know Can Hurt You: Investor–State Disputes and The Protection of the Environment in Developing Countries' (2006) 6 *Global Environmental Politics* 73–100 (describing how the alteration of the natural landscape affects Indigenous peoples' relationship with land, their lifestyle, and worldview).

474 Francioni, 'Access to Justice', at 64.

475 Kleinfeld, 'The Double Life of International Law', 1770.

476 Id. at 1765.

and human rights adjudication seem to speak two different languages even when they deal with similar issues.

The power asymmetry between the two treaty regimes perpetuates and intensifies 'already-existing power imbalances between [I]ndigenous communities, states, and investors.'[477] Respondent states can raise human rights issues 'as a means of justifying [their] action' before arbitral tribunals.[478] Yet, they rarely raise human rights arguments in investment arbitrations 'to avoid the negative repercussions that could result from investors … deciding to invest in other states.'[479]

Nonetheless, a state's obligations to foreign investors under international investment law cannot justify violations of other obligations it has under international law. For instance, in the *Sawhoyamaxa* case,[480] the Inter-American Court of Human Rights clarified that the state's investment law obligations did not exempt it from protecting and respecting the property rights of the Sawhoyamaxa.[481] These communities claimed that Paraguay had, *inter alia*, violated their right to property by failing to recognize their title to ancestral lands.[482] For its part, Paraguay had attempted to justify its conduct by claiming that the disputed lands belonged to German investors and were protected under the Germany–Paraguay BIT.[483]

However, after noting the linkage between land and the cultural rights of Indigenous peoples,[484] the Court clarified that the investment law obligations of the state did not exempt the state from protecting and respecting the property rights of the Sawhoyamaxa.[485] Rather, the Court noted that compliance with investment treaties should always be compatible with the human rights

477 Kleinfeld, 'The Double Life of International Law', 1757.

478 Id. at 1774.

479 James D. Fry, 'International Human Rights Law in Investment Arbitration: Evidence of International Law's Unity' (2007) 18 *Duke Journal of Comparative & International Law* 77–150, 108.

480 Inter-American Court of Human Right, *Case of the Sawhoyamaxa Indigenous Community v. Paraguay*, Judgement, 29 March 2006, Merits, Reparations, and Costs, para. 248.

481 Id. para. 140.

482 Id. para. 2.

483 Id. para. 115(b).

484 Id. para. 118 (noting that '[t]he 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 their main means of survival, but also because they form part of their worldview, of their religiousness, and consequently, of their cultural identity.').

485 Id. para. 140.

obligations of the state.[486] Moreover, the Court pointed out that the relevant BIT does not prohibit expropriation; rather, it allows expropriation subject to several requirements including the existence of a public purpose and the payment of compensation.[487] For the Court, returning land to dispossessed groups could constitute a public purpose.[488] Therefore, the Court found a violation of Article 21 of the Convention and ordered the government to return the land to the Sawhoyamaxa community.[489] The dispute embodies a clash of cultures between different land claims—one reflecting a particular way of life and cultural identity, protected under human rights law, and the other premised on the land's economic value, protected under an investment treaty.[490] The same state measure can simultaneously constitute the expropriation of a foreign investment and the restitution of traditional land to Indigenous peoples.

From an international law perspective, cultural heritage-related arbitrations show that international investment law is not a self-contained regime; rather, it is part and parcel of international law. One may identify underlying processes of investment treaty arbitration that lead to a construction of unity and coherence in international law. As the Arbitral Tribunal in *Asian Agricultural Products Ltd. v. Sri Lanka* put it, bilateral investment treaties are 'not a self-contained closed legal system' but have to be 'envisaged within a wider juridical context in which rules from other sources are integrated through implied incorporation methods, or by direct reference to certain supplementary rules whether of international law character or of domestic law nature'.[491] Therefore, while international investment law can contribute to the development of international law, it should also be influenced by the development of the latter. Because of the increased proliferation of treaties, some overlap between different branches of international law is unavoidable. Customary norms of treaty interpretation as restated in the VCLT require adjudicators to consider the context of a treaty, which includes any relevant rules of international law applicable in the relations between the parties.

Arbitral tribunals have increasingly considered the protection of cultural heritage as an essential aspect of state sovereignty. In the *Glamis Gold* case, the Tribunal accorded deference to national cultural policies, recognizing that 'It

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486 IACtHR, *Case of the Sawhoyamaxa Indigenous Community v. Paraguay*, Judgment, para. 140.

487 Id.

488 Id.

489 Id. para. 144.

490 Lorenzo Cotula, '(Dis)integration in Global Resource Governance: Extractivism, Human Rights, and Investment Treaties' (2020) 23 JIEL 431–454, 447.

491 *Asian Agricultural Products Ltd v. Sri Lanka* (*AAPL v. Sri Lanka*), ICSID Case ARB/87/3, Award, 27 June 1990 (1997) 4 ICSID Reports 245, para. 21.

is not the role of this Tribunal or any international tribunal to supplant its own judgment of underlying factual material and support for that of a qualified domestic agency' and that 'governments must compromise between the interests of competing parties.'[492] In *Parkerings*, the Tribunal took into account the cultural heritage elements of the case, distinguishing the two projects on the basis of their diverse cultural features. In the *Pyramids* case, damages for loss of profits were not awarded because of the unlawfulness of the proposed economic activity under international cultural heritage law. In *Lemire v. Ukraine*, the Arbitral Tribunal acknowledged that, according to the treaty preamble, the main purpose of the BIT was the promotion of foreign investment instrumental to the pursuit of economic development.[493] Accordingly, the Tribunal recognized that 'the object and purpose of the Treaty is not to protect foreign investments per se, but as an aid to the development of the domestic economy,' and that, in order to achieve these developmental objectives, the treatment of foreign investors must be balanced against the right of the host state 'to pass legislation and adopt measures for the protection of what as a sovereign it perceives to be its public interest.'[494]

The *Lemire* Tribunal reaffirmed full respect for Ukraine's cultural sovereignty, stating that 'It certainly is not the task of this Arbitral Tribunal, constituted under the ICSID Convention, to review or second-guess the rules which the representatives of the Ukrainian people have promulgated,' and acknowledging that 'in all jurisdictions, radio and TV are special sectors subject to specific regulation' as states regulate media companies to guarantee linguistic pluralism and other similar factors.[495] According to the *Lemire* Tribunal, the inherent right to regulate 'extends to promulgating regulations which define the State's own cultural policy.' Moreover, 'the high measure of deference that international law generally extends to the right 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.'[496]

While acknowledging state cultural concerns, arbitral tribunals have imposed schemes of good governance, requiring respect for investment treaty provisions that prohibit discrimination and require fair and equitable

492 *Glamis Gold v. United States*, Award, paras 779 and 803.
493 *Lemire v. Ukraine*, Decision on Jurisdiction and Liability, paras 272–3.
494 Id. para. 273.
495 Id. para. 240.
496 Id. para. 505.

treatment. While not every breach of municipal law amounts to a violation of investment treaty provisions, relevant violations will undergo the scrutiny of arbitral tribunals. Such an assessment can contribute to good cultural governance as demanded by the relevant UNESCO instruments: in fact, 'unrestricted state sovereignty may be detrimental to the very cause of cultural diversity.'[497] In this sense, the delimitation of state sovereignty in cultural matters can 'contribute to a better check and balance between the promotion of cultural identity and cultural diversity in any given state.'[498]

To determine whether Ukraine had violated performance requirement prohibitions under the relevant BIT in imposing Ukrainan-language quotas in radio broadcasting, the Arbitral Tribunal adopted a comparative approach and concluded that 'a rule cannot be said to be unfair, inadequate, inequitable or discriminatory when it has been adopted by many countries around the world.'[499] This comparative method may play a positive role in enhancing the coherence of international law. Comparative surveys may help adjudicators to reach results in harmony with general principles of international law or customary international law. More importantly, the fact that economic standards of valuation are not the only ones that are taken into consideration by arbitral tribunals seems to be distinctive. The *Lemire* Tribunal was not driven by a cost-benefit analysis or a review of the efficiency of the national measure; rather, it was interested in the 'normality' of such measure – that is, assessing whether it was a regulatory choice that diverged from the canons commonly accepted by the international community.

The almost universal ratification of international cultural heritage law instruments indicates that the international community perceives the protection of cultural heritage as an important public interest. Human rights law similarly demands the protection of cultural heritage as a key element of cultural identity. This leads to the conclusion that the protection of cultural heritage is a general principle of law if not a norm of customary international law already, and that adjudicators will have to take cultural concerns into account. If cultural heritage protection already belongs to customary international law, the case for such consideration is even stronger.

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497 Christophe Germann, 'Towards a Global Cultural Contract to Counter Trade-Related Cultural Discrimination', in Nina Obuljen and Joost Smiers (eds), *UNESCO's Convention on the Protection and the Promotion of the Diversity of Cultural Expressions: Making it Work* (Zagreb: Institute for International Relations 2006) 290.

498 Id. 291.

499 *Lemire v. Ukraine*, Decision on Jurisdiction and Liability, para. 506.

The interaction between international investment law and cultural heritage law demonstrates the gradual emergence of customary norms requiring the protection of cultural heritage in times of peace. This is a significant outcome, as most scholars have pinpointed the existence of customary norms requiring the protection of cultural heritage in times of war. The jurisprudence of arbitral tribunals is thus contributing to the development of international law requiring the protection of cultural heritage. Rather than considering cultural heritage as an exception or as a defense justifying State measures, arbitral tribunals have considered heritage protection as a legitimate objective pursued by the host state when such tribunals have interpreted and applied relevant investment treatment standards.

Nonetheless, cultural values and interests are not necessarily at the heart of arbitral thinking and practice. In most cases, arbitral tribunals are activated by investors to obtain protection for their investments, certainly not for the protection of cultural heritage potentially affected by the investments themselves. In the end, these cases represent a remedy that is available only after an investor files an investor–state claim. There may be cases in which cultural heritage concerns arise, but states prefer to ignore such matters in favor of economic development. Several cases are settled during the cooling-off period that is required before investment arbitration. There is a risk that in such a context, the host state will scale down its cultural policies behind closed doors to avoid expensive arbitration costs. In other cases, the state may adopt cultural policies discriminating against foreign investments, but the investor may decide not to pursue arbitration, deeming it too expensive. Finally, and more importantly, when a tribunal is established for reasons related to the clash between the execution of an investment and cultural heritage protection, arbitrators will adjudicate the compliance of state measures with international investment law. Arbitral tribunals have limited jurisdiction: they must determine whether state conduct complied with its investment treaty obligations. They are not required to rule on the state's compliance with its obligations under international cultural heritage law.

Much remains to be done to successfully accommodate cultural heritage and human rights considerations within international investment law and arbitration. The available jurisprudence shows the need to reinforce the protection of cultural heritage and human rights, for instance by introducing specific reference to cultural concerns in international investment treaties, in order to prevent a culture clash between investors' rights and the host state's preservation of fundamental cultural interests and values. For instance, requiring investors' compliance with domestic laws and regulations in the text of the relevant international investment agreements can reinforce the state's right to

protect its cultural heritage. These provisions can be strengthened by adding the ability for states to file counterclaims in the event that investors seriously violate domestic laws.

11 Conclusions

The potential for conflict of norms is inherent in every legal system. Not only does international law not constitute an exception to this notion, but it offers a fertile ground for overlapping norms and conflicting obligations. The multitude of lawmakers and the constellation of courts and administrative bodies are elements which all contribute to the complexity of the system. As Slaughter contends, conflict may be seen as 'the motor of positive change,' and the successful management of conflicts may actually strengthen the legal order.[500]

As international cultural heritage law instruments often do not include a dispute settlement mechanism, cultural heritage-related investment disputes have gravitated toward a number of national, regional, and international courts and tribunals. This chapter surveyed a number of heritage-related investment disputes, showing that while international investment law has not developed any institutional machinery for the protection of cultural heritage through investment dispute settlement (after all, international investment law is not intended to protect cultural heritage as such), in recent years, a jurisprudential trend has emerged that takes cultural heritage into consideration. Arbitral tribunals have paid increasing attention to cultural concerns and have often referred to international law principles in their reasoning in order to reconcile the different interests at stake.

It is worth investigating how arbitral tribunals have dealt with cultural heritage disputes precisely because arbitral tribunals are not courts of general jurisdiction like the ICJ. In fact, one could argue that few of the cases examined in this chapter openly dealt with cultural heritage: in some cases, cultural heritage formed part of the factual background; in other cases, cultural heritage was not even implicated in the facts, but merely mentioned in passing. The cases in question, however, all dealt with the interplay between cultural heritage protection and economic freedom. The fact that they did not seem to concentrate on cultural heritage is of no surprise. Nonetheless, what is remarkable is the attention paid to cultural concerns by most arbitral tribunals, as other

500 Anne Marie Slaughter, *A New World Order* (Princeton N.J.: Princeton University Press 2004) 209.

international economic institutions have not shown a similar willingness to consider cultural heritage.

The magnetism of arbitral tribunals has had mixed outcomes. On the one hand, the review by an international tribunal of state cultural policies can improve good cultural governance and the transparent pursuit of cultural policies. While each state retains the right to regulate within its own territory, international investment law poses vertical constraints on such a right. Adherence to this international regime adds a circuit of external accountability, forcing states to consider the interests of the investors affected by their policies. The growing importance of such tribunals means that most governments will need to consider the impact of cultural policies on foreign investors and their investments before enacting such measures in order to avoid potential claims and subsequent liability.

On the other hand, from a cultural heritage perspective, one may wonder whether the fact that cultural heritage disputes are adjudicated before arbitral tribunals raises a sort of institutional bias. In the end, such tribunals are of limited jurisdiction; they cannot adjudicate on the eventual violation of international cultural heritage law. The mechanism is mostly triggered by foreign investors; the affected communities are represented by the host state, but have no procedural rights in the context of the proceedings. Arbitrators may not have expertise in international cultural heritage law. Other institutions and regimes, such as the WTO, have dealt with cultural questions from their point of view – often an eminently economic one – prioritizing free trade over cultural concerns.[501]

At the same time, international investment law is not a closed legal system but has to be contextualized within international law and develop in conformity with the latter. In many circumstances, international law is the law applicable to investment disputes according to an applicable arbitral clause or other relevant treaty provision. Even in those cases where the applicable law is the law of the host state, international law permeates national legal systems. Furthermore, according to the principle of systemic interpretation as restated by Article 31(3)(c) of the VCLT, together with the context, any relevant rule of international law applicable in the relationship between the parties should be taken into account. Given the fact that UNESCO has an almost universal membership and that its conventions are widely ratified, this leads to the conclusion that arbitrators will have to take cultural concerns into account. If one deems

501 Céline Romainville, 'Cultural Diversity as a Multilevel and Multifaceted Legal Notion Operating in the Law on Cultural Policies' (2016) 22 *International Journal of Cultural Policy* 273–290, at 279.

that cultural heritage protection already belongs to customary international law or to general principles of law, the case for such consideration is even stronger. In fact, as international courts, arbitral tribunals should settle investment disputes 'in conformity with principles of justice and international law.'[501]

In conclusion, because the international community values the legitimate exercise of authority, the preservation of juridical values, and the safeguarding of cultural heritage, the fact that economic standards of valuation are not the only ones that are considered by arbitral tribunals is distinctive. Inward-looking approaches, that is, disregard for broader cultural concerns, may weaken the perceived legitimacy of adjudicative bodies and the coherence of the international legal system. While investor–state arbitration deals with an area at the crossroads between economics and law, the legal and cultural dimension of these disputes cannot be neglected or dismissed in favor of purely economic considerations.

501 VCLT, preamble.