



Cultural heritage in international investment law and arbitration

Introduction

Can states promote economic development without infringing their cultural heritage? Culture represents inherited values, ideas, beliefs, and traditions, which characterize social groups and their behaviour. Culture is not a static concept but rather a dynamic force, which evolves through time and shapes countries and civilizations. As such, culture has always benefited from economic exchange. Globalization and international economic governance have in recent times spurred a more intense dialogue and interaction among nations: thus, they offer unprecedented opportunities for cultural exchange. In parallel, foreign direct investments can promote cultural diversity and provide the funds needed to locate, recover and preserve cultural heritage.

Nonetheless, globalization and international economic governance can also jeopardize cultural diversity and determine the erosion of cultural heritage. While trade in cultural products can lead to cultural homogenization and even to cultural hegemony, foreign direct investments have an unmatched penetrating force with the ultimate capacity to change landscapes and erase memory. At the same time, the increase in global trade and foreign direct investment (hereinafter FDI) has determined the creation of legally binding and highly effective regimes that demand states to promote and facilitate trade and FDI. An *international economic culture* has emerged that emphasizes productivity and economic development at the expense of the common weal.

This book aims to explore the ‘clash of cultures’ between international investment law and international cultural law. When countries pursue economic growth, their policy-makers may have an incentive to lower cultural standards to promote economic activities.¹ The host state ‘may

¹ This phenomenon is also known as a ‘race to the bottom’. The literature is extensive. See e.g. N. Meisel, *Governance Culture and Development: A Different Perspective on Corporate Governance* (Paris: OECD, 2004), p. 41.

have a financial stake in the project, making it reluctant to take any action that would diminish its profitability . . . And even if officials are genuinely concerned about the impacted peoples and the environment, they may assign them a lower priority than development goals.² 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. As a wide variety of cultural policies may interfere with foreign investments, tension exists between the cultural policies of the host state and investment treaty provisions. In some cases, foreign investors have claimed that cultural policies negatively affected their investments, thereby amounting to indirect expropriation. In other cases, the investors have alleged discrimination and/or violation of other investment treaty provisions. In sum, there is a variety of potential areas of conflict between investor rights and cultural policies.

If a dispute arises between the foreign investor and the host state, several fora are available. However, foreign companies may prefer not to recur to local courts and human rights courts (which require the exhaustion of local remedies), but to bring the case before investment treaty arbitral tribunals because of streamlined procedures and alleged independence. While cultural heritage law lacks an institutionalized dispute settlement mechanism, investment treaty arbitration constitutes a sophisticated means of dispute settlement.³ As a result, foreign investors may choose to take their disputes to investment treaty tribunals when the disputes nevertheless contain obvious cultural issues.

Three examples may clarify the issues at stake. Characterized by an impressive complex of Gothic, Renaissance, Baroque and classical buildings, the historic town of Vilnius, in Lithuania, is listed on the World Heritage List as a cultural heritage site of outstanding universal value.⁴ A Norwegian investor participated in a bid to build a parking area

² G. K. Foster, 'Foreign Investment and Indigenous Peoples: Options for Promoting Equilibrium between Economic Development and Indigenous Rights', *Michigan JIL* 33 (2012), 655–6.

³ See e.g. A. Newcombe and L. Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Aalphen an den Rijn: Kluwer Law International, 2009), pp. 3 ff.

⁴ Convention concerning the Protection of the World Cultural and Natural Heritage, Paris, 16 November 1972, in force 17 December 1975 (1972) 11 ILM 1358. For commentary, see F. Francioni (ed.), *The 1972 World Heritage Convention: A Commentary* (Oxford University Press, 2008).

under the historic centre of the town.⁵ However, cultural heritage impact assessments required by law revealed that the project submitted by the investor could jeopardize the cultural heritage of the city because it included excavation under the cathedral. Therefore, the project was rejected on cultural heritage grounds and another project was selected which did not include excavation under the cathedral. Against this background, the investor filed an investor–state claim on the grounds of discrimination. Was it legitimate for the municipality of Vilnius to prefer another contractor in order to limit the perceived risk of damaging its cultural heritage?

Another example involves maritime cultural heritage. An investment dispute involved the salvage of an ancient shipwreck discovered in the Straits of Malacca by a British salvor, a company that specialized in the recovery of ancient shipwrecks.⁶ The company had signed a contract with Malaysia which gave the latter the right to obtain only a limited percentage of the recovered artefacts, while the salvor would retain the rest, to sell at the auction house Christie's. According to the salvor, however, the host state had breached the salvage contract, retaining more artefacts than those allocated in the contract. Therefore, he brought the case before an investment treaty arbitral tribunal. Two questions arose in this context. Was the salvage contract between the salvor and Malaysia a form of investment? If so, would international arbitrators take into account the cultural value of the goods?

A third example concerns religious freedom and cultural practices. An indigenous tribe has performed a spiritual pilgrimage throughout the Californian desert for centuries.⁷ Its rights are recognized by statutory law. What happens if a foreign investor deems local regulations requiring the backfilling of open-pit gold mines as a form of indirect expropriation? Should the sacred landscape of the local community be devastated by open-pit gold mines? All the above-mentioned examples are real cases that have been decided before different investor–state arbitral tribunals. These cases are just a representative sample but there are many other investment arbitrations that clearly involve cultural entitlements.⁸

⁵ *Parkerings-Compagniet AS v. Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007.

⁶ *Malaysian Historical Salvors Sdn, Bhd v. Malaysia*, Award on Jurisdiction, ICSID Case No. ARB/05/10, 17 May 2007.

⁷ *Glamis Gold Ltd v. United States of America*, ICSID Award, 8 June 2009.

⁸ On this emerging jurisprudence, see e.g. F. Lenzerini, 'Property Protection and Protection of Cultural Heritage', in S. Schill (ed.), *International Investment Law and Comparative Public Law* (Oxford University Press, 2010); A. Froehlich, 'Cultural Matters in Investment

A number of questions arise in this context. *First*, is it legitimate for the state to adopt 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 (compensable) violation of the investment treaty provisions? To what extent may investment treaty obligations collide with states' obligations to protect cultural heritage? *Third*, how have arbitrators dealt with these crucial policy issues? *Fourth*, while foreign investors have been recognized as 'international corporate citizens' and have been afforded direct access to investment treaty arbitration,⁹ the procedural rights of the investment-affected communities have remained almost unchanged.¹⁰ Is investor–state arbitration a suitable forum to protect public interests?

This book aims to provide a fresh approach to these questions, offering an in-depth analysis of the largely unexplored linkage between international investment law and cultural policies. While the clash between cultural policies and free trade has been broadly discussed by authors,¹¹ what is lacking is a systematic analysis of the relationship between cultural policies and international investment law. Given the broad policy implications that foreign investments provoke in host countries, in-depth scrutiny is needed. The aim of this study is to fill this gap in academic literature, and to contribute to the ongoing debate on the need for 'globalization with a human face'.¹²

Agreements and Decisions', in A. Reinisch and C. Knahr (eds.) *International Investment Law in Context* (Utrecht: Eleven International Publishing, 2008); A. Froehlich, 'L'enjeu de la culture dans son contexte économique international', in P. Meerts (ed.), *Culture and International Law* (The Hague: T.M.C. Asser Press Publishers, 2008); V. Vadi, 'Cultural Heritage and International Investment Law: A Stormy Relationship', *International J. Cultural Property* 15 (2008), 2.

⁹ P. Muchlinski, 'Global Bukovina Examined: Viewing the Multinational Enterprise as a Transnational Law Making Community', in G. Teubner (ed.), *Global Law Without a State* (Dartmouth: Aldershot, 2003), p. 79.

¹⁰ See N. Gal-Or, 'The Investor and Civil Society as Twin Global Citizens: Proposing a New Interpretation in the Legitimacy Debate', *Suffolk Transnational L. Rev.* 32 (2008–2009), 284.

¹¹ See, for instance, J. Morijn, *Reframing Human Rights and Trade: Potential and Limits of a Human Rights Perspective of WTO Law on Cultural and Educational Goods and Services* (Antwerpen: Intersentia, 2010); P. van den Bossche and H. Schneider (eds.), *Protection of Cultural Diversity from a European and International Perspective* (Antwerpen: Intersentia, 2008); T. Voon, *Cultural Products and the World Trade Organization* (Cambridge University Press, 2007); P. Van den Bossche, *Free Trade and Culture* (Amsterdam: Stichting Boekmanstudies, 2008); R. J. Neuwirth, *The Cultural Industries in International Trade Law* (Hamburg: Kovac, 2006).

¹² See J. Stiglitz, *Globalization and Its Discontents* (New York: WW Norton & Company, 2002); but see J. Bhagwati, *In Defense of Globalization* (Oxford University Press, 2004).

The book complements and improves upon the current literature in several ways. *First*, if investment law scholars have analysed some of the relevant cases, they have approached them from a mere investment law standpoint, leaving aside cultural arguments or merely citing them in passing. In sum, the cultural aspects of these cases have been neglected, while at the same time light has been shed on more conventional economic law topics, such as, *inter alia*, the definition of regulatory expropriation. Only recently has the linkage between international investment law and public policy objectives attracted scholarly analysis.¹³

Second, with regard to the existing literature on international investment law and other values,¹⁴ the book takes the discussion into greater depth by focusing on the linkage between international investment law and culture. Culture is an inclusive concept, whose protection partially includes but also differs from the protection of environmental goods. *Third*, while there is a growing amount of literature on multinational corporations and the law,¹⁵ the interplay between cultural heritage and investor rights has never been studied from a perspective internal to international investment law and arbitration. Thus, it is my belief that a thorough study is greatly needed.

Fourth, in a systemic perspective, this study complements the literature on the linkage between trade and culture by offering an updated and systematic analysis of the parallel linkage between investment and culture.¹⁶ This scrutiny is needed because international investment law and arbitration complement the existing international trade regime in many ways. Although there is no single multilateral investment treaty, authors have stressed the emergence of an international investment regime.¹⁷ In this context, investor–state arbitration constitutes a major

¹³ See, e.g. S. Subedi, *International Investment Law: Reconciling Policy and Principle* (Oxford: Hart Publishing, 2008).

¹⁴ See e.g. J. Viñuales, *Foreign Investment and the Environment in International Law* (Cambridge University Press, 2012); L. Cotula, *Human Rights, Natural Resources and Investment Law in a Globalized World* (Abingdon: Routledge, 2011); K. Tienhaara, *The Expropriation of Environmental Governance* (Cambridge University Press, 2009); S.F. Puvimanasinghe, *Foreign Investment, Human Rights and the Environment* (Leiden: Martinus Nijhoff, 2007).

¹⁵ On multinational corporations and the law, see e.g. S. Picciotto, *Regulating Global Corporate Capitalism* (Cambridge University Press, 2011); P. Muchlinski, *Multinational Enterprises and the Law*, 2nd edn (Oxford University Press, 2007).

¹⁶ On trade and culture, see note 11 above.

¹⁷ See e.g. S.W. Schill, *The Multilateralization of International Investment Law* (Cambridge University Press, 2009).

development in international law and facilitates the access of foreign investors to justice.¹⁸ At the same time, it may jeopardize the cultural policies of the host state if read in ‘clinical isolation’ from international public law.¹⁹ Thus, an analysis and critical assessment of the interplay between the international investment regime and cultural heritage are urgently needed.

Finally, this book complements the existing literature on international cultural law.²⁰ While authors have explored the role of UNESCO in international cultural law rule-making,²¹ little attention has been paid to the adjudication of disputes related to cultural heritage.²² The book offers an extensive overview and critical assessment of the investor–state arbitrations that have involved cultural heritage.

As there is an increasing tension between two different sets of normative values, which is shown by the boom of relevant international disputes, this study aims to (1) map in a systematic and complete fashion the relevant investor–state arbitrations in order to give policy-makers, arbitrators, stakeholders and the public at large a complete survey of the existing arbitral case law concerning cultural elements; and (2) propose legal methods to reconcile these different values both *de lege lata* (i.e. interpreting the existing legal instruments) and *de lege ferenda* (amending the existing law or proposing the adoption of different legal provisions). In this sense, this study investigates whether or not culture can be mainstreamed into international investment law and arbitration, and if so, how. At the same time, this book cautions against an uncritical

¹⁸ See generally J. Paulsson, *Denial of Justice in International Law* (Cambridge University Press, 2005).

¹⁹ The term is borrowed from Appellate Body Report, *US Gasoline, United States Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996, at 16.

²⁰ See, e.g. J. A. R. Nafziger, R. K. Paterson and A. Dundes Renteln (eds.), *Cultural Law: International, Comparative and Indigenous* (Cambridge University Press, 2010); C. Forrest, *International Law and the Protection of Cultural Heritage* (Abingdon: Routledge, 2010); B. Hoffmann (ed.), *Art and Cultural Heritage: Law, Policy and Practice* (Cambridge University Press, 2006).

²¹ See, e.g., A. Yusuf (ed.), *Standard-Setting in UNESCO: Normative Action in Education, Science and Culture* (Leiden: Brill, 2007).

²² Most scholars have focused on the national case law. See e.g. S. von Schorlemer, ‘Compliance with the UNESCO World Heritage Convention: Reflections on the Elbe Valley and the Dresden Waldschlösschen Bridge’, *German YIL* 51 (2008), 321–90; B. W. Boer, ‘World Heritage Disputes in Australia’, *Journal of Environmental Law and Litigation* 7 (1992), 247–79. Other authors have focused on the regional case law. See e.g. H. Nathan, ‘Creating an Ever Closer Union: The European Court of Justice and the Threat to Cultural Diversity’, *Columbia J. of Transnational Law* (2008), 166–207.

merger and acquisition of cultural entitlements in international investment law and arbitration: it is submitted that while the state must comply with investment treaty provisions, certain cultural entitlements are linked to human dignity and to other human rights and may present higher status.

The key objective of the study is to find ways to reconcile economic development with cultural heritage protection. The underlying thesis of this work is that reconciliation is possible, and that development should be conceived as a broad concept inclusive not only of mere economic growth, but also of human flourishing and well-being to which cultural elements are crucial. This analysis contributes to the current discourse on global governance and the legitimacy of international investment law and arbitration, and strengthens the growing cognizance of the importance of effective protection of cultural heritage and diversity for peaceful relations between nations.

Chapter plan

The book proceeds as follows. The first part of the book aims at defining the two fields of international cultural law and international investment law. The first chapter introduces the notion of cultural heritage and examines its regulation at the international law level. The second chapter briefly explores the rationale behind the protection of foreign direct investment and the elements of investment rules that will be of particular importance when considering their impact on cultural policies.

The second part of the book investigates the interplay between the protection of foreign direct investment and cultural policies in international investment law and arbitration, focusing on specific sectors such as the governance of world cultural heritage, underwater cultural heritage, cultural diversity, intangible heritage and indigenous heritage. In particular, the third chapter will scrutinize the areas of conflict between the protection of world cultural heritage and foreign direct investment. Chapters 4, 5 and 6 explore the interplay between foreign direct investment and underwater cultural heritage, cultural diversity, intangible heritage and indigenous cultural heritage. A rich collection of arbitrations provides evidence that the regime established according to investment treaties does not strike an appropriate balance between the different interests concerned, and that international law has not yet developed any institutional machinery for the protection of cultural values through investment dispute settlement.

The third part of the book analyses the available means for promoting consideration of cultural heritage in international investment law and arbitration, and suggests new methods and approaches. Chapter 7 is divided into two parts. The first part explores the possible synergies between foreign direct investment and cultural policies, suggesting the use of available mechanisms to better reconcile cultural values and investor rights. Viewed *de lege lata*, investment treaties should not be considered as self-contained regimes, but as an important component of public international law. Accordingly, this book argues that international investment law has to be consistent with international law and, therefore, must also be interpreted in accordance with customary rules of treaty interpretation. In the interpretation of investment treaties, arbitrators should take relevant international law into account. Traditional tools of treaty interpretation may contribute to reconciling foreign investment and cultural heritage in a harmonious fashion, as well as to the *humanization* of international investment law. The second part of Chapter 7 focuses on the mechanisms that *lex ferenda* can reconcile the protection of cultural heritage and the promotion of foreign direct investment including cultural exceptions. The conclusions will then sum up the key findings of the study.

Methodological framework of the book

This book crosses traditional boundaries between academic disciplines to explore an area of inquiry at the crossroads between economics and culture. Therefore it presents both interdisciplinary and multidisciplinary aspects. Because of the interdisciplinary character of the research project, methods and insights of different disciplines and traditional fields of study are taken into account. In particular, reference is made to studies elaborated under the aegis of the UNESCO, in cultural economics literature and in cognate disciplines such as international relations, anthropology and art history.

Against this background, the analysis maintains a primarily legal character and rests on sound theoretical and empirical methodological grounds. The book rests on a firm theoretical standpoint, elaborated by Hart.²³ A ‘moderate external point of view’²⁴ is adopted that combines ‘explanation’ (which implies the distance of the scientist, commitment to objectivity and focus on causality) with ‘comprehension’ (understanding

²³ H. L. A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961). ²⁴ *Ibid.*, pp. 86–8.

the inner logic of the object of study), and provides the rational structure on which the scientific nature of the approach is based. This approach does not follow a mere positivist stance, but considers the legal norms as the results of balance of interests. This is very appropriate to the study of international law which is the outcome of intense political processes and negotiations.

While the interrelationship between cultural policies and investor rights may be studied from a variety of different perspectives and institutional settings, this book adopts an ‘internal’ approach with respect to international investment law and arbitration. The choice of this approach is not meant to imply that the institutional setting of international investment law is to be preferred to other approaches for reconciling the interests at stake. On the contrary, it is acknowledged that other fora, like the International Court of Justice and regional human rights courts, represent useful alternatives. However, looking at the linkage between cultural policies and foreign direct investment from an inside view of international investment law allows a reflection on the emerging investment treaty arbitrations. Although investment treaty arbitration may not constitute the most ideal forum for the settlement of disputes with cultural elements, a rich case law has emerged in recent years. Therefore, an analysis and critical assessment of this emerging jurisprudence is necessary.

The experimental aspect of the work is based on the adoption of a double track. On the one hand, the book focuses on the impact of investors’ rights on the five different but related categories of culture: (1) world cultural heritage; (2) underwater cultural heritage; (3) cultural diversity; (4) intangible heritage and (5) indigenous cultural heritage. Specific chapters of the book will be dedicated to an analysis of the interplay between international investment law and the relevant cultural policies governing each of these aspects, except for the linkage between cultural diversity and intangible heritage on the one hand, and foreign investment on the other, which will be discussed in Chapter 5 due to the conceptual closeness between cultural diversity and intangible heritage. Elements of intangible heritage will also be examined in the context of Chapter 6 dedicated to indigenous heritage. The way in which the work is organized aims to allow the reader to immediately identify thematic areas of interest.

On the other hand, within each of these tracks, the analysis proceeds by adopting investment law categories; and the relevant case studies are analysed according to the traditional elements of investment law. Thus,

the book questions whether certain economic activities relating to the conservation of cultural heritage may constitute a form of investment; or whether certain regulations aimed at protecting cultural heritage may be deemed to amount to an expropriation and/or a violation of other standards vis-à-vis foreign investors. By adopting a double track, the methodological differences between the legal systems regulating foreign investments and cultural heritage respectively are acknowledged.

The choice of case studies that are factually rich is deliberate, in order to provide a proper context and to enable the reader to draw his or her own conclusions about the norms at play. This contrasts with the way in which cases are generally mentioned within international investment law and arbitration; investment law scholars and practitioners usually omit the statement of the facts, or they offer them sparsely to enucleate the *ratio decidendi*. While such a fact-elusive approach is most appropriate for those who scrutinize investment law per se; it may not be appropriate for inter-disciplinary and contextual analysis connecting international investment law and arbitration to other areas of the law. Only by providing the reader with proper context can he or she appreciate the full interaction between international investment law and the protection of cultural heritage.

There are, of course, limitations with this case method. For instance, only those investment treaty arbitrations and conflicts which received media attention or were available to the public could be scrutinized. There were cases in which there was not enough information to analyse. More generally, investment treaty arbitration constitutes a *post factum* dispute settlement mechanism mainly triggered by a foreign developer after a state has adopted cultural policies. Therefore, the cases are not representative of all threats to cultural heritage posed by foreign direct investment. However, they are still valuable for illuminating trends in international law.

Many conflicts of interests between developers, government actors and residents affected by projects are settled at a domestic level.²⁵ In some cases, even if state authorities are genuinely concerned about the impact on local communities, they balance the protection of cultural heritage against developmental goals, and forms of quantitative assessment

²⁵ See e.g. A. Perry-Kessaris, 'Anemos-ity, Apatheia, Enthousiasmos: An Economic Sociology of Law and Wind Farm Development in Cyprus', *Journal of Law and Society* 40(1) (2013), 72 (discussing the development of wind farms in Cyprus and mentioning 'the cultural implications of a wind farm towering over an eighteenth-century mosque').