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Gravity and Grace: Foreign Investments and Cultural Heritage in International Investment Law

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"[W]e possess no other life . . . than the treasures stored up from the past and digested, assimilated and created afresh by us. Of all the human soul's needs, none is more vital than this one of the past."[1]

ABSTRACT

Globalization and international economic governance have promoted dialogue and interaction among nations, potentially increasing cultural diversity and providing the funds to recover and preserve cultural heritage. However, these phenomena can also jeopardize cultural diversity. Foreign direct investments in the extraction of natural resources have the potential to change cultural landscapes, destroy monuments, and erase memories. In parallel, international investment law constitutes a legally binding and highly effective regime that demands that states promote and facilitate foreign direct investment. Does the existing legal framework adequately protect cultural heritage vis-à-vis the economic interests of foreign investors?

To address this question, this Article complements traditional tools of legal analysis with a novel, interdisciplinary, philosophical perspective. This Article relies on the thought of Simone Weil (1909–1943) to examine how cultural and economic forces can be balanced in international law. A philosopher, mystic, and resistance fighter, Weil was a defining figure of the twentieth century. While no study has highlighted the relevance of her thought for international law yet, her philosophy can help clarify legal concepts, reflect on what principles

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1. SIMONE WEIL, THE NEED FOR ROOTS: PRELUDE TO A DECLARATION OF DUTIES TOWARDS MANKIND 48 (Arthur Wills trans., 1952) (1949) [hereinafter ROOTS].

ought to be accepted, and identify future directions of the field. This Article relies on her philosophy for investigating the interplay between foreign investments and cultural heritage in international investment law and arbitration. In light of Weil's philosophical insights, this Article also examines recent arbitrations and proposes three legal tools to foster a better balance between economic and cultural interests in international investment law and arbitration.

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I. PRELUDE: GRAVITY AND GRACE

Protecting cultural heritage is a fundamental public interest that is closely connected to the respect, protection, and fulfilment of human rights and is among the best guarantees of international peace and security. Economic globalization and international economic governance have fostered intense dialogue and interaction among nations, potentially promoting cultural diversity and providing the funds to recover and preserve cultural heritage. Foreign direct investments can facilitate cross cultural exchanges, thus contributing to not only economic development, but also conflict prevention and international peace.

However, these phenomena can also jeopardize cultural heritage. Foreign direct investments in the extraction of natural resources have

the potential to change cultural landscapes, destroy monuments, and erase memories. In parallel, international investment law constitutes a legally binding and highly effective regime that demands that states promote and facilitate foreign direct investments. The privileged regime created by international economic law within the boundaries of the host state has increasingly determined a tension between the promotion of economic development and cultural sovereignty, meant as the regulatory autonomy of the host state in the cultural field. Does the existing legal framework adequately protect cultural heritage vis-à-vis the economic interests of foreign investors?

To properly address the interplay between foreign direct investments and world-cultural heritage in international investment law and arbitration, this Article complements traditional tools of legal analysis with a novel, interdisciplinary, philosophical perspective. Not only can philosophy be fruitfully combined with legal research, but in some cases, it becomes indispensable, as, "for almost any doctrinal subject, there is a relevant philosophical dimension so that philosophical analysis could provide more depth to the research."[2] Although philosophy and law have their own languages, methods, and techniques, both disciplines conduct research in the humanities to investigate human action and are based on interpretation and argumentation.[3] In fact, philosophy can provide "insights regarding central or fundamental concepts and principles, or the ideas behind the legal order."[4] It can help clarify concepts and principles used in law and reflect on what law should be or what principles ought to be accepted.[5] For legal scholars, philosophical insights are useful because "they are important building blocks" for constructively criticizing the legal order, identifying future directions of the field, and building it as a coherent system.[6]

Until about a decade ago, philosophical inquiry related to international law was commonly limited to a few subjects, such as distributive justice and just-war theory. Since then, however, philosophers have increasingly written about other aspects of the global political order,[7] and international lawyers have increasingly

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2. Sanne Taekema & Wibren van der Burg, *Legal Philosophy as an Enrichment of Doctrinal Research Part I: Introducing Three Philosophical Methods*, L.& METHOD 1, 1 (2020).

3. *See id.* at 2, 3, 5.

4. *Id.* at 3.

5. *See id.*

6. *Id.* at 4.

7. *See generally* SERENA PAREKH, NO REFUGE: ETHICS AND THE GLOBAL REFUGEE CRISIS (2020) (considering the philosophical implications of the global refugee crisis); ANNA STILZ, TERRITORIAL SOVEREIGNTY: A PHILOSOPHICAL EXPLORATION (2019) (arguing in defense of the philosophical basis of a territorial states system).

adopted philosophy as a research tool for investigating their field.[8] International lawyers can benefit from the insights of philosophers for several reasons. First, "philosophy . . . provides a set of analytical tools to [examine] core questions that underlie the structure and rules of [international law]." [9] For instance, in relation to international economic law, "philosophical work offers a rigorous way of arguing about who should bear the benefits and burdens of transnational economic interactions, whether trade, investment, or finance." [10] Second, "rules that can be defended in terms of their legitimacy, fairness, or even justice stand a better chance of providing international actors good reasons to respect the rules, or good reasons to change or supplement them."[11] Third, engagement with philosophy can encourage lawyers to take "an ethical position on issues of global justice."[12]

In light of these recent developments, this Article relies on the philosophy and thought of Simone Weil (1909–1943), one of the most important thinkers of the twentieth century, to examine how cultural and economic forces can be balanced in international law. A philosopher, mystic, and resistance fighter, Weil was a defining figure of the twentieth century. "[D]espite her provoking, masterful, [and] even extraordinary work," her thought has remained unknown in the discipline of international law for decades.[13] Her mysticism, life experience, and early death have contributed to a characterization of

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8. *See, e.g.*, DAVID LEFKOWITZ, PHILOSOPHY AND INTERNATIONAL LAW: A CRITICAL INTRODUCTION 2 (2020) (describing "recent work by legal and political philosophers on conceptual and moral questions specific to particular domains of international law"); Andrea Bianchi, *On Asking Questions: Philosophy and Theory in International Law*, *in* THEORY AND PHILOSOPHY OF INTERNATIONAL LAW: PHILOSOPHICAL INQUIRIES AND GENERAL THEORETICAL CONCERNS (Andrea Bianchi ed., 2017) (describing international law as historically "undertheorised" and providing reference articles wherein international law scholars used philosophy and theory to contribute to legal research); ANTHONY CARTY, PHILOSOPHY OF INTERNATIONAL LAW (2017) (describing the historic and integral role of philosophy within international law); Samantha Besson & John Tasioulas, *Introduction*, *in* THE PHILOSOPHY OF INTERNATIONAL LAW 1 (Samantha Besson & John Tasioulas eds., 2010) ("International law has recently emerged as a thriving field of philosophical inquiry.").

9. Andreas Follesdal & Steven R. Ratner, *Introducing David Lefkowitz's Philosophy and International Law*, EJIL: TALK! (Nov. 4, 2021), https://www.ejiltalk.org/introducing-david-lefkowitzs-philosophy-and-international-law/ [https://perma.cc/Y6F3-AR6K] (archived July 26, 2022).

10. *Id.*

11. *Id.*

12. *Id.*; *see also* CHI CARMODY, FRANK J. GARCIA & JOHN LINARELLI, GLOBAL JUSTICE AND INTERNATIONAL ECONOMIC LAW: OPPORTUNITIES AND PROSPECTS 3 (Chi Carmody et al. eds., 2014).

13. MARY DIETZ, BETWEEN THE HUMAN AND THE DIVINE: THE POLITICAL THOUGHT OF SIMONE WEIL xiii (1988).

her philosophy as impractical and other-worldly.[14] Such idealizations, however, do not truly render "the complexity and range of her writing, nor her own method of inquiry."[15] In fact, "in thought and in deed[,] Simone Weil was fundamentally engaged in, and constantly struggling to make sense of, the world in which she lived."[16] Therefore, it is time for international lawyers to investigate her philosophy and thought in relation to their field.[17]

Weil's philosophy is characterized by the interplay between gravity and grace intended as counter weighing forces. On the one hand, the force of gravity reflects "the gravitational pull of the actual," and refers to the material reality of violence and war, which afflict human beings and communities. [18] On the other hand, grace constitutes an immaterial reality made of beauty, arts, and culture which elevates human beings.[19] The interplay of gravity and grace is at the heart of Weil's thought.[20] Her work on colonialism and the use of force has already influenced the field of international relations.[21] Scholars have scrutinized her work on colonialism's brutality and its constitutive elements, namely "uprooting, loss of the past, degradation of labor, and the pursuit of unlimited profit and power."[22] What is missing is an appraisal of how her reflection on heritage and economic development can influence the interpretation and application of international law and, ideally, its future developments. Weil reflected on art, roots, heritage, and belonging, as well as the negative consequences associated with industrialization and economic development.[23] Therefore, her work can be used as both a starting point and a supplement to legal research on the interplay between the promotion of foreign investments and the safeguarding of cultural heritage, because it reflects on why it is worth safeguarding cultural heritage and how countervailing economic and cultural forces can be balanced. While many legal scholars have discussed the balance of economic and cultural interests without indicating which interests are

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14. *See* Helen M. Kinsella, *Simone Weil: An Introduction*, *in* ÉMIGRÉ SCHOLARS AND THE GENESIS OF AMERICAN INTERNATIONAL RELATIONS: A EUROPEAN DISCIPLINE IN AMERICA? 176, 176 (Felix Rösch ed., 2014) (reporting this mischaracterization of Simone Weil's "thought as 'other-worldly,' 'anti-political,' or 'merely mystical'").

15. *Id.* at 180.

16. *Id.* at 176–77.

17. *See id.* at 176–93.

18. SEAMUS HEANEY, THE REDRESS OF POETRY: OXFORD LECTURES 4 (1995).

19. *Id.*

20. *See* Kinsella, *supra* note 14, at 180.

21. *See* Helen M. Kinsella, *Of Colonialism and Corpses: Simone Weil on Force*, *in* WOMEN'S INTERNATIONAL THOUGHT: A NEW HISTORY 73 (Patricia Owens & Katharina Rietzler eds., 2021).

22. *Id.*

23. *See* Julien-François Gerber, *Degrowth and Critical Agrarian Studies*, 47 J. PEASANT STUD. 235, 240 (2020) (noting that "[a]lready in the 1930s, [Simone Weil] denounced the violence of industrialism that 'uproots' workers and peasants, denies limits, and negates the material and immaterial 'necessities' of the body and the soul").

more important or how a standard of weight can be constructed for the appraisal of such interests,[24] Weil's philosophical reflection answers certain questions that treaties, jurisprudence, and other legal sources cannot. She "pointed to a different metric of valuation, one that appreciates the entire 'radiance of the spirit,' the whole being."[25] In summary, it offers "the guiding light of a theory of values," thus enriching "our understanding of the human significance of law."[26]

In referring to Weilian philosophy, this Article does not assume Weil's perspective to be the only, let alone the best, point of view. Rather, it highlights that, while contradictory views persist on whether safeguarding cultural heritage should prevail over promoting economic development, Weil offers interesting, sound, and convincing arguments on why heritage should be protected. More importantly, such ideas are compatible with the existing legal framework, and can inspire its functioning in general and its implementation in particular. This Article conceptualizes the linkage between the promotion of foreign direct investments and the safeguarding of world heritage in terms of gravity and grace. Weil used the expression "gravity and grace" throughout her work and, more significantly, in her debut work, *Gravity and Grace*, and her last masterpiece, *The Need for Roots*, both published posthumously.

After the German occupation of Paris during World War II, the French philosopher, mystic, and political activist Simone Weil found refuge in southern France, where she worked in the grape harvest.[27] Before moving further to escape persecution, she entrusted some of her notebooks to the French philosopher Gustave Thibon (1903–2001), who collected and published her writings on her behalf after her untimely death.[28] Weil's first publication, *Gravity and Grace*, has become a

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24. *See generally* TANIA VOON, CULTURAL PRODUCTS AND THE WORLD TRADE ORGANIZATION (2007).

25. Kinsella, *supra* note 14, at 189 (quoting ROOTS, *supra* note 1, at 22).

26. Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 848–49 (1935) (noting legal scholarship seeks refuge in concepts at the expense of analysis of the ethical determinants and consequences of legal decisions).

27. *See* Johanna Selles Roney, The Spirituality of Labour: Simone Weil's Quest for Transcendence 116–17 (Oct. 1983) (M.Phil. thesis, Institute for Christian Studies) (noting that "Weil continued to pursue her goal of experiencing an agricultural labourer's life. Her friend Father Perrin put her in contact with Gustav Thibon . . . Weil worked as a picker in the grape harvest. She wrote to a friend, 'Sometimes I am crushed by a great fatigue, but I find in it a kind of purification' . . . Weil worked in the harvest from September 22 until October 22, 1941.")

28. *See* Ronald K.L Collins, *The Famous Book She Never Wrote—The Story of Simone Weil's Gravity and Grace*, WASH. INDEP. REV. BOOKS (Apr. 16, 2020), https://www.washingtonindependentreviewofbooks.com/index.php/features/the-famous-book-she-never-wrote [https://perma.cc/CME6-G626] (archived Aug. 14, 2022) (noting that "[d]espite the claim on the book's cover and title page, [GRAVITY AND GRACE] is not a book that Weil wrote. True, its words were hers. But the conception, selection, organization, and rearrangement of those words into 39 compressed chapters with

source of spiritual guidance and wisdom for countless individuals. Weil had a powerful style and adopted an aphoristic technique; the indeterminacy of some of her aphorisms allows for a variety of different interpretations, offering each reader light for the spirit and nourishment for the soul.

In *Gravity and Grace*, Weil distinguishes natural "gravity" (heaviness, *pesanteur*) from supernatural "grace" (lightness, *grace*).[29] Gravity is identified as "the forces of the natural world that subject all created beings physically, materially, and socially, and thus functions as a downward 'pull,'" while grace is identified as attention to the essential, the divine that nourishes the soul of human beings and thus constitutes an upward pull and a counterbalance to gravity.[30] For Weil, grace includes "home, country, traditions, [and] culture" that "warm and nourish the soul and without which . . . a human life is not possible."[31] It also encompasses cultural heritage, as beauty conveys a sense of eternity and divine.[32] As Weil puts it,"[i]n everything which gives us the pure authentic feeling of beauty there really is the presence of God."[33] If foreign direct investments represent a force of gravity needed to foster development, cultural heritage expresses the grace—"a link between the human and the divine," a bridge created by people's roots in "the path towards the transcendent good,"[34] and the

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aphorism-like appeal were not her work product. Rather, they were titled and patched together by Gustave Thibon (1903-2001) [a winegrower and self-educated philosopher]. Excerpting and arranging fragments from the 11 notebooks she entrusted to him in 1942, Thibon staged Weil's thoughts for all to behold . . . In a 1991 postscript to GRAVITY AND GRACE, Thibon described his role as simply 'presenting Simone Weil's first book to the public.'").

29. *See* Megan Laverty, *Simone Weil*, *in* GREAT THINKERS FROM A TO Z 244, 245 (Julian Baggini & Jeremy Stangroom eds., 2004) (highlighting that "Weil characterizes the human condition as having two dimensions: the natural (gravity) and the Supernatural (grace)").

30. A. Rebecca Rozelle-Stone & Benjamin P. Davis, *Simone Weil*, STAN. ENCYCLOPEDIA PHIL. (Nov. 24, 2021), https://plato.stanford.edu/entries/simone-weil/ [https://perma.cc/5VL8-DH3M] (archived July 26, 2022).

31. SIMONE WEIL, GRAVITY AND GRACE 147 (Emma Crawford trans., 1963) (1947) [hereinafter GRAVITY AND GRACE].

32. *See id.* at 204 (stressing that "[a]mong other unions of contraries found in beauty there is that of the instantaneous and the eternal"); SIMONE WEIL, L'OMBRA E LA GRAZIA 261 (Franco Fortini trans., 2017) (1947) (It.) [hereinafter L'OMBRA] ("[S]telle ed alberi da frutto fioriti. La totalepermanenza e l' estrema fragilità danno egualmente il senso dell'eterno.", *translated* "Stars and flowering fruit trees. The permanent totality and extreme fragility equally give a sense of eternity."); *see* also HENRY LEROY FINCH, SIMONE WEIL AND THE INTELLECT OF GRACE 27 (2001) (noting that "[t]he order and beauty of the world may be enough of a consolation for the Greeks, and for Simone Weil they are an expression of the Divine Love").

33. L'OMBRA, *supra* note 32, at 269.

34. Christine Howe, Towards a Poetics of Hope—Simone Weil, Fanny Howe and Alice Walker 21–22 (2008) (Ph.D. dissertation, University of Wollongong).

inheritance and promise of one's own future.[35] In revealing the beauty of the world, cultural heritage can direct people's attention to the divine and "redee[m] gravity."[36] In conclusion, for Weil, gravity (force) and grace (justice) are two primary aspects of human existence that lie at the intersection of the horizontal (necessity) and the vertical (grace).[37]

Some of these themes reappear in Weil's last book, *The Need for Roots*, which she wrote in 1943 during her exile in London in the final and most terrible phase of World War II.[38] Commissioned by the leaders of the French Resistance, the book does not constitute a mere transient pamphlet but, due to the imminent death of its author, is a lasting legacy and a sort of testament to the enduring timeliness of her thought. Weakened by inadequate nutrition, overwork, and anguish, Weil died of tuberculosis in August 1943 and was buried in a pauper's grave in Kent.[39]

A profoundly interesting and challenging read, *The Need for Roots* investigates how France and Europe could be rebuilt after the war.[40] Although the book seems to focus on a unique historical and geographical moment—post-war France—it really is about something deeper and more universal. Such depth and breadth are reflected in the subtitle of the book—*Prelude to a Declaration of Duties Toward [Hu]Mankind*. This book can be considered as a philosophical counterpoint to the historical antecedents of the 1948 United Nations Declaration of Human Rights. It highlights that there are no rights without obligations and contextualizes human beings in a compelling framework of attentive duties toward each other.[41] For Weil, paying attention to each other's needs is the rarest and purest form of generosity, as it implies not just understanding others and sympathizing with them but also welcoming them.[42]

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35. *See generally* LORENZO CASINI, EREDITARE IL FUTURO—DILEMMI SUL PATRIMONIO CULTURALE [*Inheriting the Future—Cultural Heritage Dilemmas*] (2016) (It.).

36. *See* L'OMBRA, *supra* note 32, at 269 ("[L]a pesantezza è sconfitta solo dalla grazia.", *translated* "Heaviness is only defeated by grace.").

37. *See* Rozelle-Stone & Davis, *supra* note 30 ("For Weil, natural/necessary gravity (force) and supernatural/spiritual grace (justice) are the two fundamental aspects of the created world, coming together most prominently in the crucifixion. The shape of the cross itself reflects this intersection of the horizontal (necessity) and the vertical (grace).").

38. ROOTS, *supra* note 1, at xi, xiv.

39. *See* Max Norman, *The Subversive Philosophy of Simone Weil*, PROSPECT MAG. (Apr. 11, 2021), https://www.prospectmagazine.co.uk/arts-and-books/the-subversive-philosophy-of-simone-weil[https://perma.cc/C7TY-L23S] (archived Sept. 4, 2022).

40. *See* ROOTS, *supra* note 1, at 177.

41. Rozelle-Stone & Davis, *supra* note 30 (noting that "[o]verall, Weil presents not a law-based or rights-based, but a compassion-based morality, involving obligations to another that are discernible through attention").

42. *See* SIMONE PÉTREMENT, SIMONE WEIL: A LIFE 462 (Raymond Rosenthal trans., 1976) (referring to Letter from Simone Weil to Joë Bousquet (Apr. 13, 1942)).

Like the political philosopher Hannah Arendt (1906–1975),[43] Weil "believes that the tragedy of the twentieth century is partially to be understood through people's experience of being uprooted," that is, "being unable to find a place, a role, or a life of meaning."[44] For Weil "uprootedness" or deracination indicates a near universal condition resulting from the destruction of ties with the past and the loss of community.[45] Uprooted people lack a sense of their own vital place in the world. Not only did Weil refer to millions of displaced people, refugees, and asylum seekers, but also to millions of peasants and workers who found themselves uprooted by industrialization.[46] Industrial productivity may be a force for good, but it has a high price. In an epoch characterized by the worship of money and commitment to an individualistic and rights-based (mis)conception of justice, any living sense of the sacred is lost and individuals feel uprooted. *The Need for Roots* thus diagnoses the causes of the social, cultural, and spiritual malaise that Weil believed afflicted twentieth century civilization and proposes some remedies for a cultural renaissance.

What makes *The Need for Roots* particularly relevant now is its appraisal of the ethic of liberalism that had originally emerged to serve the needs of the industrial society.[47] Even today, the deliberate destruction of cultural heritage often takes place in the belief that industrial or mining projects will foster economic growth.[48] Little, if any, attention is paid to the safeguarding of cultural heritage and the well-being of local communities whose heritage is affected by foreign direct investments in the mining and other industrial sectors.[49] However, as Weil cautions, it is not the fame, the size, or the gross

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43. HANNAH ARENDT, LE ORIGINI DEL TOTALITARISMO [*The Origins of Totalitarism*] 651 (A. Guadagnin trans., 2004) (stating that "[e]ssere sradicati significa non avere un postoriconosciuto e garantito dagli altri; essere superflui significa non appartenere al mondo. Lo sradicamento può essere la condizione preliminare della superfluità", *translated* "Being uprooted means not having a place recognized and guaranteed by others; being superfluous means not belonging to the world. Eradication can be the precondition for superfluity.") (It.).

44. Simon Duffy, *Review: The Need for Roots*, CITIZEN NETWORK (Sept. 17, 2014), https://citizen-network.org/library/the-need-for-roots.html [https://perma.cc/HP7A-UC5W] (archived Aug. 14, 2022).

45. *See* Lyndsey Stonebridge, *Simone Weil's Uprooted*, *in* PLACELESS PEOPLE: WRITINGS, RIGHTS, AND REFUGEES (2018) (noting that "[f]or Simone Weil, deracination was the tragic condition of modern times, affecting not only refugees and the dispossessed, but all who capitalism and colonialism had torn from their roots").

46. *See id.*

47. *See* Pankaj Mishra, *The Need for Roots Brought Home the Modern Era's Disconnection with the Past and the Loss of Community*, GUARDIAN (Aug.18, 2013), https://www.theguardian.com/commentisfree/2013/aug/18/need-roots-disconnection-past-community [https://perma.cc/97XN-A5KK] (archived Aug. 14, 2022).

48. *See infra* Part III.

49. *See generally* Valentina Vadi, *Local Communities, Cultural Heritage and International Economic Law*, *in* LOCAL ENGAGEMENT WITH INTERNATIONAL ECONOMIC LAW AND HUMAN RIGHTS 150–68 (Ljiljana Biuković & Pitman Potter eds., 2017).

domestic product of a country that really matters: "[I]nstead, it is whether the country can offer people a way of life that is fully rooted."[50]

"A human being," according to Weil, "has roots by virtue of his real, active, and natural participation in the life of a community which preserves in living shape certain particular treasures of the past and certain particular expectations for the future."[51] For Weil, human beings are social animals who need to belong to communities and places in order to flourish. Cultural heritage is a paradigmatic expression of such roots that was left by the generations that preceded us and is transmitted to future generations. For Weil, politics, or a shared political vision, should adopt and express "tender feelings" for the "beautiful, precious, fragile, and perishable object." [52] The conservation of cultural heritage thus plays a crucial role in Weil's political theory.

Against this background, for Weil, the destruction of the past—traditionally associated with wars of conquest but also the colonization processes and the Industrial Revolution—is "perhaps the greatest of all crimes."[53] In her most famous work, *Iliad or the Poem of Force*, Weil aptly noted that "the greatest misfortune that could occur among men is the destruction of a city."[54] In her political theory, cities symbolize humanity, civilization, and the paradigm of human resistance and resilience. In *Venice Saved*, the only play authored by Weil and published posthumously, Weil referred to a 1618 plot to overthrow the Republic of Venice and bring it under Spanish rule.[55] In the play, Venice successfully resisted the violent plan of a band of mercenaries, men without roots, "men of action and adventure, the dreamers [who attempted to] . . . force others to dream their dream."[56] In fact, the beauty and frailty of Venice persuade one of the conspirators to save it; in the play, "beauty opens the way for grace to enter the human

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50. Duffy, *supra* note 44.

51. ROOTS, *supra* note 1, at 40.

52. *Id.* at 167 (adding "[I]sn't a man easily capable of acts of heroism to protect his children or his aged parents? . . . A perfectly pure love for one's country bears a close resemblance to the feelings which his young children, his aged parents, or a beloved wife inspire in a man.").

53. ROOTS, *supra* note 1, at 48.

54. SIMONE WEIL, THE ILIAD OR THE POEM OF FORCE: A CRITICAL EDITION 65 (James P. Holoka ed. & trans., 2006) (1940).

55. *See generally* SIMONE WEIL, VENICE SAVED (Silvia Panizza trans., 2019) (depicting the plot by a group of Spanish mercenaries to sack Venice in 1618 and how it fails when one conspirator, Jaffier, betrays them to the Venetian authorities, because he feels compassion for the city's beauty).

56. Maria Nadotti, *Venezia Salva*, ARTFORUM, Summer 1994, at 11; *see also* WEIL, *supra* note 54 (adding that "[t]he victor lives his dream. The vanquished lives the dream of others.").

heart . . . . In the mystifying process, a city was rescued" and its people maintained their roots.[57]

What exactly was saved when Venice was saved—beauty, freedom, culture, history, the "rootedness" of the city's inhabitants? While Venice, under siege, allegorized France (and arguably Europe) invaded by Nazi troops in World War II, it is plausible to read a broader meaning into the play. Cultural treasures should be preserved because they constitute the essence, spirit, wealth, and patrimony of a community. They constitute the cultural legacy of a civilization and benefit humankind as a whole.

After having briefly examined the interplay between foreign direct investments and cultural heritage from a philosophical perspective and expressing it as a relationship between gravity and grace, this Article proceeds as follows. Part II investigates the legal interplay between foreign direct investments and cultural heritage in international investment law and arbitration. Part III highlights the main features of international investment law and arbitration. Part IV discusses several recent arbitrations. Part V examines whether investment treaty tribunals consider cultural interests when adjudicating investment disputes. Part VI proposes three main tools to better address the interplay between economic and cultural interests in international investment law and arbitration. Finally, some conclusions are drawn.

II. REDEEMING GRAVITY WITH GRACE: FOREIGN INVESTMENTS AND CULTURAL HERITAGE

For a long time, the mainstream development theory did not touch upon cultural heritage.[58] Rather, an international economic culture emerged based on macroeconomic notions of growth aimed at productivity and development. An industrial culture developed, which was "directed towards and influenced by technical science, . . . tinged with pragmatism, extremely broken up by specialization, entirely deprived both of contact with this world and, at the same time, of any window opening onto the world beyond." [59] Development was considered "a transformation of society, a movement from traditional relations, traditional ways of thinking, . . . [and] traditional methods

57. Ronald Collins, *The Play's the Thing: On Simone Weil's Venice Saved*, L.A. REV. BOOKS (Aug. 28, 2019), https://lareviewofbooks.org/article/the-plays-the-thing-on-simone-weils-venice-saved/ [https://perma.cc/59VA-BWJG] (archived Aug. 14, 2022).

58. *See World Heritage and Sustainable Development*, UNITED NATIONS EDUCATIONAL, SCIENTIFIC, AND CULTURAL ORGANIZATION, UNESCO, whc.unesco.org/en/sustainabledevelopment (last visited Nov. 19, 2021) [https://perma.cc/AX38-AK53] (archived Aug. 14, 2022).

59. ROOTS, *supra* note 1, at 42.

of production, to more modern ways."[60] By conceptualizing economic progress as "a process of successive upgrading," economists have highlighted the pressures on societies to adopt a productive economic culture and the "growing convergence around the productivity paradigm."[61] For instance, the 2000 Millennium Development Goals did not even mention cultural heritage, as if culture did not belong to developmental discourse.[62]

However, this absence from developmental discourse has started to change. Cultural heritage has increasingly been perceived as a strategic driver of sustainable development,[63] that is, development that meets the needs of the present and future generations.[64] Cultural heritage can be an engine of economic growth and welfare, be central in people's lives, empower them, and enrich their existence in both a material and immaterial sense.[65] In turn, development has been conceived as a broad concept inclusive of not only economic growth, but also human flourishing and well-being, for which cultural elements are crucial.

In the 2030 Agenda for Sustainable Development, one of the Sustainable Development Goals,[66] Goal 11—make cities and human settlements inclusive, safe, resilient, and sustainable—expressly acknowledges, inter alia, the need to "strengthen efforts to protect and safeguard the world's cultural and natural heritage."[67] The Agenda for Sustainable Development also includes respect for cultural diversity

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60. Joseph E. Stiglitz, Senior Vice President & Chief Economist, World Bank, 9th Raúl Prebisch Lecture at the United Nations Conference on Trade and Development: Toward a New Paradigm for Development 5 (Oct. 18, 1998), https://unctad.org/webflyer/towards-new-paradigm-development-dr-joseph-e-stiglitz-senior-vice-president-and-chief [https://perma.cc/PX27-8X4G] (archived Aug. 14, 2021).

61. Michael E. Porter, *Attitudes, Values, Beliefs, and the Microeconomics of Prosperity*, *in* CULTURE MATTERS: HOW VALUES SHAPE HUMAN PROGRESS 14, 26 (Samuel P. Huntington & Lawrence E. Harrison eds., 2000).

62. *See Millennium Development Goals (MDGs)*, UNITED NATIONS, www.un.org/millenniumgoals (last visited Nov. 19, 2021) [https://perma.cc/G8HD-9Y8J] (archived Aug. 14, 2022).

63. *See, e.g.*, G.A. Res. 68/223 (Dec. 20, 2013).

64. *See generally* DAVID THROSBY, THE ECONOMICS OF CULTURAL POLICY (2010).

65. *See* UNESCO, UNESCO UNIVERSAL DECLARATION ON CULTURAL DIVERSITY 57 (2002), https://unesdoc.unesco.org/ark:/48223/pf0000127162 (last visited Nov. 19, 2021) [https://perma.cc/7FKB-MND8] (archived Aug. 14, 2022) (acknowledging that "cultural diversity is one of the roots of development, understood not simply in terms of economic growth, but also as a means to achieve a more satisfactory intellectual, emotional, moral, and spiritual existence").

66. *Sustainable Development Goals (SDGs) of the 2030 Agenda for Sustainable Development*, UNITED NATIONS (last visited Nov. 22, 2021), www.un.org/sustainabledevelopment/development-agenda [https://perma.cc/4XFB-8S3B] (archived Aug. 14, 2022).

67. *Sustainable Development Goals of the 2030 Agenda for Sustainable Development: Goal 11.4*, UNITED NATIONS (last visited Nov. 22, 2021), https://www.un.org/sustainabledevelopment/cities/ [https://perma.cc/SN9G-A29Z] (archived Aug. 14, 2022).

among its objectives [68] and "pledge[s] to foster intercultural understanding, tolerance, [and] mutual respect," while "recogniz[ing] that all cultures and civilizations can contribute to, and are crucial enablers of, sustainable development."[69]

More recently, in 2020, architects, artists, engineers, economists, and leading thinkers signed a manifesto for a cultural renaissance of the economy in response to the ongoing pandemic. The open letter highlights the importance of culture for global prosperity and sustainable development, noting that "territories that successfully preserve and promote the different aspects of their original identities will enjoy a real competitive advantage" on the global plane.[70] Such cultural awareness can improve our understanding of other cultures.[71] The statement also endorses the idea of the purple economy—that is, an economy that considers cultural aspects and adapts to, and benefits from, cultural diversity. [72] In sum, cultural factors are capable of transforming economics and paving the way for global prosperity.

While there may be mutual support between the promotion of foreign direct investment and the protection of cultural heritage, 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 extractive industries have the capacity to change cultural landscapes, destroy monuments, and erase memories.[73]

A highly effective legal framework demands that states promote foreign direct investment. Under most international investment

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68. *2030 Agenda: Universal Values*, UNITED NATIONS, https://unsdg.un.org/2030-agenda/universal-values (last visited Nov. 22, 2021) [https://perma.cc/BYL4-5GP8] (archived Aug. 14, 2022) (The state parties "envisage a world of universal respect for human rights and human dignity, the rule of law, justice, equality and non-discrimination; of respect for race, ethnicity and cultural diversity; and of equal opportunity permitting the full realization of human potential and contributing to shared prosperity.").

69. *UN General Assembly adopts a new resolution on culture and sustainable development*, UNESCO (Apr. 21, 2022), https://www.unesco.org/en/articles/un-general-assembly-adopts-new-resolution-culture-and-sustainable-development [https://perma.cc/AHB9-VBLA] (archived Aug. 14, 2022).

70. *Per Un Rinascimento Culturale dell'Economia* [*For a Cultural Renaissance of the Economy*], CORRIERE DELLA SERA (June 7, 2020), https://www.corriere.it/cultura/20_giugno_07/per-rinascimento-culturale-dell-economia-dcacbef2-a803-11ea-b900-84da2a1f22a9.shtml (last visited Nov. 19, 2021) [https://perma.cc/B5LK-D2UW] (archived Aug. 14, 2022) (It.).

71. *See id.*

72. *See* Santosh Kumar Tripathi & Snehlata Jaiswal, *Purple Economy: Component of a Sustainable Economy in India*, 20 J. BUS. & MGMT. 47, 47 (2018) (noting that "the purple economy refers to taking account of cultural aspects in economics. It designates an economy that adapts to the human diversity in globalization.").

73. *See infra* Part III.

agreements (IIAs), states have agreed to grant arbitrators wide jurisdiction over what are essentially regulatory disputes. Modern IIAs do not require the intervention of the home state in the furtherance of a dispute.[74] In practice, this means that foreign investors have access to arbitration against the host state if there is an IIA between the home state and the host state. Given that there are more than three thousand IIAs worldwide, investment treaty arbitrations have become increasingly frequent.[75]

Foreign investors increasingly claim that cultural policies violate international investment law before investment treaty arbitral tribunals.[76] Arbitral tribunals are given the power to review the exercise of public authority and settle disputes by determining the appropriate boundary between two conflicting values: the legitimate sphere for state regulation for protecting cultural heritage on the one hand, and the protection of private interests from state interference on the other.[77]

This Article contributes to the existing literature by discussing the key features of the interplay between the protection of cultural heritage and the promotion of foreign direct investments in international investment law and arbitration and by examining several arbitrations that have emerged in the last few years. This recent jurisprudence highlights that arbitral tribunals are increasingly providing consideration to cultural concerns. However, the interplay between the protection of cultural heritage and the promotion of foreign direct investments in international investment law and arbitration continues to pose three main problems: (1) an ontological problem concerning the essence of international investment law, (2) an epistemological problem concerning the mandate of arbitral tribunals, and (3) a normative problem concerning the emergence of general principles of law.

Regarding 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 and mutual supportiveness between different treaty regimes? Regarding the epistemological problem, arbitral tribunals have limited jurisdiction; they have a limited mandate to assess state compliance with

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74. *See* VALENTINA VADI, PROPORTIONALITY, REASONABLENESS AND STANDARDS OF REVIEW IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION 1 (2018) (noting that "[i]nvestors are not required to exhaust local remedies and no longer depend on diplomatic protection to defend their interests against the host state").

75. *Id.* at 4 ("IIAs include BITs, regional investment treaties, free trade agreements (FTAs) or sectoral agreements with investment provisions, such as the Energy Charter Treaty.").

76. *See* Valentina Vadi, *Toward a* Lex Administrative Culturalis? *The Adjudication of Cultural Disputes Before Investment Arbitral Tribunals* 4 (Jean Monnet Working Paper Program, Working Paper No. 17/14, 2014).

77. *Id.* at 2.

international investment law but do not have a specific mandate to ascertain the adequate protection of cultural heritage. Therefore, the key question is whether they can consider cultural concerns in the adjudication of investment disputes and, if so, to what extent. Regarding the normative problem, the question is whether general principles of law have emerged requiring the protection of cultural heritage in times of peace.

III. INTERNATIONAL INVESTMENT LAW AND ARBITRATION AS A TOOL OF GLOBAL CULTURAL GOVERNANCE

Once deemed to be an "exotic and highly specialized" domain,[78] international investment law is now becoming mainstream.[79] Due to economic globalization and the rise of foreign direct investments, the regulation of the field has become a key area of international law and a well-developed field of study. As there is no single comprehensive global investment treaty, investors' rights are defined by an array of IIAs, customary international law, and general principles of law.[80]

At the substantive level, "[i]nternational investment law provides extensive protection to investors' rights in order to encourage foreign direct investment and foster economic development."[81] Under IIAs, parties agree to provide a certain degree of protection to investors, who are nationals of contracting states, or their investments. Such protection generally includes compensation in case of expropriation, fair and equitable treatment, non-discrimination, and full protection and security, among others.[82]

At the procedural level, international investment law is characterized by sophisticated dispute settlement mechanisms. While state-to-state arbitration is rare,[83] investor-state arbitration is the most successful in settling investment-related disputes.[84] Nowadays, most IIAs allow investors to directly access international arbitral

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78. Int'l Law Comm'n, Rep. of the Study Group of the International Law Commission of Its Fifty-Eighth Session, U.N. Doc. A/CN.4/L.682, ¶ 8 (2006) [hereinafter Rep. of the Study Group].

79. *See* Stephan W. Schill, *W(h)ither Fragmentation? On the Literature and Sociology of International Investment Law*, 22 EUR. J. INT'L L. 875, 876 (2011).

80. *See* Statute of the International Court of Justice art. 38, June 26, 1945, 33 U.N.T.S. 993.

81. Valentina Vadi, *The Protection of Indigenous Cultural Heritage in International Investment Law and Arbitration*, *in* THE INHERENT RIGHTS OF INDIGENOUS PEOPLES IN INTERNATIONAL LAW 203, 210 (2020).

82. VADI, *supra* note 74, at 248.

83. *See* Anthea Roberts, *State-to-State Investment Treaty Arbitration: A Hybrid Theory of Interdependent Rights and Shared Interpretive Authority*, 55 HARV. INT'L L.J. 1, 3 (2014) ("This lack of attention [to the scope of state-to-state arbitration] is understandable given the high number of investor-state claims and the relative dearth of state-to-state cases since the mid-1990s.").

84. Susan D. Franck, *Development and Outcomes of Investor Treaty Arbitration*, 50 HARV. INT'L L.J. 435, 440, 444 (2009).

tribunals. [85] Arbitral tribunals are typically composed of three members: one arbitrator selected by the claimant, another selected by the respondent, and a third appointed by a method that attempts to ensure neutrality.[86] All arbitrators are required to be independent and impartial. Under this mechanism, investors do not need to exhaust local remedies and do not depend on diplomatic protection to defend their interests against the host state.[87]

The internationalization of investment disputes has been conceived as an important valve for guaranteeing a neutral forum and depoliticizing investment disputes.[88] Investor-state arbitration shields investment disputes from power politics and insulates them from the diplomatic relations between states. [89] The depoliticization of investment disputes benefits foreign investors, the host state, and the home state.[90] First, foreign investors no longer have to rely on the vagaries of diplomatic protection; rather, they can bring direct claims and make strategic choices in the conduct of the arbitral proceedings.[91] In this regard, investor-state arbitration can facilitate access to justice for foreign investors and provides a neutral forum for the settlement of investment disputes.[92] Such access is considered necessary to render meaningful investment treaty provisions. Second, the depoliticization of investment disputes protects the host state by reducing the home state's interference in its domestic affairs.[93] It prevents or "limit[s] unwelcome diplomatic, economic and perhaps military pressure from strong states whose nationals believe they have been injured."[94] Third, the depoliticization of investment disputes also protects the home state in that it no longer has to become involved in investor-state disputes.[95]

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85. *See* Valentina Vadi, *Towards a New Dialectics: Pharmaceutical Patents, Public Health and Foreign Direct Investments*, 5 N.Y.U J. INTELL. PROP. & ENT. L. 113, 133 (2015) (citing Lahra Liberti, *Intellectual Property Rights in International Investment Agreements: An Overview* 1, 3 (OECD Working Papers on Int'l Inv., No. 2010/01, 2010)).

86. Chiara Giorgetti, *The Arbitral Tribunal: Selection and Replacement of Arbitrators*, *in* LITIGATING INTERNATIONAL INVESTMENT DISPUTES: A PRACTITIONER'S GUIDE 143, 143 (2014).

87. VALENTINA VADI, PUBLIC HEALTH IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION 19–20 (2012).

88. *See* Ibrahim F.I. Shihata, *Toward a Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA*, 1 ICSID REV. – FILJ 1, 4 (1986).

89. *See* Sergio Puig, *No Right Without a Remedy: Foundations of Investor–State Arbitration*, 35 UNIV. PA. J. INT'L L. 829, 848–53 (2014).

90. *See* Anthea Roberts, *Triangular Treaties: The Extent and Limits of Investment Treaty Rights*, 56 HARV. INT'L L.J. 353, 390 (2015).

91. Puig, *supra* note 89, at 844.

92. *See* Francesco Francioni, *Access to Justice, Denial of Justice and International Investment Law*, 20 EUR. J. INT'L L. 729 (2009).

93. Roberts, *supra* note 90, at 389–90.

94. Joost Pauwelyn, *At the Edge of Chaos? Foreign Investment Law as a Complex Adaptive System, How It Emerged and How It Can Be Reformed*, 29 ICSID REV. 372, 404 (2014).

95. Roberts, *supra* note 90, at 390.

Arbitral tribunals have reviewed host state conduct in key sectors, including cultural heritage.[96] In fact, given the "structural imbalance between the vague and non-binding dispute settlement mechanisms" provided by international instruments adopted by the United Nations Educational, Scientific, and Cultural Organization (UNESCO) and "the highly effective and sophisticated dispute settlement mechanisms under international investment law," [97] a number of investment disputes related to cultural heritage have been brought before investment treaty arbitral tribunals.[98] Consequently, many of the recent arbitral awards have determined the boundary between two conflicting values: the legitimate need for state regulation in the cultural sector on the one hand, and the protection of private interests from state interference on the other.

This Part examines and critically assesses several recent arbitrations. Given the potential impact of arbitral awards on cultural governance and the growing number of investment arbitrations, scrutiny and critical assessment of this jurisprudence is particularly timely and important. Such scrutiny illuminates the way that international investment law responds to cultural concerns in its operation, thereby contributing to the ongoing investigation of the role of international investment law within the broader matrix of international law.[99] It also shows that, although unforeseen to its makers, international investment arbitration has become an unlikely but effective tool for global cultural governance. Although this jurisprudence is heterogeneous, it can be scrutinized according to the taxonomy of the claims brought by foreign investors, including, inter alia, the notion of investment, non-discrimination, fair and equitable treatment, expropriation, and compensation standards.

A. *The Notion of Investment*

States sign international investment agreements (IIAs) for promoting and protecting reciprocal investments. Addressing the question as to whether certain economic activities relating to cultural

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96. *See generally* VALENTINA VADI, CULTURAL HERITAGE IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION (2014).

97. Valentina Vadi, *Heritage, Power, and Destiny: The Protection of Indigenous Heritage in International Investment Law and Arbitration*, 50 GEO. WASH. INT'L L. REV. 725, 737–38 (2018).

98. Obviously, this does not mean that these are the only available courts for this kind of dispute. Other tribunals are available such as national courts, human rights courts, regional economic courts and traditional state-to-state courts and tribunals such as the International Court of Justice or even inter-state arbitration. Some of these dispute settlement mechanisms may be more suitable than investor–state arbitration to address cultural concerns. However, given its scope, this study focuses on the jurisprudence of arbitral tribunals. Vadi, *The Protection of Indigenous Cultural Heritage*, *supra* note 81, at 210.

99. *See id.* at 212.

heritage amount to an investment is crucial to establishing an arbitral tribunal's subject matter jurisdiction. Individuals or companies are entitled to the substantive and procedural protections afforded by the treaty only if the treaty classifies them as "investors" or their economic activity as an "investment." 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 heritage-related economic activities constitute a form of protected investment under a given IIA, one has to examine the text of the applicable treaty, as investment agreements generally provide slightly different definitions of investment. If the parties have opted for resolving their dispute at the International Centre for Settlement of Investment Disputes (ICSID), the ICSID Convention will also be applicable, which extends jurisdiction "to any legal dispute arising directly out of an investment." [100] In this situation, the adjudicators will have to determine whether a given economic activity constitutes an investment under both the ICSID Convention and the applicable IIA.

Regarding the ICSID Convention, it does not provide a definition of investment.[101] Rather, it stipulates that ICSID jurisdiction extends "to any legal dispute arising directly out of an investment." [102] In practice, this has meant that commentators and arbitral tribunals have elaborated a number of criteria for defining the term.[103] Most notably, the leading test was articulated by *Salini Costruttori S.p.A. v. Kingdom of Morocco*, which involves a dispute arising out of the 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.[104] These requirements embody a balance between

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100. Convention on the Settlement of Investment Disputes between States and Nationals of Other States §25(1), Mar. 18, 1965, 17 U.S.T. 1270 [hereinafter ICSID Convention].

101. *See* Alex Grabowski, *The Definition of Investment Under the ICSID Convention: A Defense of Salini*, 15 CHI. J. INT'L L. 287, 293 (2014) (noting that "[t]he signatories to the [ICSID] convention purposefully left the term 'investment' undefined when granting the body jurisdiction over matters of international investment").

102. ICSID Convention, art. 25(1).

103. *See* Grabowski, *supra* note 101, at 293.

104. Salini Costruttori S.p.A. v. Kingdom of Morocco, ICSID Case No. ARB/00/4, 42 ILM 609, Decision on Jurisdiction, ¶ 52 (July 23, 2001). The need for the last element, the contribution to the economic development of the host state, is sometimes put in doubt. Quiborax v. Plurinational State of Bolivia, ICSID Case No. ARB/06/2, Decision on Jurisdiction, ¶ 220 (Sept. 27, 2012); Grabowski, *supra* note 101, at 290 (detailing that *Quiborax* argues that "while the ICSID Convention attempts to foster economic development via international investment, such development is not a necessary element of investment"). *See generally* Apotex Holdings Inc. v. United States, ICSID Case No. ARB(AF)/12/1, Award (Aug. 25, 2014) (holding that it did not seem necessary that the investment contribute to the economic development of the country; according to the Tribunal, the contribution to economic development was difficult to establish, and was implicitly covered by the other three elements of an investment).

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," "the definitions of 'investment' in contemporary treaties tend to be broad and open-ended," resting on the assumption that "foreign investment tends to spur economic development."[105] Yet, the quantitative tendency toward amplifying the definition of investment in treaties has not necessarily lent more clarity to the qualitative understanding of the concept of investment.[106] Therefore, with regard to the notion of investment, clarifying this concept has been left to the interpretation of practitioners and arbitrators.

In *Cortec Mining Kenya, Ltd. v. Republic of Kenya*,[107] the Arbitral Tribunal established under the 1999 Kenya-United Kingdom Bilateral Investment Treaty (BIT) held that it lacked jurisdiction to hear a dispute concerning a mining project that the Tribunal found did not comply with domestic environmental law. The Tribunal found that, in order 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 and was, therefore, not protected as such.[108]

Cortec planned to develop a niobium and rare-earths mine at Mrima Hill in Kenya in 2007.[109] Mrima Hill is located about 70 km to the south of Mombasa and is "home to a natural forest" which is "rich in biodiversity and rare species."[110] Reportedly, "Mrima Hill is also a Kaya . . . [a] relict patc[h] of forest that once sheltered the fortified villages of the Mijikenda people (in Mrima's case, the Digo) on the Kenyan coast." [111] Accordingly, it has "spiritual and ceremonial significance."[112] Cortec was initially granted a prospecting license for its project and subsequently granted a mining license over an area that

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105. BARTON LEGUM, DEFINING INVESTMENT AND INVESTOR: WHO IS ENTITLED TO CLAIM?, ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT 2 (Dec. 12, 2005), https://www.oecd.org/investment/internationalinvestmentagreements/36370461.pdf [https://perma.cc/TW3B-D2AG] (archived July 26, 2022).

106. *See generally* Grabowski, *supra* note 101.

107. Cortec Mining Kenya, Ltd. v. Republic of Kenya, ICSID Case No. ARB/15/29, Award (Oct. 22, 2018).

108. *Id.* ¶ 387.

109. *Id.* ¶ 1.

110. *Id.* ¶ 42.

111. *Mrima Hill Forest, Kenya*, KEY BIODIVERSITY AREAS, https://www.keybiodiversityareas.org/site/factsheet/6408 (last visited Sept. 4, 2022) [https://perma.cc/T7JQ-JQS7] (archived Sept. 4, 2022).

112. *Id.*; *see also Sacred Mijikenda Kaya Forests*, UNESCO WORLD HERITAGE CONVENTION, https://whc.unesco.org/en/list/1231/ (last visited Aug. 23, 2022) [https://perma.cc/T56A-XXRX] (archived Aug. 23, 2022).

included Mrima Hill. Following a change of government, the mining license was revoked in 2013.[113] In Kenya's view, the conditions for the mining license had not been met, and Kenyan law prohibited mining in Mrima Hill. Cortec advanced its claim on the basis 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."[114] In fact, "as a matter of statute law, a number of key approvals and consents were required and conditions were to be satisfied before they could be allowed to obtain a valid mining license, including requirements arising out of the special protected status of Mrima Hill as a forest reserve, nature reserve, and national monument."[115] The same Kenyan Mining Act has been prohibiting all prospecting and mining at Mrima Hill since 1997.[116] 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.[117]

The Arbitral Tribunal concluded that the applicable BIT "protects only lawful investments."[118] In order to be protected, a mining license must be in compliance with the domestic law that establishes and governs it.[119] The alleged investment—Cortec's mining license—was procured by the claimants' successful lobbying but was void from the outset because it had been issued in violation of Kenyan laws.[120] The Tribunal held that such a breach of domestic law could not be waived by politicians.[121] Therefore, such a "license" did not constitute a protected investment under the BIT. Since there was no mining license, there was no basis for tribunal jurisdiction under the BIT. The only valid license held by Cortec was a prospecting license—which "was not itself a license to make money . . . [but] a license to spend money. Prospecting, as such, involves cost not revenue."[122]

In 2019, Cortec sought an annulment of this award, arguing that regulatory compliance was not a jurisdictional issue and that there was no express legality requirement in the Kenya-United Kingdom BIT. Therefore, according to the claimant, the reading of a legality requirement into the BIT, and the resulting conclusion that their mining license was not an investment, amounted to an extra-

113. *Cortec Mining Kenya, Ltd.*, Award, ¶ 2.
114. *Id.* ¶ 4.
115. *Id.* ¶ 5.
116. *Id.* ¶ 43.
117. *Id.* ¶ 7.
118. *Id.* ¶ 9.
119. *Id.* ¶¶ 222, 319, 322.
120. *Id.* ¶¶ 11, 222, 364–65.
121. *Id.* ¶ 105.
122. *Id.* ¶ 328.

jurisdictional exercise of the Tribunal's powers.[123] In parallel, the company also claimed that the Tribunal failed to exercise jurisdiction over Cortec's investments.

The ad hoc Annulment Committee's decision on the annulment application dismissed each of these arguments.[124] For the Committee, reading an implicit legality requirement into the BIT is not untenable; the Committee thus upheld the Tribunal's finding that the mining license was not a protected investment on the basis that it failed to comply with Kenyan environmental 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."[125]

B. *Non-Discrimination*

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)."[126] The ascertainment of non-discrimination is based on three steps: first, arbitrators must assess whether the investments being compared are similar; second, they must scrutinize whether the treatment they receive is also similar; third, if the investments are similar but receive different treatment, then arbitrators must investigate whether there are reasonable justifications for such differential treatment. The non-discrimination principle is typically reflected in the provisions of national treatment and most favoured nation treatment.[127] 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.[128]

The ascertainment of non-discrimination is crucial in investment disputes with elements of cultural heritage; the key question is whether foreign investments are being regulated because the activity in question presents certain risks to world heritage, or whether they are being regulated because they are foreign investments.

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123. *See* Cortec Mining Kenya, Ltd. v. Republic of Kenya, ICSID Case No. ARB/15/29, Application for Annulment, ¶¶ 20–21 (Feb. 15, 2019).

124. Cortec Mining Kenya, Ltd. v. Republic of Kenya, ICSID Case No. ARB/15/29, Decision on Application for Annulment, ¶ 290 (Mar. 19, 2021).

125. *Id.* ¶ 143.

126. ANDREW D. MITCHELL, DAVID HEATON & CAROLINE HENCKELS, NON-DISCRIMINATION AND THE ROLE OF REGULATORY PURPOSE IN INTERNATIONAL TRADE AND INVESTMENT LAW 2 (2016).

127. On nondiscrimination in international investment law and arbitration, see generally Federico Ortino, *Non-Discriminatory Treatment in Investment Disputes*, *in* HUMAN RIGHTS IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION 344 (Pierre-Marie Dupuy et al. eds., 2009).

128. *Id.* at 349.

Discrimination and non-discrimination "are not polar opposites in a static system,"[129] as "there may be several ways in which the notion of . . . discrimination may be understood."[130]

Difficulties arise in ascertaining discrimination in the cultural sector: while states could have legitimate reasons for imposing cultural policy measures that differentiate foreign investors from other actors, it may be difficult to distinguish cultural motives from protectionism.[131] As Tania Voon highlights, identifying the true motive for a governmental measure may be problematic not only because such a measure may be determined by a number of factors, but also because the true reasons may diverge from the official narratives.[132] In order to detect discrimination, Voon suggests the use of criteria such as the efficiency and/or effectiveness of the given regulatory measure.[133] Rachael Craufurd Smith analogously argues that proportionality "could guide the application of [cultural policy] measures and serve to prevent more blatant forms of protectionism."[134]

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.[135] Rather than asking "what is right and wrong," adjudicators investigate whether something is proportionate.[136] 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.[137]

Moreover, arbitral tribunals have rarely referred to the concept of proportionality and, when they have done so, this reference has led to suboptimal results.[138] In *S.D. Myers, Inc. v. Gov't of 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

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129. KONRAD VON MOLTKE, ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, DISCRIMINATION AND NON-DISCRIMINATION IN FOREIGN DIRECT INVESTMENT MINING ISSUES 7 (Feb. 7, 2002), https://www.oecd.org/env/1819921.pdf (last visited Sept. 4, 2022) [https://perma.cc/2KNQ-TT43] (archived July 27, 2022).

130. Ortino, *supra* note 172, at 349.

131. *See* Tania Voon, *State Support for Audiovisual Products in the World Trade Organization: Protectionism or Cultural Policy?*, 13 INT'L J. CULTURAL PROP. 129, 142–43 (2006).

132. *Id.* at 144.

133. *Id.* at 144–45.

134. Rachael Craufurd Smith, *The UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions: Building a New World Information and Communication Order?*, 1 INT'L J. COMMC'NS 24, 40–41 (2007).

135. *See* Stavros Tsakyrakis, *Proportionality: An Assault on Human Rights?*, 7 INT'L J. CONST. L. 468, 482 (2009).

136. *Id.* at 487.

137. Valentina Vadi, *A History of Success? Proportionality in International Economic Law*, *in* THE REFORM OF INTERNATIONAL ECONOMIC GOVERNANCE 9 (Antonio Segura Serrano ed., 2016).

138. VADI, *supra* note 74, at 99.

on the export of polychlorinated biphenol (PCB) wastes from Canada to the United States.[139] The claimant, a US company specializing in the remediation of PCB waste, argued that the ban applied in a discriminatory manner, in effect favouring Canadian operators who were not involved in transborder activities.[140] The Tribunal used the concept of propor-tionality to assess whether Canada had breached the national treatment provision of the North American Free Trade Agreement. It investigated whether the ban on the export of PCBs had a legitimate aim, and whether it disproportionately benefitted nationals over foreign investors.[141] The Tribunal considered the ability to process PCBs within Canada to be a legitimate objective in light of the Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (Basel Convention).[142] However, the Tribunal found that the ban discriminated against the foreign investor in breach of the national treatment provision because there were other less restrictive ways to achieve the same objective.[143] 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.[144] The use of proportionality analysis in detecting discrimination has remained relatively isolated in investment arbitration.[145]

As a valid alternative, reasonableness belongs to the lexicon of treaty interpretation.[146] "[I]ts open-endedness makes it particularly fit

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139. S.D. Myers, Inc. v. Gov't of Canada, UNCITRAL/NAFTA, Partial Award, ¶ 126 (Nov. 13, 2000).

140. For a discussion of this case, see VALENTINA VADI, PUBLIC HEALTH IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION 141 (2012).

141. *S.D. Myers, Inc.*, Partial Award, ¶ 252.

142. Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, Mar. 22, 1989, 28 I.L.M. 656 [hereinafter Basel Convention].

143. *S.D. Myers, Inc.*, Partial Award, ¶ 255.

144. *See* VADI, *supra* note 140, at 145.

145. *See* VADI, *supra* note 74, at 101.

146. *See, e.g.*, 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, 164 I.C.J.27, ¶ 39 (Feb.1, 2012) (holding that "if 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, 6 Eur. Ct. H.R. (ser. A) at 31, ¶ 10 (1968) ("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, 216 Eur. Ct. H.R. (ser. A) at 31, ¶ 73 (1991) (defining discrimination as "different treatment, without an objective and reasonable justification, of persons in similar situations"); Karlheinz Schmidt v. Germany, Judgment, 291-B Eur. Ct. H.R. (ser. A) at 8, ¶ 24 (1994) (holding that "a difference of treatment is discriminatory if it has no 'objective and

for use in evolving legal systems because it enables such systems to adapt to emerging circumstances. Reasonableness is a flexible, pragmatic and contextual standard that has a distinct evaluative character and can deliver 'just results in individual cases.'"[147] 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 assesses whether a given measure is logically and rationally related to its objectives and is 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 pluralism."[148]

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."[149] To detect whether a state action has been discriminatory, arbitral tribunals first consider the issue of whether two circumstances are analogous; if they are, arbitrators will assume that their similarity 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 legitimate provided there are reasonable grounds to differentiate the treatment of investments.[150] 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

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reasonable justification'"); Belli and Arquier-Martinez v. Switzerland, App. No. 65550/13, ¶ 90 (Mar. 3, 2019), https://hudoc.echr.coe.int/eng?i=001-188649 [https://perma.cc/UH7U-4MU6] (archived Sept. 4, 2022) ("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.").

147. Jan Wouters & Sanderijn Duquet, *The Principle of Reasonableness in Global Administrative Law* 42 (Jean Monnet Working Paper Program, Working Paper No. 12/13, 2016)).

148. VADI, *supra* note 74, at 184.

149. Marvin Roy Feldman Karpa v. United Mexican States, ICSID Case No. ARB(AF)/99/1, Award, ¶ 170 (Dec. 16, 2002).

150. *See* Saluka Investments BV (The Netherlands) v. Czech Republic, UNCITRAL Partial Award, ¶¶ 66, 307 (Mar. 17, 2006) (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").

for such treatment; otherwise, it would be a discriminatory measure violating the national treatment standard."[151]

The open-endedness of the reasonableness criterion to distinguish legitimate distinction from unlawful discrimination is particularly suited to the cultural policy domain. Cultural policies may present internal tensions. Even if a cultural policy has a legitimate objective, there is an array of different tools available to achieve such an objective. For instance, in order to sustain linguistic diversity, states may give support to expression, creation, and dissemination in the greatest possible number of languages. On the other hand, in order to protect a certain language in danger of extinction, states might restrict the dissemination of other languages. The selection of the appropriate cultural policy is thus contingent on a number of factors.

Discrimination can be direct or indirect. Direct discrimination indicates openly discriminatory language in regulations. Indirect discrimination occurs when the use of apparently neutral criteria affects a particular group of people. It is possible to spot openly differentiating language in current cultural governance. If a measure "differentiates directly on the basis of origin," such *de jure* differentiation constitutes a factor pointing towards illegal discrimination.[152] However, the respondent has the opportunity to justify the measure by proving its legitimate policy objective and the rational 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 legitimate cultural interest.

Current regulations rarely include openly discriminatory language. However, some regulatory measures may result in de facto, unintentional, or indirect discrimination. For instance, in *Parkerings-Compagniet v. Republic of Lithuania*,[153] Parkerings, a Norwegian enterprise, filed a claim before an ICSID Tribunal, claiming that Lithuania breached the most favoured nation clause as a result of allegedly preferential treatment of a Dutch competitor.[154] Parkerings had concluded an agreement with the Municipality of Vilnius (Lithuania) for the construction of parking facilities.[155] Because of technical difficulties and the growing public opposition due to the cultural impact of the investor's project on the city's Old Town, a World Heritage site, the municipality terminated the agreement and subsequently signed another contract with a Dutch company for the

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151. Renée Rose Levy de Levi v. The Republic of Peru, ICSID Case No. ARB/10/17, Award, ¶ 215 (Feb. 26, 2014).

152. VALENTINA VADI, CULTURAL HERITAGE IN INTERNATIONAL ECONOMIC LAW (Brill *forthcoming* 2022).

153. Parkerings-Compagniet AS v. Republic of Lith., ICSID Case No. ARB/05/08, Award (Sept. 11, 2007).

154. *See id.* ¶ 203.

155. *See id.* ¶¶ 64, 174, 204.

completion of the project. The successful contractor would not excavate under the Old Town.[156]

The Tribunal dismissed this claim, finding that Parkerings and the Dutch competitor were not in like circumstances.[157] The project presented by Parkerings included excavation works under the cathedral.[158] Not only did the Tribunal pay due attention to cultural heritage matters, but it also stated that compliance with obligations flowing from the World Heritage Convention (WHC)[159] justified the refusal of the project, [160] holding 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."[161] While the Tribunal did not mention any hierarchy among different international law obligations, it concretely balanced the different norms.

C. *Fair and Equitable Treatment*

Fair and equitable treatment (FET) has become the most often-invoked provision in investment treaty arbitration. [162] 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 other 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 favoured nation principles, which, in contrast, define the required treatment by reference to the treatment accorded to other investments.

Whether or not the fair and equitable standard protects the legitimate expectations of foreign investors has been answered in various ways.[163] The concept of "legitimate expectations" allows a foreign investor to claim compensation in situations where the host

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156. *See id.* ¶ 282–84.

157. *See id.* ¶ 396.

158. *See id.* ¶ 392.

159. Convention Concerning the Protection of the World Cultural and Natural Heritage, Nov. 16, 1972, 1037 U.N.T.S. I-15511.

160. *See Parkings-Compagniet AS*, Award, ¶¶ 381–82, 385.

161. *Id.* at ¶ 392.

162. *See* Rudolf Dolzer, *Fair and Equitable Treatment: Today's Contours*, 12 SANTA CLARA J. INT'L L. 7, 10 (2014) (pinpointing that "FET may be considered to be at the heart of investment arbitration").

163. *See* Michele Potestà, *Legitimate Expectations in Investment Treaty Law: Understanding the Roots and the Limits of a Controversial Concept*, 1–2 (Soc'y Int'l Econ. L., 3d. Biennial Global Conference, Working Paper, 2012), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2102771## (last visited July 26, 2022) [https://perma.cc/6VFV-LGC9] (archived July 27, 2022) (noting that "[a]rbitral tribunals ... have typically taken for granted the idea that a breach of the investor's expectations may be relevant in deciding upon a violation of an investment treaty especially of the fair and equitable treatment standard").

state creates a reasonable expectation that the investor may rely on that conduct.[164] Legitimate expectations are not an independent cause of action. The divergence concerning the content of the FET standard, and the protection of the legitimate expectations of the investor, is really about the level of protection that should be granted to foreign investors and their investments. While investors want stronger investment protections, host states favour weaker restrictions on 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 use of investors' rights in the pursuit of legitimate public policy objectives. Conversely, if a host state grants specific assurances regarding the exploitation of one's investment in the host state, the adoption of new regulatory measures affecting the economic value of their investment might amount to a breach of fair and equitable treatment.[165]

In *Crystallex International Corp. v. Bolivarian Republic of Venezuela*,[166] a Canadian company that had invested in the Las Cristinas deposit in Venezuela (one of the largest gold deposits in the world) claimed that the conduct of the host state in relation to the mine amounted to, inter alia, a violation of fair and equitable treatment.[167] State authorities denied an environmental permit that prevented the exploitation of the mine because of concerns about the project's environmental impact. Venezuela pointed out that "Las Cristinas lie[d] in the Imataca Reserve, . . . a fragile rainforest with an extremely varied biodiversity and a significant [I]ndigenous population."[168] The Imataca Forest Reserve was declared a World Heritage site in 1994. For Venezuela, "the Ministry of Environment was obliged to review the project carefully, only approving it once Crystallex had adequately demonstrated that it would not cause unacceptable environmental or social impacts."[169] Venezuela contended that "the environmental and socio-cultural impact of the project proposed by Crystallex could not be mitigated and that its authorization would have been a violation of the Venezuelan government's obligation to 'ensure protection of the environment and the population from situations that constitute imminent damages.'"[170]

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164. *See* Unglaube v. Republic of Costa Rica, ICSID Case No. ARB/09/20, Award, ¶ 270 (May 16, 2012) (holding that "[C]laimants must demonstrate reliance on specific and unambiguous State conduct, through definitive, unambiguous and repeated assurances, and targeted at a specific person or identifiable group.")

165. *See* VADI, *supra* note 96, at 126–27.

166. Crystallex International Corp. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB(AF)/11/2, Award (Apr. 4, 2016).

167. *See id.* ¶¶ 44, 184.

168. *Id.* ¶ 201.

169. *Id.* ¶ 378.

170. *Id.*

However, the claimant pointed out that "the justifications adduced by the Ministry of Environment" for denying the permit were "concerns for the environmental and [I]ndigenous people of the Imataca Forest Reserve [that] had never been raised during the four-year approval process and were not supported by a single study . . . to demonstrate that the project would adversely impact the Imataca region."[171] Crystallex also claimed that the company "had submitted plans for dealing with the . . . [I]ndigenous communities" and had consulted them.[172]

The Tribunal found that Venezuela breached the fair and equitable treatment standard when it denied the environmental permit. In fact, it argued that a letter from the state authorities had created legitimate expectations that the project would proceed.[173] Moreover, the denial did not sufficiently elucidate reasons for the decision; rather, the permit denial letter "extend[ed] to a mere two and a half pages" that vaguely referred to climate change and "serious environmental deterioration in the rivers, soils, flora, fauna, and biodiversity in general in the plot."[174] While the Tribunal did not contest the state's "right (and the responsibility) to raise concerns relating to global warming, environmental issues [regarding] the Imataca Reserve, biodiversity, and other related issues," it held that the way the state put forward such concerns in the permit denial letter "present[ed] significant elements of arbitrariness."[175]

In *Gosling and others v. Republic of Mauritius*, a group of British property developers brought a claim against Mauritius, inter alia, alleging breach of fair and equitable treatment under the 1986 United Kingdom-Mauritius BIT.[176] Gosling and other investors planned to develop property at Le Morne.[177] "A peninsula of outstanding beauty, and cultural and historical significance," Le Morne "had been a place of refuge for escaped slaves, known as 'maroons'" in the nineteenth century.[178] Because of its natural beauty and significance, Mauritius pursued its inscription as a cultural landscape on UNESCO's World Heritage List since 2003 and finally obtained it in 2008.[179] 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

171. *Id.* ¶ 277.
172. *See id.* ¶ 289(g).
173. *See id.* ¶ 588.
174. *See id.* ¶ 590.
175. *See id.* ¶ 591.
176. *See* Gosling and others v. Republic of Mauritius, ICSID Case No. ARB/16/32, Award, ¶ 1 (Feb. 18, 2020).
177. *See id.* ¶ 41.
178. *Id.* ¶ 42.
179. *See id.* ¶¶ 42, 76.

specific assurances received from Government officials at the highest level."[180]

The Tribunal noted that "the level of treatment required to breach the [fair and equitable treatment] standard has evolved."[181] While the standard "is a flexible one which 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."[182] In fact, such a standard must be interpreted "in a balanced manner," considering "both state sovereignty and . . . the necessity to protect foreign investment."[183]

In casu, the Tribunal noted that the investors knew the state's objective to inscribe Le Morne on the World Heritage List.[184] The government "was entitled to change its policy" and had given no assurance that it would not limit development to ensure inscription of Le Morne on the UNESCO World Heritage List.[185] 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.[186]

The government never promised or assured the claimants that their proposed development project was 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. Because the Tribunal rejected the majority of the respondent's objections to its jurisdiction and the claimant's claims on the merits, it was deemed appropriate that each side pay for its own costs and share the tribunal fees and expenses.[187]

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180. *Id.* ¶ 168.

181. *Id.* ¶ 243 (adding that "what was considered minimum treatment in the nineteenth century is not the minimum required in the twenty-first").

182. *Id.* ¶ 244.

183. *Id.* ¶ 245.

184. *See id.* ¶ 249.

185. *See id.*

186. *Gosling*, ICSID Case No. ARB/16/32, Dissenting Opinion of Arbitrator Stanimir Alexandrov, ¶ 27 (Feb. 14, 2020).

187. *See Gosling*, Award, ¶ 286.

D. *Expropriation*

International investment treaties provide, *inter alia*, protection against unlawful expropriation. This raises two questions: whether a state action constitutes expropriation and, if it does, whether or not the expropriation is lawful. Several arbitrations have been concerned with the issue of what acts of the state amount to an expropriation. Treaty provisions often lack a precise definition of expropriation, and their language encompasses 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.[188] Failure to satisfy any of these requirements will imply that the expropriation is unlawful and thus requires compensation.[189]

Expropriation can be either direct or indirect. Direct expropriation generally entails a formal transfer of title or an outright seizure of property. Indirect expropriation includes measures that interfere with the use of property depriving the owner of its economic benefit.[190] While the concept of direct expropriation coincides with the notion of taking, the precise boundaries of indirect expropriation are unclear. Under this rubric, regulation aimed at protecting world 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 easily distinguishable in theory, the growing number of cases concerning indirect expropriation that have recently emerged demonstrates that the distinction is difficult to define in practice.[191]

Several investment treaty arbitrations have dealt with the question of whether state measures allegedly aimed at protecting world heritage may be deemed indirect expropriation. For instance, in *Southern Pacific Properties Ltd. v. Arab Republic of 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 WHC.[192] SPP contended that the cancellation had resulted in an uncompensated and thus unlawful expropriation not truly based on the WHC.[193] Rather, according to the claimant, Egypt used the WHC as a "post-hoc rationalization," since the pyramids had been

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188. *See* VADI, *supra* note 96, at 63.

189. *See id.*

190. *See* Brigitte Stern, *In Search of the Frontiers of Indirect Expropriation*, *in* CONTEMPORARY ISSUES IN INTERNATIONAL ARBITRATION AND MEDIATION: THE FORDHAM PAPERS 29, 35 (Arthur W. Rovine ed., 2008).

191. *See* discussion of the cases in this section.

192. *See* S. Pac. Props. (Middle East) Ltd. v. Arab Republic of Egypt, ICSID Case No. ARB/84/3, Award on the Merits, ¶¶ 150–58 (May 20, 1992).

193. *See id.* ¶¶ 150–53.

included in the World Heritage List only after the cancellation of the project.[194] The Arbitral Tribunal held that "the UNESCO Convention by itself does not justify the measures taken by the Respondent to cancel the project, nor does it exclude the Claimants' right to compensation."[195] 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. Furthermore, "a hypothetical continuation of the claimant's activities interfering with antiquities in the area could [have] be[en] considered as unlawful from the international point of view."[196]

Experts in international cultural heritage law criticized the award, indicating that, under Article 12 of the WHC,[197] the protection of heritage is not contingent on the inscription of a site on any list but rather flows from ratification of the WHC as such.[198] Accordingly, the outstanding and universal value would depend on the qualities of a site rather than on its formalistic evaluation. This latter line of interpretation, which is generally preferred by commentators, has been upheld by both domestic and international courts.[199]

The case of *Glamis Gold, Ltd. v. United States of America* involved an area of the Californian desert that the Quechan Indian Tribe deems a sacred place.[200] Although the area is not listed on the World Heritage List, its cultural importance for the Tribe is similar to the importance of Mecca or Jerusalem for other believers.[201] When Glamis Gold, a Canadian mining company, planned to mine gold in the area, the Tribe opposed the project because it would destroy the Trail of Dreams, a sacred path used for performing ceremonial practices.[202] Although permission for the project was granted, emergency regulations required the back-filling of all open-pit mines to recreate the approximate contours of the land prior to mining.[203] Since California's regulation required the backfilling of open-pit gold mines, which

194. *Id.* ¶ 153.

195. *Id.* ¶ 154.

196. *Id.*

197. Article 12 of the WHC provides that "[t]he 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." Convention Concerning the Protection of the World Cultural and Natural Heritage, *supra* note 159, art. 12.

198. *See* Patrick J. O'Keefe, *Foreign Investment and the World Heritage Convention*, 3 INT'L J. CULTURAL PROP. 259, 259–61 (1994).

199. *See* VADI, *supra* note 96, at 121–23. *See generally* CULTURAL HERITAGE CONVENTIONS AND OTHER INSTRUMENTS: A COMPENDIUM WITH COMMENTARIES (Patrick J. O'Keefe & Lyndel V. Prott eds., 2011).

200. *See* Glamis Gold, Ltd. v. United States of America, ICSID, 48 I.L.M. 1038, Award, ¶ 50 (June 8, 2009).

201. *See id.* ¶¶ 103–8.

202. *See id.* ¶ 107.

203. *See id.* ¶ 183.

allegedly made the investor's mining operation unprofitable, the latter filed an investment treaty arbitration claiming that state measures to preserve the skyline of ancient Indigenous cultural landscape amounted, inter alia, to an indirect expropriation of its investment.[204] In particular, backfilling would be uneconomic and arbitrary, since it would not be rationally related to its stated purpose of protecting cultural resources.[205] For the claimant, "once you take the material out [of] the ground, if there are cultural resources on the surface, they are destroyed. Putting the dirt back in the pit actually does not protect those resources," but may even lead to the burial of more artifacts and cause greater environmental degradation.[206]

The Arbitral Tribunal found the claimant's expropriation argument to be without merit.[207] 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 taken.[208] First, the Tribunal determined that the claimant's investment remained profitable[209] and that the backfilling requirements did not cause a sufficient economic impact on the investment to constitute an expropriation.[210] Second, the Tribunal deemed that the measures were rationally related to their stated purpose.[211] The Tribunal acknowledged that "some cultural artifacts w[ould] indeed be disturbed, if not buried, in the process of excavating and backfilling" but concluded that, without such legislative measures, significant pits and waste piles in the near vicinity would harm the landscape.[212] Therefore, it concluded that there was a reasonable connection between the harm and the proposed remedy. Remarkably, the Tribunal also expressly referred to Article 12 of the WHC, which requires states to protect their cultural heritage even if it is not listed on the World Heritage List.[213]

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-

204. *See id.* ¶ 359.
205. *See id.* ¶ 321.
206. *Id.* ¶ 687.
207. *Id.* ¶ 360.
208. *See id.* ¶¶ 366, 803.
209. *See id.* ¶ 366.
210. *See id.* ¶ 536.
211. *See id.* ¶ 803.
212. *Id.* ¶ 805.
213. *See id.* ¶ 84 n.194 ("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.'").

United Kingdom BIT.[214] The claimants planned to develop a gold mine in Roşia Montană, which is located in the Apuseni Mountains of Transylvania, Romania. A historic mining district that has been mined intermittently since Roman times, the site includes evidence of the infrastructure and mining techniques.[215] The project envisaged the development of an open-pit mine to exploit gold and silver deposits at Roşia Montană using cyanide in the extraction process.[216] However, the state reportedly rejected the claimants' environmental impact assessment and did not issue an environmental permit to allow exploration at the Roşia Montană gold mining site. The claimant alleged that the government had breached its treaty obligations by preventing implementation of the project without compensation and effectively depriving the investor of their investment's value.[217]

In 2017, Romania applied to UNESCO to have the Roşia Montană site listed on the World Heritage List. In 2021, the Roşia Montană mining landscape was inscribed on the UNESCO World Heritage in Danger List.[218] Thus, UNESCO noted that "the current mining proposal means that the integrity of the property is highly vulnerable" and indicated the need for the Romanian government to enact adequate measures to prevent the extension of active mining licenses on the site.[219] As the case is still pending, it is unclear what effects, if any, the UNESCO inscription will have on the dispute.

In *Gosling v. Mauritius*, the investors contended that the denial of a building permit qualified, inter alia, as an indirect expropriation of their investment in Le Morne. They claimed that such an expropriation was unlawful, as no compensation had been paid.[220] The respondent counterargued that the investors had never acquired the right to develop the area, as no permission had been granted.[221] It also contended to have exercised its police powers in good faith when pursuing "its paramount policy objective of inscribing Le Morne as a UNESCO World Heritage Site," and that the claimants admittedly knew this objective before making plans to build a resort at Le Morne.[222] 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

214. See Gabriel Resources Ltd. v. Romania, ICSID Case No. ARB/15/, Request for Arbitration, ¶ 1 (July 21, 2015).

215. *See id.* ¶ 4.

216. See *id.* ¶ 24.

217. *See id.* ¶¶ 7, 37.

218. *List of World Heritage in Danger: Roşia Montană Mining Landscape*, UNESCO, https://whc.unesco.org/en/list/1552 (last visited Nov. 24, 2021) [https://perma.cc/Q8LT-28GU] (archived July 27, 2022).

219. *Id.*

220. *See Gosling*, Award, ¶¶ 167–68.

221. *Id.* ¶ 242.

222. *Id.* ¶ 209.

government not allow more development at Le Morne."[223] Finally, for the government, there was no expropriation, because the area was not deprived of its entire economic value; it retained at least a quarter of its market value. The Arbitral Tribunal held that the investors had never obtained the necessary permits and authorizations and thus did not have the rights to develop the area.[224] On this basis, it dismissed the claim of indirect expropriation.

In another pending case, *Elitech and Razvoj Golf v. Republic of Croatia*, the investors planned the construction of a luxury resort and golf courses on a hill overlooking Dubrovnik, a World Heritage Site.[225] Reportedly, residents opposed the project alleging that it would damage the environment and jeopardize the city's World Heritage Site status.[226] Therefore, they filed claims before domestic administrative courts to halt the project.[227] Croatian courts put the project on hold.[228] The company thus filed an investor-state arbitration against Croatia for $500 million USD in compensation under the Croatia-Netherlands BIT.[229]

E. *Remedies*

Under 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."[230] The three principal forms of reparation are restitution, compensation, and satisfaction.[231] 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.[232] Satisfaction is

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223. *Id.* ¶¶ 209–10

224. *Id.* ¶ 242.

225. Cosmo Sanderson, *Croatia Faces Second ICSID Claim over Golf Resort*, GLOB. ARB. REV. (Nov. 17, 2020), https://globalarbitrationreview.com/article/croatia-faces-second-icsid-claim-over-golf-resort [https://perma.cc/3BBJ-X7VX] (archived July 27, 2022).

226. *Elitech and Razvoj v. Croatia—Investment Policy Hub*, UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/845/elitech-and-razvoj-v-croatia (last visited Sept. 4, 2022) [https://perma.cc/6VDZ-7UCF] (archived Sept. 4, 2022).

227. *Id.*

228. *Id.*

229. Elitech B.V. v. Republic of Croatia, ICSID Case No. ARB/17/32 (pending, argued Oct. 4–8, 2021).

230. Factory at Chorzów (Ger. v. Pol.), Judgment on Claim for Indemnity, 1928 P.C.I.J. (ser. A) No. 17, at 47 (Sept. 13, 1928).

231. Int'l Law Comm'n, Rep. on the Work of Its Fifty-Third Session, U.N. Doc. A/56/10, pt. 2, ch. 2, art. 34; *see also* G.A. Res. 60/147 (Dec. 15, 2005).

232. *Factory at Chorzów*, Judgment, at 47.

a residual remedy and "may consist in an acknowledgment of the breach, an expression of regret, a formal apology or another appropriate modality."[233] It applies only insofar as restitution or compensation do not provide a remedy.[234]

In investment arbitration, restitution in kind is rarely (if ever) granted; rather, compensation is the primary remedy in practice.[235] A number of world heritage-related arbitrations did not concern the question of whether (*an*, in Latin) reparation was due but centred on the amount (*quantum*) of compensation the host states owed to foreign investors. In particular, in these cases the parties disagreed on the amount of compensation due to the foreign investor.

The case of *Compañia del Desarrollo de Santa Elena SA v. Republic of Costa Rica* involved a particularly beautiful natural area including over 30 km of Pacific coastline, as well as numerous rivers, forests, and mountains in Costa Rica.[236] In addition to its geographical and geological features, the property was home to a dazzling variety of flora and fauna. 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 investor deemed that the compensation was not adequate, it filed a claim before 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 law permits the host state to expropriate foreign-owned property for a public purpose and against prompt, adequate, and effective compensation.[237] 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."[238]

Analogously, in *Unglaube v. Republic of Costa Rica*, when events occurred in the same Guanacaste province eleven years later, the Arbitral Tribunal held that the creation of a national park to protect endangered leatherback turtles was a legitimate goal; however, the expropriation was indirect and unlawful due to state failure to pay compensation.[239] The Tribunal held that:

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233. Int'l Law Comm'n Rep., *supra* note 231, art. 37.

234. *See* JAMES CRAWFORD, STATE RESPONSIBILITY 527–28 (2013).

235. BORZU SABAHI, COMPENSATION AND RESTITUTION IN INVESTOR-STATE ARBITRATION: PRINCIPLES AND PRACTICE 91 (2011); *see also* Christoph Schreuer, *Alternative Remedies in Investment Arbitration*, 3 J. DAMAGES INT'L ARB. 1, 4 (2016).

236. Compañia del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica, Award, ICSID Case No.ARB/96/1, Final Award, ¶ 15 (Feb. 17, 2000).

237. *Id.* ¶ 24.

238. *Id.* ¶ 71.

239. *See Unglaube*, Award, ¶¶ 210, 305.

> 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.[240]

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."[241] However, the Tribunal concluded that this had not been the case, and explicitly referred to the *Santa Elena v. Costa Rica* case.[242]

A slightly different approach was adopted in *SPP v. Egypt* concerning the cancellation of a construction project near the pyramids. While the Tribunal awarded compensation to the investor, it reduced the amount of such compensation, stating that only the actual damage (*damnum emergens*, in Latin) and not the loss of profit (*lucrum cessans*) could be compensated.[243] 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."[244] Furthermore, the fact that "the project was located in an area where the claimants should have known there was a risk that antiquities would be discovered" was "reflected in the method used by the Tribunal to value the claimants' loss."[245] The Tribunal thus displayed sensitivity to the tenets of the WHC in the determination of the *quantum* of compensation.

IV. GRAVITY AND GRACE IN INTERNATIONAL LAW

What is the relevance of these and similar arbitrations to international investment law, international cultural heritage law, and international law more generally? These cases have a significance that extends beyond international investment law itself because of their potential impact on cultural governance and international law as a whole.

From the perspective of international investment law, arbitrations related to cultural heritage demonstrate that international investment law is not a self-contained regime and is part of international law. International investment law is both influenced by, and can itself influence, international law. As one Tribunal explained, IIAs "ha[ve] to be construed in harmony with other rules of

240. *Id.* ¶ 205.
241. *Id.* ¶ 210.
242. *Id.* ¶¶ 214–18.
243. *See S. Pac. Props. (Middle East) Ltd.*, Award on the Merits, ¶ 188–91.
244. *Id.* ¶ 190.
245. *Id.* ¶ 251.

international law of which it forms part."[246] Nonetheless, these cases illustrate how arbitral tribunals have dealt with (or have chosen not to deal with) cultural concerns. Arbitral tribunals have demonstrated some qualified deference to state regulatory measures aimed at protecting cultural heritage when the host state had raised such cultural concerns.[247]

Disputes related to cultural heritage can affect the implementation of international cultural heritage law. Not only can arbitral tribunals contribute to good governance in international economic relations, but they may also contribute to good *cultural governance* by expressing the need to govern cultural phenomena according to due process and the rule of law.[248] As Dirk Pulkowski points out, "cultural policies are no longer part of a sovereign [reserved domain] (*domaine réservé*)."[249] Rather, "states must justify their domestic cultural policies . . . at the international level."[250] Such scrutiny by arbitral tribunals can prevent institutions from adopting discriminatory, demagogic, or opportunistic behaviour. If private property is expropriated—whether directly or indirectly—compensation must be paid.[251] As the *Crystallex* case demonstrates, while states have the right to protect cultural heritage, they must treat foreign companies fairly and equitably.

At the same time, the interplay between the promotion of foreign direct investments and the protection of cultural heritage highlights the power imbalance between the two fields of international law, making the case for rethinking and strengthening the current regime protecting cultural heritage.[252] Even if there are no theoretical, inherent tensions between these two subfields of international law, tensions often arise in practice. While the international investment regime is characterized by binding, effective, and timely dispute settlement mechanisms,[253] international cultural heritage law is characterized by a complex legal framework. There is no dedicated international court empowered to adjudicate violations of international cultural heritage law. Most UNESCO instruments lack dispute-settlement or compliance mechanisms and rarely do they include a clause listing possible dispute resolution tools.

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246. Urbaser S.A. v. The Argentine Republic, ICSID Case No. ARB/07/26, Award, ¶ 1200 (Dec. 8, 2016).

247. *See, e.g.*, *Glamis Gold Ltd.*, Award, ¶¶ 329, 624, 788.

248. *See* Valentina Vadi, *Global Cultural Governance by Arbitral Tribunals: The Making of a Lex Administrativa Culturalis* 33 B.U. INT'L L.J. 457, 487–91 (2015).

249. DIRK PULKOWSKI, THE LAW AND POLITICS OF INTERNATIONAL REGIME CONFLICT 11 (2014).

250. *Id.*

251. *See Unglaube*, Award, ¶ 305 (regarding indirect expropriation); *see also Compañia del Desarrollo de Santa Elena S.A.*, Award, ¶ 72 (regarding direct expropriation).

252. *See generally* Vadi, *supra* note 97.

253. *See id.*

Certainly, a state's obligations to foreign investors under international investment law cannot justify violations of its other obligations under international cultural heritage law. For instance, in the *Sawhoyamaxa* case,[254] 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. [255] Rather, the Court noted that compliance with investment treaties should always be compatible with the human rights obligations of the state. [256] Analogously, compliance with investment treaties does not justify violations of international cultural heritage law; rather, compliance with investment treaties should be compatible with state obligations under international cultural heritage law. Vice versa, compliance with international cultural heritage law does not justify state breaches of international investment law obligations.

From a general international law perspective, the intersection of international investment law and international cultural heritage law constitutes a paradigmatic example of the possible interaction between different treaty regimes.[257] The increased proliferation of treaties and specializations of different branches of international law makes some overlap unavoidable. General treaty rules on hierarchy—namely *lex posterior derogat priori*[258] and *lex specialis derogat generali*[259]—may not be entirely adequate to govern the interplay between treaty regimes because the given bodies of law do not exactly overlap; rather, they have different scopes, aims, and objectives.[260]

Can investment treaty tribunals consider or apply other bodies of law in addition to international investment law? Adopting a Weilian philosophical perspective, arbitral tribunals should pay attention to the need to safeguard cultural heritage for the well-being of present and future generations. For Weil, artworks symbolize humanity, the universe, and the divine.[261] Moreover, paying attention is "a form of justice, for it is a method of inquiry and for reading past the presumptions and prejudices of the world to achieve deeper insight and

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254. Sawhoyamaxa Indigenous Cmty. v. Paraguay, Merits, Reparations, and Costs, Judgement, Inter-Am. Ct. H.R. (ser. C) No. 146 (Mar. 29, 2006).

255. *See id.* ¶ 140.

256. *See id.*

257. *See* PULKOWSKI, *supra* note 249, at 4–5 ("Cultural policy may fall under the disciplines of several international treaties or 'regimes'—the regimes of the World Trade Organization (WTO), the Cultural Diversity Convention adopted under the auspices of the United Nations Educational, Scientific, and Cultural Organization (UNESCO), and human rights treaties.").

258. *See* Vienna Convention on the Law of Treaties art. 30, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention].

259. *See* Rep. of the Study Group, *supra* note 78, ¶ 251.

260. Donald McRae, *International Economic Law and Public International Law: The Past and the Future*, 17 J. INT'L ECON. L. 627, 635 (2014).

261. *See* SIMONE WEIL, IL BELLO E IL BENE 14–15 (2013).

knowledge."[262] Therefore, hearing the voice of the afflicted is the basis of all justice:[263] "It is precisely because the afflicted are potentially us at any and all times that requires recognition and response."[264] Consequently, arbitrators should "[r]ecogniz[e] individuals as sacred unto themselves rather than commodities in a transactional exchange,"[265] and pay attention to state obligations in the cultural field. This would realize what Weil calls "the spirit of justice."[266]

From an international law perspective, customary norms of treaty interpretation, as restated in the Vienna Convention on the Law of Treaties, require adjudicators to settle international disputes "in conformity with the principles of justice and international law."[267] Accordingly, adjudicators should consider the context of a treaty, which includes any relevant rules of international law applicable in the relations between the parties. Nonetheless, given their institutional mandate, which is to settle investment disputes, there is a risk that investment treaty tribunals water down or overlook noteworthy cultural aspects of a given case.[268] Arbitrators may not have specific expertise in international cultural heritage law, as their appointment requires expertise in international investment law. Furthermore, due to the emergence of a *jurisprudence constante* in international investment arbitration,[269] there is a risk that tribunals do conform to these *de facto* precedents without necessarily considering analogous heritage-related cases adjudicated before other international courts and tribunals.[270] This is not to say that consistency in decision-making is undesirable; clearly, it can enhance the coherence and predictability of the system contributing to its legitimacy.[271] However, the selection of the relevant precedent matters, as it can impact the decision.[272] Therefore, arbitral tribunals should not be merely guided by jurisprudential developments in their own field, but consider a broader range of jurisprudential developments in international law.

The growing cognizance of the importance of protecting cultural heritage in the jurisprudence of international courts and tribunals,

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262. Kinsella, *supra* note 14, at 192.

263. *See* ROBERT ZARETSKY, THE SUBVERSIVE SIMONE WEIL: A LIFE IN FIVE IDEAS 20–24 (2020).

264. Kinsella, *supra* note 21, at 90.

265. *Id.* at 91.

266. SIMONE WEIL, *La Personne et le Sacré*, *in* ÉCRITS DE LONDRES ET DERNIÈRES LETTRES 33 (1957) ("L'esprit de justice et de verité n'est pas autre chose qu'une certain espèce d'attention.", *translated* "The spirit of justice and truth is nothing but a certain kind of attention.") (Fr.).

267. Vienna Convention, *supra* note 258, arts. 26–38.

268. *See* Vadi, *supra* note 49, at 151.

269. *See* Andrea K. Bjorklund, *Investment Treaty Arbitral Decisions as* Jurisprudence Constante, *in* INTERNATIONAL ECONOMIC LAW: THE STATE AND FUTURE OF THE DISCIPLINE 265–80 (Colin B. Picker et al. eds., 2008).

270. *See* Vadi, *supra* note 81, at 228.

271. *See id.* at 151.

272. *See id.*

including arbitral tribunals, may contribute to the gradual emergence of general principles of international law requiring the protection of cultural heritage in times of peace.

V. POLICY OPTIONS

After having critically assessed the interplay between international investment law and international cultural heritage law, this Part now examines three principal avenues that can facilitate a better balance between the public and private interests in international investment law: (1) a textual approach, (2) a jurisprudential approach,[273] and (3) counterclaims.

A. *Inserting Cultural Clauses in International Investment Agreements*

A textual approach suggests treaty reform or amendment to bring international investment law better in line with cultural concerns.[274] It promotes the consideration of cultural heritage in international investment law, relying on the periodical (re)negotiation of IIAs. Treaty drafters can expressly accommodate the protection of cultural heritage in the text of future IIAs or renegotiate existing ones.[275] For instance, reference to the protection of cultural heritage could be inserted in preambles, exceptions, carve-outs, and annexes of IIAs.[276] In abstract terms, when states sign BITs, they do not relinquish their right to regulate. Accordingly, even without cultural exceptions, states do maintain the right and duty to govern their cultural resources. Nonetheless, including cultural clauses in the treaty text certainly facilitates and even promotes the consideration of cultural concerns in investment treaty arbitration.

However, state practice remains uneven. Most existing IIAs do not contain any explicit reference to cultural heritage. Moreover, IIAs generally include "survival clauses that guarantee protection under the treaty . . . for a substantial period after the treaty has elapsed."[277] Therefore, "it is unrealistic to expect that treaty drafting can solve the conflict between [international investment law] and other community interests on its own."[278] While countries gradually rebalance their IIAs, it is crucial to consider other mechanisms to promote the

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273. Mihail Krepchev, *The Problem of Accommodating Indigenous Land Rights in International Investment Law*, 6 J. INT'L DISP. SETTLEMENT 42, 45 (2015).

274. *See* Stephan W. Schill & Vladislav Djanic, *International Investment Law and Community Interests* 4 (Soc'y Int'l Econ. L., Working Paper No. 2016/01, 2016).

275. *See* VADI, *supra* note 96, at 277–86.

276. *See* Schill & Djanic, *supra* note 274, at 15.

277. *Id.* at 16.

278. *Id.*

consideration of cultural heritage in international investment law and arbitration.[279]

B. *A Jurisprudential Approach to Promote the Consideration of Cultural Heritage in International Investment Arbitration*

A jurisprudential approach suggests that international investment law already possesses the tools needed to address the interplay between investors' rights and the protection of cultural heritage.[280] Such an approach promotes the consideration of cultural heritage in international investment law and arbitration by arbitral tribunals. Its implicit assumption is that "[w]hile [international investment law] is a highly specialized system, it is not a self-contained one, but forms part of the general system of international law."[281]

Arbitral tribunals have limited jurisdiction and cannot adjudicate on infringements of international cultural heritage law. However, according to customary rules of treaty interpretation restated in the Vienna Convention on the Law of Treaties, when interpreting a treaty, arbitrators can take other international obligations of the parties into account.[282] Therefore, arbitral tribunals can and should interpret international investment law in conformity with the system to which it belongs.[283] As mentioned, international investment law is not a self-contained regime but constitutes an important field of international law. As such, it should not frustrate the aims and objectives of the latter, which include the protection of cultural heritage. Rather, arbitral tribunals should interpret international investment law by considering "any relevant rules of international law applicable in the relations between the parties."[284]

In conclusion, international investment law does not provide much consideration to cultural heritage, particularly in the texts of international investment agreements. International arbitral tribunals have a limited, or no specific, mandate to protect cultural heritage. Nonetheless, international law can influence the interpretation and application of international investment law. Interpretation in conformity with general international law is required by the principle of systemic integration, as restated in Article 31(3)(c) of the Vienna Convention on the Law of Treaties.[285]

However, despite the possibilities offered by treaty drafting and systemic interpretation, the consideration of cultural heritage in

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279. *See id.*
280. *See id.* at 3–4.
281. *Id.* at 16.
282. Vienna Convention, *supra* note 258, art. 31(3)(c).
283. *See* Schill & Djanic, *supra* note 274, at 16.
284. Vienna Convention, *supra* note 258, art. 31(3)(c).
285. *See, e.g.*, Perenco Ecuador Ltd. v. Republic of Ecuador, ICSID Case No. ARB/08/6, Interim Decision on the Environmental Counterclaims, ¶ 322 (Aug. 11, 2015).

international investment law and arbitration remains far from widespread. On the contrary, arbitral tribunals often seem reticent to refer to, let alone consider, cultural entitlements. Therefore, all actors involved—treaty negotiators, arbitrators, academics, and local communities—should strive to foster such consideration.

C. *Counterclaims*

A third way of inserting cultural concerns in the operation of investor–state arbitration is by raising defences or counterclaims for eventual violations of domestic law protecting cultural entitlements. States have increasingly tried to assert counterclaims against investors, even though their efforts have tended to be unsuccessful.[286] While most treaties do not have broad enough dispute resolution clauses to encompass counterclaims, "drafting treaties to permit closely related counterclaims would help to rebalance investment law."[287]

Some investor–state dispute settlement provisions confer on tribunals the power to hear "any dispute between an investor of one contracting party and the other contracting party in connection with an investment."[288] Other investment treaties provide that the law applicable in investor-state arbitration is the domestic law. If domestic law is the applicable law, "international law plays a supplemental and corrective function in relation to domestic law."[289] Not only does international law "fill the gaps in the host state's laws," but, in cases of conflict with the latter, it prevails.[290] In any case, even if the applicable law is not a domestic law, investors remain under an obligation to abide by the domestic laws of the state in which they operate, due to the international law principle of territorial sovereignty. These and similar textual hooks seem to enable counterclaims.

The ICSID Convention also expressly contemplates the possibility of counterclaims, "provided that they are within the scope of the consent of the parties and are otherwise within the jurisdiction of the centre."[291] Analogously, the 2010 United Nations Commission on International Trade Law Arbitration Rules also enable arbitral

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286. *See* Andrea K. Bjorklund, *The Role of Counterclaims in Rebalancing Investment Law*, 17 LEWIS & CLARK L. REV. 461, 464 (2013).

287. *Id.* at 461.

288. Promotion and Protection of Investments, India-Neth., art. 9.1, Nov. 6, 1995.

289. Yaraslau Kryvoi, *Counterclaims in Investor–State Arbitration* 17 (L., Soc'y and Econ., Working Paper No. 8/2011, 2011).

290. *Id.*

291. ICSID Convention, art. 46 (stating that "[e]xcept as the parties otherwise agree, the Tribunal shall, if requested by a party, determine any incidental or additional claims or counter-claims arising directly out of the subject-matter of the dispute, provided that they are within the scope of the consent of the parties and are otherwise within the jurisdiction of the centre").

tribunals to hear counterclaims, provided that they have jurisdiction over them.[292]

In practice, arbitral tribunals have adopted diverging approaches regarding the possibility of counterclaims.[293] Most tribunals have declined jurisdiction to hear counterclaims by focusing on whether counterclaims were within the scope of the consent of the parties.[294] While most tribunals remain hesitant to hear counterclaims, recent arbitral tribunals have been more willing to hear such claims.[295] If consent to jurisdiction is explicitly granted,[296] or if it is deemed to exist implicitly, at least in those cases where the applicable law is the domestic law,[297] investment tribunals can allow states to raise breaches of cultural policies in their counterclaims against investors, and investor-state arbitration can prompt investors to comply with domestic (and international) cultural norms.[298] If investors knew that they could be held liable for harm to cultural heritage in the event of a dispute, they would be more likely to develop investment projects that safeguard—or at least respect—the cultural heritage and cultural entitlements of local communities.

VI. CONCLUSIONS

"Enigmatic and elliptical," but prioritizing human dignity over other concerns, Weil's philosophy centred on "the counterbalance of the material to the mystical," and articulated "the specific details of that relationship."[299] Therefore, examining her "lucid analysis of the failures and the fears of her time" enables us "to be better able to confront those in ours."[300] Following Weil's powerful intuitions, this

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292. *See* G.A. Res. 65/22, UNCITRAL Arbitration Rules (Dec. 6, 2010); *see also* G.A. Res 31/98, UNCITRAL Arbitration Rules (Dec. 6, 1974).

293. *See* Bjorklund, *supra* note 286, at 473.

294. Jean Kalicki, *Counterclaims by States in Investment Arbitration*, INV. TREATY NEWS (Jan. 14, 2013), https://www.iisd.org/itn/en/2013/01/14/counterclaims-by-states-in-investment-arbitration-2/ [https://perma.cc/4U5L-8CN9] (archived Aug. 23, 2022).

295. *See e.g.*, Burlington Res. Inc. v. Republic of Ecuador, ICSID Case No. ARB/08/5, Decision on Counterclaims, ¶ 275 (Feb. 7, 2017) (holding Burlington liable for violating Ecuador's domestic law while implementing international standards); *Urbaser S.A.*, Award, ¶ 1192 (holding that a bilateral investment treaty "[is] not a set of rules defined in isolation without consideration given to rules of international law").

296. *See Burlington*, Decision on Counterclaims, ¶ 60 (affirming jurisdiction on counterclaims, as the claimant did not object to the Tribunal's jurisdiction).

297. *See* Al-Warraq v. Republic of Indon., UNCITRAL, Final Award, ¶ 155 (Dec. 15, 2014) (allowing Indonesia to bring a counterclaim to seek compensation of the investor's failure to comply with domestic banking law).

298. For a similar argument, see Anagha Sundararajan, *Environmental Counterclaims: Enforcing International Environmental Law through Investor–State Arbitration* (Lloyd N. Cutler Center for the Rule of Law, Salzburg Global Seminar Paper 2017–2018).

299. Kinsella, *supra* note 14, at 190.

300. *Id.*

Article argues that an international society in which mere economic growth is unreservedly prioritized over anything else (and thus gravity prevails over grace), cannot properly survive the winds of change.[301] Rather, the protection of cultural heritage is a vital necessity and a human need that enables individuals, local communities, states, and the international community as a whole to contribute a sparkle of beauty to the eternal vicissitudes of history and time.[302] By inheriting vital legacies from ancestors and safeguarding them for future generations, communities can be resilient, successfully address change, and prosper.

The review by an international tribunal of state cultural policies can improve good cultural governance. While each state retains the right and duty to govern cultural heritage within its own territory, international investment law poses vertical constraints on such a right. Adherence to this international regime adds a circuit of external accountability, forcing states to consider the interests of the investors affected by their policies. The growing importance of such tribunals means that most governments will need to consider the impact of regulations (including cultural policies) on foreign investors and their investments before enacting such measures to avoid potential claims and subsequent liability.[303]

At the same time, international investment law is not a self-contained regime; rather, it is part of public international law and needs to develop in conformity with it. States can and should introduce cultural concerns in their IIAs in the form of cultural clauses or legality requirements. In parallel, arbitral tribunals should consider cultural concerns in light of customary rules of treaty interpretation, as restated by the Vienna Convention on the Law of Treaties, and should settle investment disputes "in conformity with the principles of justice and international law."[304]

While the possibility of raising counterclaims remains debated, arbitral tribunals should not dismiss such a possibility if they have jurisdiction. Counterclaims can constitute a mechanism that allows them to not only defend, but also enforce international cultural heritage law against private parties, potentially resolving some of the tension between international cultural heritage law and international investment law. To conclude, the growing jurisprudence of arbitral tribunals relating to domestic cultural policies certainly contribute to the emergence of general principles of law that require the protection of cultural heritage in times of peace.

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301. *See* GRAVITY AND GRACE, *supra* note 31, at 287.

302. *See id.* at 321.

303. *See generally* Eyal Benvenisti, *Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders*, 107 AM. J. INT'L L. 295 (2013).

304. Vienna Convention, *supra* note 258, pmbl.