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CULTURAL HERITAGE PROPERTY DISPUTES IN INTERNATIONAL ARBITRATION PROCEEDINGS

The article's purpose is to argue why arbitration is beneficial for users despite the availability of a wide range of alternative dispute resolution (ADR) means to the parties involved in cultural heritage disputes. While litigation is a time-consuming, expensive, and public process, arbitration offers a speedy and confidential alternative. This offers more flexibility and control over the results than litigation. The tension between investor rights and cultural heritage protection raises several questions. Is the measure implemented by the state justified by the fact that it aims to protect cultural heritage? Can governments use cultural policies to discourage investment or discriminate against foreign investors? It is important to clarify the extent to which arbitral tribunals pay attention to cultural heritage and how they balance the rights of the investor and the cultural policies of the host state.

Keywords: *cultural heritage, international economic law, investment law, alternative dispute resolution, mediation, arbitration, international investment agreement.*

1. Introduction

The growth of global trade and foreign direct investment has led to the creation of effective legal regimes that oblige states to facilitate investment activities and trade. A "clash of cultures" has emerged between international investment law and international cultural law. As countries aim for economic growth, they may loosen cultural norms to facilitate business activity. In a project with a financial interest, the state does not want to take any action that would reduce profitability. Even if officials are genuinely concerned about the impact on people and the environment, they are entitled to prioritize development goals over cultural heritage.[1]

Culture is the inherited values, ideas, beliefs, and traditions that characterize social groups and their behavior. Culture is not a static concept, it is a dynamic force that develops over time and shapes countries and civilizations. Globalization and economic governance have recently promoted intense relations and dialogue between nations. Thus, unprecedented opportunities for cultural exchange have arisen. In addition, foreign direct investment can promote cultural diversity and provide funds for the discovery, restoration, and preservation of cultural heritage.[2]

Nowadays, culture is not only the "life of the mind", but it is also a "broad, inclusive concept that includes all manifestations of human existence", such as beliefs, values, habits, arts, customs, and ways of life that feature

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1 If states still maintain a high standard of cultural heritage protection, then a foreign investor can initiate a dispute and claim that such treatment violates the provisions of the investment treaty and affects their economic interests. Diverse cultural policies may lead to a conflict between the course taken by the host state and the investment treaty. In some cases, foreign investors claim that cultural heritage policies have a negative impact on investment, leading to indirect expropriation. *Vadi V.,* Cultural Heritage in International Investment Law and Arbitration Cambridge University Press, 2014, 1-2.

2 The expansion of trade and foreign direct investment promotes interaction between different cultures and can be considered a process of expanding cultural freedom. As a result, there is a relationship between trade promotion, FDI, and cultural heritage protection. *Vadi V.,* Cultural Heritage in International Economic Law, Brill | Nijhoff, 2023, 2.

particular groups – passed down from generation to generation. Culture does not comprise the mere sum of individual practices, It consists the complex whole through which individuals and communities "express their humanity," give meaning to their existence, and shape their worldviews.[3]

A multidisciplinary approach has become relevant in the 21st century, when cultural heritage disputes can have a different range of legal disciplines, such as investment law, international trade law, private international law, intellectual property law, international humanitarian law, and international criminal law. The study of cultural heritage law in the context of the mentioned disciplines reveals that it is a multifaceted subject and not strictly separated.[4]

Thus, it is interesting how cultural heritage disputes arising from these areas can be regulated.

2. Cultural Heritage as an Object of Property Rights

The essence of cultural heritage does not derive only from its aesthetic or economic value. The archetypal "property" of works of art refers to the possibility of owning them and suggests that marketable assets with financial value have a cultural, intangible aspect. This stock of historical, symbolic, religious, and scientific values embodies a cultural object and contributes to the formation of the identity and dignity of peoples, and communities. This defines the lives of their ancestors and societies. This 'duality' explains why cultural assets cannot be equated to ordinary merchandise. These are the outcomes of human creativity expressing meanings distinct from the commercial value that they may possess. It is an important result of human creativity, apart from its commercial value. Cultural heritage legislation focuses on the protection of civilization, that is, the achievements, values, and beliefs of a particular group or nation. Because the past is woven into all works, legal and non-legal issues are intertwined.[5]

For centuries, the cultural product was protected as a form of property. According to this structure, movable cultural objects are private property, cultural monuments are immovable property, and intangible cultural goods can exist (but not necessarily) in the form of intellectual property.[6] The cultural property paradigm crosses boundaries not only between property – immovable, movable, and intellectual – but also between international, regional, and domestic laws. Since the property paradigm is well established, in most legal traditions cultural heritage objects are generally governed by the same norms as other types of property. Only in some cases is it subject to exceptions due to the cultural characteristics of the protected good.[7]

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[3] UN Economic and Social Council, Committee on Economic, Social and Cultural Rights, General Comment №21, Right of Everyone to Take Part in Cultural Life, Article 15, para. 1(a) of the International Covenant on Economic, Social and Cultural Rights, E/C.12/GC/21, 21 December 2009, para.11,13.

[4] *Adenekan V. O.,* An Appraisal of the Existing Legal Frameworks for the Resolution of Cultural Heritage Disputes and the Enforcement of Cultural Heritage Law, December 2019, 6.

[5] Christopher Byrne emphasized that "there is a fundamental difference between goods that are standardized and easily replaced and those that are vested with emotional, spiritual, or cultural qualities" as only the latter "retain unique and transcendent cultural significance which imparts inherent value to them". *Chechi A.,* Evaluating the Establishment of an International Cultural Heritage Court, Vol. XVIII, Issue 1, Art Antiquity and Law, April 2013, 36.

[6] The legal definition of monuments varies between legal systems. In practice, there are various internal mechanisms for the definition of cultural objects. The accounting method specifies the type of each item that is protected. The categorization system provides a general description of what is protected (Germany). A classification system extends protection to a specific object only when an appropriate administrative decision is made to that effect (UK). Italy combines categorization with classification. Turkey makes an extensive list of some properties yet categorizes some of them. Canada combines an inventory-based approach with administrative regulations. Some states protect classes of artefacts that are unique to their national identity and have significant historical and artistic value. They can be "They can be 'the centerpieces of active cultures and religions, illustrations of the changing patterns of aesthetics, anthropological records of previous societies, beautiful and desirable items which confer prestige on their owners, or commodities in the international art market." *Roodt C.,* Private International Law, Art and Cultural Heritage, Edward Elgar Publishing Limited 2015, 3-4.

[7] *Vadi V.,* Cultural Heritage in International Investment Law and Arbitration Cambridge University Press, 2014, 25. Which interest should be prioritized in the management of cultural heritage – the local population or the international community? When interests collide, officials face the dilemma of whether to prioritize international interests over domestic concerns, or vice versa. While internationalists see cultural heritage as an expression of "common human culture" wherever it may be located, nationalists see it as part of national culture. *Vadi V.,* Cultural Heritage in International Economic Law, Brill | Nijhoff, 2023, 58, 59.

3. Importance of Alternative Resolution Mechanisms in Cultural Heritage Disputes

The art world is largely based on trust and personal contacts. Cultural heritage disputes are characterized by the special sensitivity of the participants. Cultural property infringement can be of different types. As a rule, the main concern of states is the return of cultural property from one country to another. The extent of the concern and the need for effective compensation methods have been legalized by the creation of several dozen international documents. The Hague 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations for the Execution of the Convention, The UNESCO 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, UNIDROIT 1995 Convention on Stolen or Illegally Exported Cultural Objects, Despite the widespread ratification of these conventions, the return of cultural property through the court system of foreign jurisdictions is a difficult task. Because ownership is a central issue in cultural heritage disputes, parties can seek restitution through the foreign court system. Procedural flaws and political sensitivities in litigation can make ADR (alternative dispute resolution) more attractive. In fact, a majority of disputes over looted cultural property that have arisen over the past four decades have been settled out of court. [8]

The first attempt to create a specialized tribunal dates back to 1933, when a draft Convention on repatriation of cultural objects was prepared under the auspices of the League of Nations International Museums Office. The draft obliged the contracting states to apply for ad hoc arbitration, to start a dispute in the Permanent Court of International Justice (PCIJ) in case of disagreement on the choice of the tribunal, or if they were not parties to the protocol, to go to the arbitration court created for the peaceful settlement of international disputes in accordance with the Hague Convention. The outbreak of war in the late 1930s meant that the draft could not be transformed into a binding treaty.[9]

The increase in ownership disputes between museums and parties (museums, associations, representatives of governing bodies, national societies, private individuals), in particular requests for return and restitution, intellectual property rights, requires a more adequate mechanism of settlement than litigation. Since 2006, the International Council of Museums (ICOM) has been committed to developing specialized alternative dispute resolution procedures for art and cultural heritage. ICOM has started a partnership with the WIPO (World Intellectual Property Organization) Center for Arbitration and Mediation to develop an adapted and customized mediation procedure for dealing with cultural property disputes.[10]

The use of mediation in cultural heritage disputes is not new. International organizations and private institutions have worked for years to develop appropriate ADR mechanisms, offering parties a wide range of possibilities. Unlike litigation and arbitration, the basic principle of mediation is to achieve a win-win outcome. ADR is based on the idea of concessions, where each party gives up its interest to get a compromise from the other. From a psychological point of view, after mediation, each party leaves the process without the aura of a

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8 *Kasteleijn L., Grenfell L.,* Using Arbitration to Resolve Cultural Property Disputes, Mar 2023, 15, <https://www.lexisnexis.co.uk/blog/research-legal-analysis/using-arbitration-to-resolve-cultural-property-disputes> [02.12.2024].
The researchers emphasized that the International Arbitration Tribunal provides the most effective resolution of disputes related to the repatriation of artifacts. Brooks Daly mentions that the Permanent Court of Arbitration (PCA) may be able to develop a specialized mechanism for the resolution of cultural property disputes between States and between States and individual claimants. Similar views were discussed during the Symposium on 'Resolution Methods for Art-Related Disputes', organized at the University of Geneva in 1997, and the Seminar on 'Resolution of Cultural Property Disputes' Permanent Court of Arbitration in 2003. Marilyn Phelan argued that the International Council of Museums (ICOM), as the sole body of the international community of museum professionals, should establish a dispute resolution mechanism to resolve ownership issues related to cultural objects in museum collections. In May 2011, ICOM together with the World Intellectual Property Organization (WIPO) launched the Arts and Cultural Heritage Mediation Program. Experts argue that institutionalized mediation, particularly WIPO's Arbitration and Mediation Center, is the most effective way to resolve disputes involving indigenous and traditional communities. *Chechi A.,* Evaluating the Establishment of an International Cultural Heritage Court, Vol. XVIII, Issue 1, Art Antiquity and Law, April 2013, 38-39.

9 *Chechi A.,* Evaluating the Establishment of an International Cultural Heritage Court, Vol. XVIII, Issue 1, Art Antiquity and Law, April 2013, 37.

10 ICOM reinforces its commitment to promoting the return of illegally acquired cultural property and combating illicit trade. The idea of art and cultural heritage mediation arose in 2005 in Seoul from the development of a project by ICOM's Legal Affairs Committee. The program met a long-standing need among museum professionals to develop procedures adapted to the alternative resolution of cultural property disputes. ICOM, Art and Cultural Heritage Mediation, An alternative litigation resolution method adapted to art and cultural heritage fields, 12 July, 2011 in Paris, 3, 4.

loser. Mediation is a recommended mechanism in cultural property disputes where the parties can reach a consensus. It fosters a friendly atmosphere that does not exist during the competitive process.[11]

ICOM-WIPO Art and Cultural Heritage Mediation is a non-profit service specifically designed for these types of disputes. From the list of mediators of these organizations, the parties can choose a mediator experienced in art and cultural heritage mediation. These two institutions, recognized for their rigor and expertise, provide procedural advice and support to the parties. They charge low administrative fees and determine the mediator's fee by mutual agreement. Mediation guarantees confidentiality and a speedy dispute resolution at a minimal cost. The parties reach a mutually satisfactory agreement that balances both interests. They are free to stop the process at any stage.[12]

They have the option at all stages to combine the mediation process with other dispute resolution mechanisms, such as WIPO arbitration, expedited arbitration, or expert determination. A claimant can initiate a cultural property dispute (return, restitution, acquisition, claim, or intellectual property right issues) by sending a claim to the ICOM Secretariat.[13]

In the United States, cultural entities support the arbitration of cultural property disputes. The Museum of Modern Art director Glenn Lowry the director of the Museum of Modern Art, asked for "a process, a way to resolved these complicated situations in a non-confrontational, non-emotionally charged way." The Association of Art Museum Directors' (AAMD) Task Force, that was created to develop principles to assist museums in resolving art claims, recommended "the creation of a mechanism for the fair resolution of these claims, such as mediation, arbitration or other forms of alternate dispute resolution." [14]

In such a highly specific field as cultural property disputes, which usually involve various parameters (cultural, economic, ethical, etc.) and raise technical questions (cultural significance, age and authenticity of a given object, provenance, excavation, and/or export date, due diligence standards, fair compensation), experts play a crucial role, especially in the classification of items and, accordingly, in determining the applicable substantive law. The specific experience of the arbitrator, not only in the arbitration technique but also in the specific area of the dispute can contribute to increasing the speed of the arbitration proceedings and reducing the costs, to the extent that additional external expertise will no longer be required.[15]

Most judges and juries in litigation do not have in-depth knowledge of the customs of the cultural property or art market. D. Shapiro noted, "Given the lack of experience of judges and juries in art matters, the arcane nature of art and the art market, and the difficulties often inherent in explaining art-related disputes, the outcome of art litigation is highly unpredictable, which should create hesitancy in bringing a lawsuit." Even though experts are

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[11] Both individuals and states benefit from the jointly created ICOM-WIPO service. This forum draws on the significant experience of two highly specialized partner institutions. For example, the Camera Arbitrale di Milano strongly recommends using its Fast Track Mediation rules in art disputes. In this institution, from 2015 to 2019, the number of mediations in art and cultural heritage disputes increased to 55%, and the settlement of disputes by agreement was recorded in 75%. Also new is the Court of Arbitration for Arts (CAfA), a unique dispute institution that provides both mediation and arbitration. Disgruntled owners of cultural heritage are often involved in such things as illegal art trade, the so-called. 'artnapping'. Under Article 17 (5) of the UNESCO Convention, the parties may request the institution to expand its offices to facilitate the settlement process. Later, a special intergovernmental committee was created to implement the UNESCO instruments, its charter clearly relying on the use of mediation and conciliation. Arsic M., 2021. Mediation in cultural heritage disputes – pro et contra, 135-136.

[12] ICOM, Art and Cultural Heritage Mediation, An alternative litigation resolution method adapted to art and cultural heritage fields, 12 July 2011 in Paris, 5-6.

[13] ICOM, Art and Cultural Heritage Mediation, An alternative litigation resolution method adapted to art and cultural heritage fields, 12 July, 2011 in Paris,7.

[14] Another benefit of arbitration of cultural property disputes is that it is usually faster than litigation. The parties may arbitrate disputes once they agree on a date. In contrast, cases in overloaded courts can take months or even years to resolve. Cultural heritage ownership is unique and often emotionally charged, leading to lengthy court proceedings. According to earlier practice, judicial review of cultural values lasted from seven to twelve years. Thus, the speed at which arbitration can be initiated and a decision rendered is advantageous over litigation. Especially if the cultural property in question is to be sold, exhibited, or taken out of the country. The availability of arbitrators with experience in the area of dispute is another advantage of arbitration. The parties may choose arbitrators who are experts in the area of the particular cultural property dispute, whether it is issues of conservation, authenticity, or compensation. Arbitrators' knowledge of the constraints, needs, ethics, and practices of the arts community allows them to make a decision that best serves the interests of both parties. *Varner E.,* Arbitrating cultural property disputes, Spring 2012, Cardozo Journal of Conflict Resolution,Vol.13, 480, 482.

[15] *Gazzini F. I.,* cultural property disputes: the role of Arbitration in resolving non-contractual disputes 2004,118,119.

accessible throughout litigation, there is a big difference between an arbitrator with expert knowledge and an expert in the court's cross-examination mode. Litigation often devolves into a battleground of experts, with both sides trying to "buy" something that a judge or jury will believe.[16]

The problem of expert testimony during litigation was highlighted in *Greenberg v. Bauman*, where one of Calder's leading experts testified that the sculpture "Mobile" sold to the claimant was not an authentic work by the famous American sculptor Alexander Calder. According to the judge, the expert was unable to convince him of the work's inauthenticity, although if Calder's expert had been the arbiter, the result would probably have been different. Thus, there is a big difference between experts who, on the one hand, are familiar with art market issues and, on the other, who try to provide information to the decision-makers. Therefore, having an expert as an arbitrator is an advantage of arbitration in cases of cultural property disputes.[17]

There is a view that arbitration is better suited to cultural heritage ownership issues than litigation. Arbitrage is usually less expensive. Disputes about cultural property often turn into a "court show", the cost of which can easily exceed several million. The cost of litigation may even exceed that of disputed cultural property. The fiscal cost of the process is not the only argument to consider. The negative publicity of the "show" diminishes the value of cultural assets, especially if the authenticity or bona fide acquisition is questionable. Arbitration is confidential to protect the reputation and cultural value of the parties. Given the contractual nature of arbitration, the parties may agree to remain confidential to protect their reputations. Given the immense public interest in stolen, fraudulent or damaged cultural property, parties will be able to avoid negative public scrutiny. Accordingly, along with court costs and attorney's fees, risks of cultural property devaluation and reputational damage is considered as well.[18]

The historic city of Vilnius, an impressive complex of Gothic, Renaissance, Baroque, and Classical buildings, is included in the World Heritage List as a cultural heritage site of outstanding universal value. The Norwegian investor, in accordance with the agreement signed with the Vilnius Municipality, planned to build a parking lot under the historical center of the city. The assessments of the impact of the cultural heritage determined by the law showed that the project presented by the investor may pose a threat to the cultural heritage due to the planned excavation. Amid technical difficulties and growing public opposition, the project was shelved and another was chosen that did not involve excavation. To complete the project, the municipality signed a new contract with a Dutch company. The Norwegian enterprise Parkerings filed a claim before the ICSID (International Center for Settlement of Investment Disputes) tribunal alleging discrimination due to the advantage given to a Dutch competitor. Naturally, the question arose whether it was legitimate for the Vilnius municipality to give preference to another contractor to limit the risk of damage to cultural heritage.[19]

The arbitral tribunal noted that "it is the indisputable right and privilege of each state to exercise its sovereign legislative authority. There is nothing controversial about the regulatory changes that existed at the time of the investment. Investors in transition countries, i.e. in states that have moved from a socialist-type centralized economy to a market-based economy, cannot legitimately expect a stable legal framework; Moreover, legislative changes should be considered a normal business risk. In this case, Lithuania, a country of the former Soviet Union, was granted candidacy for EU membership. However, any transition does not absolve states from the general duty of good faith and transparency. The arbitrator rejected the claim of discrimination, finding that Parkerings and its Dutch competitor were not similarly situated. The claimant's project included excavation works under the cathedral. Not only did the Tribunal pay due attention to cultural heritage matters, but it also stated that compliance with the obligations flowing from the UNESCO 1972 World Heritage Convention (WHC) justified

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16 *Varner E.,* Arbitrating Cultural Property Disputes, Spring 2012, Cardozo Journal of Conflict Resolution,Vol.13, 483.

17 Greenberg v. Bauman, 817 F Supp.167 D.C. 1993. Arbitration confidentiality protects the value of cultural assets. Litigation, with the accompanying negative publicity, will 'burn' the work, substantially reducing its chances of sale or otherwise adversely affecting its value." For instance, when buyers of the Calder Mobile sued the seller for inauthenticity, the value of the mobile dropped as the art market learned that the owner and the Calder expert did not believe it was authentic. Thus, confidentiality is an important benefit of arbitration that is not available in litigation.Varner E., *Arbitrating cultural property disputes,* Spring 2012, Cardozo Journal of Conflict Resolution, Vol.13, 483-485.

18 *Varner E., Arbitrating cultural property disputes,*Spring 2012, Cardozo Journal of Conflict Resolution, Vol.13, 481.

19 Parkerings-Compagniet AS v. Lithuania*,* ICSID Case №ARB/05/8, Award, 11 September 2007. *Polasek M., Puig S.,* ICSID Review-Foreign Investment Law Journal, Volume 22, Issue 2, Fall 2007, 446-454, <https://rb.gy/ku8dab> [02.12.2024].

the refusal of the project, concluding that "the historical and archaeological preservation and environmental protection could be, and in this case were, a justification for the refusal of the claimant's project." [20]

The handling of cultural property disputes is based on the experience of cultural property professionals, namely lawyers, curators, art dealers, and scientists. If the contract deals with the valuation or authenticity of a cultural object, the arbitration agreement may specify an appraiser or valuer. If a contract is signed for the sale or ownership of cultural property, the arbitration agreement will determine the lawyer and the art dealer. For example, one auction house's arbitration clause states, "The arbitrator shall be a retired judge or attorney familiar with commercial law and specialized in arbitration."[21]

Arbitration agreements may provide for expedited arbitration. Expedited arbitration is useful if there is already a relationship between the parties involved or there are time constraints such as alienation, export of cultural property in the near future, etc. The hearing can be expedited by: setting time limits for each party and limiting the number of depositions and discovery. Limitations must be reasonable so as not to adversely affect the proceedings and outcomes.[22]

The arbitral tribunal successfully concluded the case of Maria Altman's lawsuit, on which the United States court had reached a dead-end (2001-2004). Altman sued the Austrian government in 1998 for the return of six Gustav Klimt paintings valued at around $150 million (including one of the famous portraits of the Nazi-exiled Madame Bloch-Bauer, aka "Lady in Gold"). The paintings were given to the Austrian National Gallery, which refused to return them to the family after World War II because they enjoyed the status of a national treasure.[23] Despite the existence of immunity under the Foreign Sovereign Immunities Act (FSIA), a 2004 decision of the US Supreme Court eliminated immunity when property obtained in violation of international law is held by a foreign government agency/institution engaged in commercial activities in the United States. The latter condition was deemed sufficient to prove American jurisdiction, due to the availability of the Austrian museum catalog in the US. Such a low threshold reflects the willingness of American courts to extend their jurisdiction to handle Holocaust-related cases. In 2001, the California District Court rejected the Austrian party's request to hear the case in Austria. The court stated: "Altman's suit in Vienna would have been dismissed because of the thirty-year statute of limitations applicable there. Thus, he would remain without a legal protection mechanism. Therefore, Austria is not an adequate alternative forum for claims." As a result, the Austrian government agreed to arbitration proceedings and eventually returned five of Klimt's six paintings to Maria Altmann, Bloch-Bauer's heir. [24]

4. Cultural property Disputes in International Investment Arbitration

There are various potential areas of conflict between investor rights and cultural policy. If a dispute arises between the investor and the host state, then several courts are available. Foreign companies may not resort to local courts and human rights tribunals (requiring the exhaustion of local remedies) but instead bring cases in investment treaty arbitration due to simplified procedures and greater independence. Investment treaty arbitration is a sophisticated means of dispute resolution.[25] Although the WTO's Dispute Settlement Mechanism (DSM) was until recently considered the "jewel in the crown" of this organization, Investor-State Dispute Settlement has become the most successful mechanism for settling investment-related disputes. [26]

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20 *Vadi V.,* Cultural Heritage in International Economic Law, Brill | Nijhoff, 2023, 213.

21 Condition of Sale in California, New York, Bonhams & Butterfields; *Varner E.,* Arbitrating cultural property disputes, Spring 2012, Cardozo Journal of Conflict Resolution,Vol.13, 514-515

22 The arbitration clause of Bonhams Auction House provides for expedited arbitration, stating: "Each party should have no more than eight hours to present its position. The hearing before the arbitrator shall not last more than three consecutive days. The award shall be made in writing no later than 30 days after the end of the proceedings." Condition of Sale in California, New York, Bonhams & Butterfields; *Varner E.,* Arbitrating cultural property disputes, Cardozo Journal of Conflict Resolution, Vol.13, Spring 2012, 506.

23 Altmann v. Republic of Austria, 142 F.Supp.2d 1187 (C.D. Cal. 1999) a 443. Maria V. Altmann, Francis Gutmann, Trevor Mantle, George Bentley, and Dr. Nelly Auersperg v. Republic of Austria (Jan. 15, 2006) (Arbitral award in German). The restitution of the sixth painting, a portrait of Amalie Zuckerkandl, was rejected in a separate arbitration (Majken Hofmann, Anna Lokrantz, Maria Muller, Andreas Muller Hofmann und Lena Muller Hofmann v. Republic of Austria (Nov. 21, 2005) (Arbitral award in German); *Renold C. et al.,* Case Six Klimt Paintings – Maria Altmann and Austria, Platform ArThemis, March 2012.

24 *Campfens E.,* Restitution of Looted Art: What About Access to Justice? May 2019, Santander Art and Culture Law Review 192-193.

25 *Vadi V.,* Cultural Heritage in International Investment Law and Arbitration Cambridge University Press, 2014, 1-2.

26 *Vadi V.,* Cultural Heritage in International Economic Law, Brill | Nijhoff, 2023,103.

Investment arbitration (ISDS) is a dispute resolution procedure between foreign investors and host states. International investment agreements are concluded between states to promote and protect investments. Most treaties contain a clause that allows an investor to bring a dispute against a state in investment arbitration. Thus, foreign investors can bring claims against the host state for failing to protect their investments from actions by local communities. All arbitrators are required to be independent and impartial. Arbitral tribunals usually consist of an unequal number of members, usually three arbitrators.[27] Cultural property transactions and high-cost disputes can become complex due to the different skills and knowledge required to litigate them. In this context, it is difficult to find a single person who is an expert in cultural property and law. Three arbitrators are preferred if it is not possible to find a competent person in these two areas. [28]

Some scholars argue that the Investment Arbitration Mechanism (ISDS) is biased in favor of corporate interests and ignores purely non-economic issues. Of course, given the architecture of the arbitration process, significant concerns arise in the context of disputes involving cultural elements. Although arbitration is structurally a private model of dispute resolution, investment disputes are characterized by aspects of public law. Arbitration decisions ultimately shape the relationship between the state on the one hand and private individuals on the other. Arbitrators determine such issues as the legality of government activity, the degree to which individuals are protected from regulation, and the appropriate role of the state. [29]

Whether the economic activity carried out by foreign investment is related to cultural heritage or not is of decisive importance for determining the subject matter jurisdiction of the arbitration. In *Renée Rose Levy and Gremcitel SA v. Republic of Peru*, [30] French investors filed an investor-state arbitration claim under the France–Peru BIT relating to the proposed development of property in a protected historical district. Investors bought oceanfront land on the outskirts of Lima and planned to develop a tourism business. A few years later, the National Institute of Culture passed a decree prohibiting any construction on the property due to the historical significance of the site. The parcels of land were located adjacent to Moro Solar, the site of the 1881 Battle of San Juan between Peruvian and Chilean forces during the War of the Pacific. According to the investor, the resolution caused the investment to lose all value. The Peruvian state argued that the corporate restructuring by which a French national acquired shares in Gremcitel, a Peruvian company, was an abuse of power. The Peruvian government indicated that the hasty transfer of shares, which made the investor the majority shareholder in Gremcitel, was carried out to comply with the bilateral investment treaty. According to the arbitral tribunal's decision: “It is well established that the reorganization of a corporate structure to obtain the benefits of an investment treaty is legitimate when it is done to protect the investment and to avoid a potential dispute with the host state. It noted, however, that when litigation is anticipated, corporate restructuring may constitute an abuse of process, and claimants should have presumed the adoption of the resolution. Accordingly, the Tribunal refused to exercise jurisdiction.

In some interesting cases, arbitrators have declined jurisdiction on the grounds that the investors did not comply with the domestic laws of the host state to protect important cultural heritage. [31] In 2015, a Costa Rican company and several Dutch investors, all shareholders of an ecotourism project called Cañaveral in Bocas del Toro, Panama, filed a claim against Panama at the ICSID. The investors challenged the domestic land management agency's decision that the claimants' property was located in the Ngöbe Buglé Indigenous Protected Area. The Ngöbe traditionally followed farming, fishing, and hunting on their land, which originally stretched from the Pacific Ocean to the Caribbean Sea. Today, they live in the Comarca Ngöbe Buglé, a district in western

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27 *Puig S.,* Social Capital in the Arbitration Market, 2014, European Journal of International Law, Volume 25, Issue 2, 387-424, 397.

28 For instance, a clause in the artwork co-ownership arbitration agreement stated: “Any claim the parties may have regarding the work shall be submitted to a panel of three arbitrators.” Moreover, many panels of arbitrators allow the parties to appoint an arbitrator “who is independent but knowledgeable about matters important to the parties.” In addition, if the value of the disputed cultural property is large, the cost of three arbitrators is justified. For example, an American Arbitration Association (AAA) clause states: “If either party's claims exceed $1 million, without attorneys' fees, the dispute shall be heard and decided by three arbitrators.” *Varner E., Varner E.,* Arbitrating cultural property disputes, Cardozo Journal of Conflict Resolution, Vol.13, Spring 2012, 475-476.

29 *Vadi V.,* Cultural Heritage in International Economic Law, Brill | Nijhoff, 2023,106.

30 Ibid., 167-168.

31 Álvarez y Marín Corporación S.A. v. Republic of Panama, ICSID ARB/15/14, Award, 12 October 2018. Vadi V., Cultural Heritage in International Economic Law, Brill | Nijhoff, 2023, 162,163.

Panama, in the area specifically established to protect their cultural and political autonomy. [32] The disputed investment covered the ownership of four farms on the coast of Panama, which were planned to be developed into an ecotourism project. As the press questioned the legitimacy of the acquisition, the National Land Administration placed two of the investors' properties outside this special zone. Dissatisfied with this fact, the indigenous population considered the action an invasion of their property. According to the claimants, Panama's treatment of their investments constituted an indirect expropriation, a disregard for fair treatment and protection standards. Panama denied any violation of treaty provisions and raised a jurisdictional claim, arguing that the investors' real estate had been illegally acquired. The arbitral tribunal declined jurisdiction over the case due to the investors' violation of domestic law. Although neither of the two investor agreements contained an explicit reference to the legality of the acquisition, the tribunal found that the requirement of legitimacy should be considered implicit in all investment agreements, as only legally acquired investments benefit from contractual protection guarantees. According to the tribunal, the law establishing the Comarca and the Panamanian Constitution aimed at protecting Indigenous peoples' cultural, economic, and social well-being. It also considered the commonality of land as a fundamental condition for the survival and continuity of the ethnic identity of Indigenous peoples.

Naturally, there is a collision between two different phenomena of normative values, which is manifested by the growth of relevant international disputes. Is it possible to integrate culture into international investment law and arbitration? And if so, how? Although the State must comply with the norms of the investment treaty, certain cultural rights are related to human dignity and other fundamental rights, so they may enjoy a higher standard of protection.

Glamis Gold v. The United States of America Canadian Mining Company planned to mine gold on federal land in southeastern California (the Imperial Project). The Imperial Project and the surrounding area had been used as a pilgrimage route by Native Americans for centuries. Their rights were recognized and protected by legislation. The Kechan, a local indigenous tribe, opposed the project because it would destroy the Trail of Dreams – a sacred path still used for ceremonial, spiritual practices. Although the area was not included in the World Heritage List, it had the same cultural significance for the tribe as Mecca or Jerusalem for the believers. The Department of the Interior banned mining for 20 years with this project to protect the historic property. When the project was re-authorized, the State Board of Mountain Geology passed emergency regulations requiring the backfilling of all open pits to restore the approximate contours of the pre-mining land. The investor brought the case in investment treaty arbitration, claiming that the state measures inter alia constituted an indirect expropriation of its investment in violation of Article 1110 of NAFTA. According to the claimant, the expropriation began when the federal government refused to approve their operating plan and continued with the backfilling requirement. In their view, uneconomical backfilling would render the mining operation unprofitable and would not be rationally related to its stated goal of protecting cultural resources. The claimant argued that while extracting gold from the ground destroys any cultural resources on the surface, "putting the dirt back in a pit does not protect those resources," and could lead to more artifacts being buried, hence greater cultural loss. The arbitral tribunal found that the challenged measures did not constitute indirect expropriation. To distinguish between non-compensable regulation and compensable expropriation, the Tribunal applied a two-step test to determine: (1) the extent to which the measures taken interfere with reasonable economic expectations; and (2) the purpose and nature of governmental actions. First, the tribunal found that the claimant's investment had not lost its profitability and that the reclamation demands had not had a sufficient economic impact on the investment to constitute expropriation. Second, the tribunal considered the measures taken to be reasonably fit for purpose and acknowledged that "some cultural artifacts may be damaged to some extent during excavation and filling", although, without such measures, significant pits and piles of waste would have damaged the nearby landscape.[33]

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[32] The 1997 law on the establishment of the Comarca Ngöbe Buglé recognized indigenous peoples' collective ownership of land and prohibited private ownership in these areas. In the region, it was only allowed to sell private land plots to individuals, provided that the plots had been a private property until 1997. However, the Comarca authorities retained the right of pre-emption of any privately owned land. According to human rights specialists, this and similar laws represent "one of the first achievements in the world to protect the rights of indigenous peoples." James Anaya, Special Rapporteur on the Rights of Indigenous Peoples, UN Human Rights Council, The Status of Indigenous Peoples' Rights in Panama, A/HRC/27/52/Add.1, 3 July 2014, para.13.

[33] Glamis Gold, Ltd. v. United States of America, Award, 8 June 2009.

Gosling v. Mauritius [34] British investors planned to build a resort in Le Morne, a UNESCO World Heritage Site. A rocky mountain overlooking the Indian Ocean in the southwest of Mauritius, Le Morne was used as a shelter by runaway slaves, the so-called maroons, through the 18th and the 19th centuries. Protected by the mountain's almost inaccessible cliffs, the maroons formed small settlements on the summit of Le Morne. The landscape thus constitutes a symbol of the slaves' fight for freedom and heroic resistance to slavery. The government did not grant a building permit to protect the area, and the investors argued in arbitration that such a refusal amounted to an indirect expropriation of the investment, as compensation was not paid. The defendant indicated that the investors never received permission to develop the area. The State of Mauritius claimed that it was exercising its authority in good faith over its main policy objective of inscribing Le Morne as a World Heritage Site. The investors admitted that this goal had been known to them even before the development plan for the property was drawn up. The state explained that it was "impossible to have Le Morne on the UNESCO World Heritage List and have the claimants' project at the same time," as the World Heritage Committee had asked the government not to allow Le Morne to be overdeveloped. Finally, the government did not expropriate as the territory did not lose all of its economic value; On the contrary, it retained at least a quarter of its market value. The arbitral tribunal found that the investors never obtained the necessary licenses. Therefore, they did not have the right to develop the territory. If claimants had obtained permits, then the interference with such rights would have given rise to a justifiable claim for compensation. The tribunal rejected the claim of indirect expropriation.

Elitech and Razvoj Golf v. Croatia[35] Investors planned to build a luxury resort on a hill overlooking Dubrovnik, a World Heritage Site. The project included the construction of golf courses, hotels, and villas. The tourist complex would significantly change the city and be massive in size compared to it. Locals opposed the project, claiming it would damage the environment and threaten Dubrovnik's World Heritage status. Based on their lawsuit, the local administrative court suspended the project. Consequently, the company filed a claim in investment arbitration seeking compensation under the bilateral investment treaty.

The preservation of places of historical and cultural significance and/or the enhancement of public welfare and quality of life associated with revitalization projects may be a legitimate public objective that is one of the prerequisites for lawful expropriation. In *United States v. Gettysburg Electric Railway Co.,* the United States Supreme Court ruled that the preservation of the historic site served a legitimate purpose. Accordingly, it was included in the powers of expropriation of the government. The court emphasized that "the preservation of Gettysburg, one of the greatest battle sites in the world, is necessary not only for a public purpose but is so intimately connected with the well-being of the Republic itself that Congress, within the powers conferred by the Constitution, has decided to protect it." [36]

5. Conclusion

Cultural heritage disputes, specifically, conservation, repatriation, image reproduction, purchase agreements, authenticity, and property rights can be discussed in arbitration. Arbitration is much cheaper and faster than litigation. The parties may select arbitrators with relevant expertise in the field. Arbitration proceedings are confidential, with the parties retaining more flexibility and control over the outcome than in litigation. Disputes over cultural property often involve years of costly, prolonged litigation, and raise questions about whether claimants have taken timely action to recover stolen property. Often, the return of looted antiquities from the Holocaust or earlier times becomes difficult due to the expiration of the statute of limitations. The situation is further exacerbated when cultural objects turn up long after they have been stolen. In recent years, alternative dispute resolution (ADR), including arbitration, mediation, and negotiation, have emerged as promising options

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[34] Thomas Gosling, Property Partnerships Development Managers (UK), Property Partnerships Developments (Mauritius) Ltd, Property Partnerships Holdings (Mauritius) Ltd, and TG Investments Ltd v. Republic of Mauritius (Gosling v. Mauritius) ICSID Case №ARB/16/32, Award, 18 February 2020, *Vadi V.,* Cultural Heritage in International Economic Law, Brill | Nijhoff, 2023, 175-176.

[35] Elitech B.V. and Razvoj Golf D.O.O. v. Republic of Croatia, ICSID Case №ARB/17/32, *Vadi V.,* Cultural Heritage in International Economic Law, Brill | Nijhoff, 2023,176.

[36] United States v. Gettysburg Electric Railway Co., 160 US 668 (1896); Berman v. Parker, 348 US 26 (1954) The United States Supreme Court confirmed that Congress had the right to compulsorily purchase a blighted neighborhood in Washington, D.C., and redevelop it, as providing residents with a nice place to live was part of the state's public welfare concept. *Vadi V.,* Cultural Heritage in International Investment Law and Arbitration Cambridge University Press, 2014, 70.

for resolving these disputes. Indeed, over the past four decades, most cultural property disputes have been settled out of court. Fortunately, the world of ADR is becoming increasingly popular as an alternative resolution method in cultural property disputes and is supported not only by the International Council of Museums, and the World Intellectual Property Organization but also by other authoritative international organizations.

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