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**The issue of cultural heritage protection in international investment
in the mining and construction sectors**

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**Submitted in fulfilment of the requirement for
the Degree of PhD in Law**

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Abstract

International mining and construction projects have given rise to concerns about whether the interests of cultural heritage itself and of those who have an interest in safeguarding cultural heritage are respected and weighed. The regulations that could potentially apply could come from cultural heritage law, investment law, human rights law, archaeological rules, and laws on mining and construction. A crucial question is whether regulations that are designed to protect cultural heritage contribute to an adequate legal framework in the context of international investment activities. How are disputes between foreign investors and a host State, disputes relating to movable cultural objects, and conflicts involving non-state actors to be dealt with? The social-legal methodology is employed to highlight legal, economic and social perspectives.

The conclusion that the existing legal framework is ineffective is inescapable due to the lack of specific measures at both international and national levels. There are cases in which protection of cultural heritage has been used as a justification for host State's interference in investors' activities, along with the preservation of the environment, human rights and public interests. Foreign investors still consider investment arbitration as a preferred method to resolve Investor-State disputes with cultural elements. Amicable arrangements may be helpful to deal with cultural property related disputes and to avoid conflicts raised by parties than this State from escalating into serious legal conflicts, but the parties involved face some difficulties in finding a suitable approach to balance their conflicting interests.

From these findings, recommendations are offered to improve the laws and procedures to achieve a higher standard of cultural heritage protection. The thesis highlights the role of unique tools of international investment law – including state contracts and guidelines of investment financiers and the requirements for more efficient rules on archaeological reports and cultural impact assessment. The thesis also demonstrates that the competing interests of the different parties concerned are to be dealt with promptly and adequately if there is to be any hope of settling Investor-State disputes, disputes relating to cultural properties or conflicts initiated by local communities or nongovernmental entities.

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Convention for Protection of the World Cultural and Natural Heritage 1972

Convention on the Protection of Underwater Cultural Heritage 2001

Convention for the Safeguarding of the Intangible Cultural Heritage 2003

Convention for the Protection of the Diversity of Cultural Expressions 2005

Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 1970

Criminal Law Convention, Council of Europe 1999

International Convention on the Settlement of Investment Disputes (ICSID Convention) 1965

ICC Arbitration Rules 2017

ICSID Additional Facility Arbitration Rules 2006

OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions 1997

Operational Guideline for the Implementation of the World Heritage Convention July 2017

UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects 1995

UNCITRAL Arbitration Rules 2013

World Bank Guidelines on the Treatment of Foreign Direct Investment 1992

Vienna Convention on the Law of Treaties 1969

Bilateral

(The bilateral investment treaty names are shortened to refer only to the Parties to the Agreement and the year. The full citations are given in the footnotes)

Argentina-Canada 1991

Australia-Chile 2008

France-Argentina 1991

Canada-Benin 2013

Canada-China 2012
Czech Republic-South Africa 1998
Czech Republic-Vietnam 1997
Finland-South Africa 1998
Greece – South Africa 1998
Jordan-Canada 2009
Korea-South Africa 1995
Kuwait-Canada 2011
Mauritius- South African 1998
Netherlands-Indonesia 1968
South Africa-Iran 1997
Vietnam- Poland 1994
Vietnam-Romania 1994
UK-Sri Lanka 1980
UK-Vietnam 2002

Multilateral and regional

ASEAN Comprehensive Investment Agreement 2009
ASEAN Protocol on Enhanced Dispute Settlement Mechanism 2004
Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) 2018
EU-Canada Comprehensive Economics and Trade Agreement (CETA) 2014
North American Free Trade Agreement (NAFTA) 1992
Trans-Pacific Partnership Agreement (TPP) 2016

National

Australia

Environment Protection and Biodiversity Conservation Act 1999
Heritage Council Act 2003
Protection of Movable Cultural Heritage Act 1986
World Heritage Properties Conservation Act 1983

Canada

Historic Sites and Monuments Act 1985

National Parks Act 2000

South Africa

Arbitration Act 1965

Mining and Petroleum Resources Development Act 2002 (Act No 28 of 2002)

National Environmental Management Act (No 73 of 1989)

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Azurix Corp v. The Argentina Republic, ICSID Case No. ARB/01/12, Award on 14 July 2006.

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Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt, ICSID Case No. ARB/99/6, Award on 12 April 2002.

Mobil Investments Canada Inc. & Murphy Oil Corporation v. Canada, ICSID Case No. ARB(AF)/07/4, Award on 20 February 2015.

Parkerings-Compagniet AS v. Republic of Lithuania, ICSID Case No. ARB/05/8, Award on 11 September 2007.

Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7, Award on 8 July 2016.

Salini Costruttori S.p.A. and Italstrade S.p.A. v. The Hashemite Kingdom of Jordan, ICSID Case No. ARB/02/13, Award on 31 January 2006.

Saluka Investments B.V. v. The Czech Republic, UNCITRAL, Partial award on 17 March 2006.

S.D. Myers, Inc. v. Government of Canada, UNCITRAL, First partial award, 13 November 2000.

SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan, ICSID Case No. ARB/01/13, Decision of the tribunal on objections to jurisdiction on 6 August 2003.

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Waste Management, Inc. v. United Mexican States, ICSID Case No. ARB (AF) 00/3, Award on 30 April 2004.

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Author's declaration

I declare that except the explicit reference is made to the contributions of others, that this PhD thesis is the result of my own work and has not been submitted for any other degree at the University of Glasgow or any other institutions.

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1. Chapter 1: Introduction

1.1 Background and context

1.1.1 International investment projects on mining and construction and threats to cultural heritage

Cultural heritage faces great threats during armed conflicts where the violence is widespread. Armies and armed groups have often been motivated to target cultural property for its symbolic values as a means of persecution, ethnic cleansing, to spread terror, incite resistance, or to destroy the identity and culture of an ethnic or religious group.¹ The Nazis expropriated and destroyed Jewish-held art in Europe during World War II; Croat forces destroyed the Mostar bridge in Bosnia in 1993; the Khmer Rouge destroyed Cambodia's Buddhist heritage in 1975; Serb forces destroyed the 'Vijecnica' National Library in Sarajevo in 1992 and bombarded the Old Town of Dubrovnik in 1999; and the Taliban demolished ancient Buddha statues in Bamiyan, Afghanistan, in 2001.

Cultural heritage also faces risks during peacetime. Among these count international investment activities including mining and construction projects that may impact cultural heritage sites and cultural objects adversely. For example, over 1,300 sites of archaeological value have been discovered in the Three Gorges Dam construction project located on the Yangtze River, China's longest river. These include sites from the Palaeolithic Period, graves from the Warring States Period (475–221 BC), and farmland sites from the Tang (618–907 AD) and Song (960–

¹ For more on the topic of the protection of cultural properties in armed conflicts, see C. Forrest, *International law and the protection of cultural heritage* (Routledge, 2010), chapter 3: Cultural heritage and armed conflicts; B. A. Roberts and G. B. Roberts, A case study in cultural heritage protection in a time of war in J. D. Kila, J. A. Zeidler, *Cultural heritage in the crosshairs: protecting cultural property during conflict* (Brill, 2013); P. Gerstenblith, *Art, cultural heritage, and the law: cases and materials* (2nd edn, Carolina Academic Press, 2008) chapter 9: Cultural heritage in time of war and the aftermath of war; K. Chamberlain, The protection of cultural property in armed conflict, *Art Antiquity and Law*, Vol. VIII, Issue 3, September 2003; S. Auwera, Contemporary conflict, nationalism and destruction of cultural property during armed conflict: a theoretical framework, available at http://www.worldinwar.eu/wp-content/uploads/2016/11/Contemporary_Conflict_Nationalism_and_th.pdf (accessed on 15/03/2019); H. Abtahi, The protection of cultural property in times of armed conflict: the practice of international criminal tribunal for the former Yugoslavia in *Harvard Human Rights Journal*, Vol. 14, 2001, 1-32; F. Francioni and F. Lenzerini, The obligation to prevent and avoid destruction of cultural heritage in B. Hoffman (ed), *Art and cultural heritage: law, policy, and practice* (Cambridge University Press, 2006) 28-40.

1279 AD) dynasties. To save heritage sites and items from being flooded, about 100 archaeological teams worked on the ‘Three Gorges Relics Rescue Program.’ Nevertheless, even if some heritage can be saved, many invaluable cultural objects will be lost. Any cultural heritage sites and cultural objects that are not detected before the water level reaches them will be much harder to find.² In May 2005 a hundred Chinese tombs, more than 2,000 years old, were destroyed during construction works for a housing project at the Helinge’er county side in Inner Mongolia.³ The situation in Trang An Scenic Landscape Complex, a mixed natural and cultural property in Vietnam which was inscribed on the World Heritage List⁴ in June 2014 also faces threats to cultural heritage. Traces of human activity dating back almost 30,000 years when you explore some of the highest caves that are spread across the landscape has revealed archaeological. A spectacular landscape of limestone karst peaks, the Trang An Complex, permeated with valleys some of which are submerged and surrounded by steep almost vertical cliffs are situated on the southern shore of the Red River delta.⁵ The property also includes Hoa Lu, the old capital of Vietnam in the 10th and 11th centuries, as well as temples, pagodas, and paddy-field landscapes.⁶ The Trang An Complex has become popular for sightseeing during the last twenty years or so. Construction projects undertaken to boost tourism and promote development have met with concerns over both environmental and cultural heritage protection.⁷

Afghanistan lost a rich piece of cultural heritage in 2001 when the Taliban used dynamite to blow up two massive Buddha statues carved into sandstone cliffs in Bamiyan in northern Afghanistan. This country is also at risk of losing many thousand-year-old artefacts again, even in peacetime.⁸ An international investment

² S. Gruber (2007), Protecting China’s cultural heritage sites in times of rapid change: current developments, practice and law in *Asia Pacific journal of environmental law* Vol. 10 (3), 253-299, at 277-278.

³ Gruber, note 2, 282.

⁴ For further information about the World Heritage List, see Chapter 2, section 2.2.1.1.

⁵ <http://vietnamflavor.com/discovering-the-landscape-of-trang-an/> (accessed on 15/03/2019).

⁶ <http://whc.unesco.org/en/list/1438> (accessed on 15/03/2019).

⁷ For more information, see Ninh Binh Provincial People’s Committee, The management plan for Trang An Landscape Complex, Ninh Binh Province, Vietnam, 2015. The text is available at whc.unesco.org/document/140195 (accessed on 15/03/2019).

⁸ V. Plesch, Saving Buddhist statue: Afghanistan’s big dig (June, 2014), available at <http://america.aljazeera.com/articles/2014/6/24/mes-aynak-savingafghanistanculturaltreasures.html> (accessed on 15/03/2019).

contract was concluded in 2008 to be carried out in the Bamiyan Valley where remains of an ancient Buddhist complex form part of the cultural landscape. This cultural site was inscribed on the List of World Heritage in Danger in 2003.⁹ Buddhist statues and sculptures; intricate monastic complexes; stupas and frescoes; pottery; coins; gold jewellery; and an ancient copper mine is buried beneath this mountainous 4.8-million-square-foot site.¹⁰

Investments are vulnerable not only during the armed conflicts but also in peacetime.¹¹ International investment is an aspect of globalisation on the one hand and economic development on the other hand. Foreign investors have brought vital capital and the know-how to developing countries.¹² Investors take a keen interest in sectors which are seen to bring many economic benefits to both host States and foreign investors. The investment contract in Mes Aynak in the Bamiyan Valley in Afghanistan is mainly for mining, for example. One estimate puts the value of the copper deposits in the valley at \$100bn, which would indicate the largest such deposit in the world, and potentially worth around five times the estimated value of Afghanistan's entire economy.¹³

The inscription of tourist sites on the World Heritage List has brought tensions between the protection of cultural heritage and the development of tourism. This is particularly in relation to the increasing pressure from burgeoning tourist numbers and tourism related activities as the Kakadu National Park in Australia illustrated.¹⁴ The Angkor Wat in Cambodia demonstrated another aspect of such tensions as the

⁹ For further information about the cultural landscape and archaeological remains of the Bamiyan Valley, see <<http://whc.unesco.org/en/list/208>> (accessed on 15/03/2019).

¹⁰ Plesch, note 8.

¹¹ See further C.H. Schreuer, 'War and Peace in International Investment Law', TDM 1 (2018), available at <https://www.transnational-dispute-management.com/journal-advance-publication-article.asp?key=1689> (accessed on 15/03/2019).

¹² International investment has been frequently regarded as one of the driving forces in economic development in developing countries. See P. Nunnenkamp, Foreign direct investment in developing countries - What policymakers should not do and what economists don't know, available at <http://www.econstor.eu/bitstream/10419/2616/1/kd380.pdf> (accessed on 15/03/2019).

¹³ W. Dalrymple, Mes Aynak: Afghanistan's Buddhist buried treasure faces destruction (May, 2013), available at <http://www.theguardian.com/books/2013/may/31/mes-aynak-afghanistan-buddhist-treasure> (accessed on 15/03/2019).

¹⁴ See further D. Davis, Kakadu National Park – conflicts in a World Heritage Area in *Tourism Management*, September 1992, 313-320.

listing of the temple complex has caused tensions between the rights of local inhabitants to live in the area and redistribute land title.¹⁵

Once wars stop, cultural heritage sites and cultural objects may continue to face risks such as destruction, fire, and theft. Despite an ongoing disappearance of cultural heritage, developing countries are experiencing rapid economic development and significant social change.¹⁶ For example, according to figures released by the State Administration of Cultural Heritage of China, there were over 140 security incidents related to cultural relics including 23 fires, 29 thefts and 89 illegal excavations in 2015.¹⁷ As with the situation that domestic investment projects, mining and construction activities conducted by foreign investors can lead to the discovery of artefacts and other materials of archaeological importance. Mining and construction projects may also provide opportunities for unprofessional or surreptitious excavation and looting of sites; or for the omission of reporting responsibilities. These activities contribute to the devaluation of movable cultural objects and may facilitate the ultimate removal and disappearance of movable cultural objects from their original locations in cultural sites and landscapes. Mining and construction activities can also result in substantial destruction in the cultural sites concerned; cultural objects which are unearthed might be stolen and smuggled out of the country when investment projects are carried out. For instance, in the case of a construction work site located in Tell es-Sakan, near Gaza City, Palestine, archaeologists and preservation activists claimed that ancient dwelling structures and sections of the ramparts had been destroyed and moveable artefacts have been taken away as well.¹⁸

¹⁵ See further J. Gillespie, Heritage and human rights: reframing the conservation ethic in A. Durbach and L. Lixinski (eds), *Heritage, culture and rights: challenging legal discourses* (Oxford: Hart Publishing, 2017) 165-180; T. Winter (2008), Post-conflict heritage and tourism in Cambodia: The burden of Angkor in *International Journal of Heritage Studies*, Vol. 14, 524-539; K. C. Sun, Angkor sites, Cultural world heritage in Hoffman, note 1, 148-156.

¹⁶ The topic of competing interests amongst an economic development, social impacts and the need for cultural heritage to be protected will be discussed at chapter 4, section 4.4.1.

¹⁷ China's cultural heritage protection faces threats: SACH (March, 2016), available at http://english.gov.cn/State_council/ministries/2016/03/25/content_281475314283988.htm (accessed on 15/03/2019).

¹⁸ French Press Agency, Gaza's ancient heritage at jeopardy amid plans to destroy Bronze Age sites (October, 2017) available at <https://www.dailysabah.com/history/2017/10/24/gazas-ancient-heritage-at-jeopardy-amid-plans-to-destroy-bronze-age-sites> (accessed on 15/03/2019).

It is a requirement for the interest of future generations and sustainable development that there be the protection of cultural heritage. As early from the 17th century, as a ground to restrain damage to cultural items in time of war, the preservation of the cultural heritage for future generations had been a topic of interest.¹⁹ The earth and its resources are much more than just as a profitable opportunity and must be held in trust for the benefit of this generation and the next.²⁰ Implementing our responsibilities to future generations require attention to nuclear power, freshwater supply, biological resources, information resources, but cultural heritage cannot be neglected because it does not provide a human necessity.²¹ Any loss of the cultural heritage is a loss of remembrance and knowledge to future generations; lost forever and irreplaceable. Nowadays, sustainable development demands a commitment to equity with future generations. The concept ‘sustainable development’, defined as ‘development that meets the needs of the present without compromising future generation's ability to meet their needs,’²² has been incorporated into a range of international instruments, national legislation, reports, and policies on cultural heritage.²³ Culture is an important pillar of sustainable development along with the dimensions of social, economic and the environment.²⁴ Significantly, according to ‘Transforming our world: the 2030 Agenda for Sustainable Development,’ a

¹⁹ L. V. Prott, P. J. O'Keefe, *Law and the cultural heritage* (Professional Books, 1984-1989), volume 1: Discovery and excavation, 27.

²⁰ E. Brown Weiss, In fairness to future generations and sustainable development in *American University International Law Review* 8, 1992 Vol. 1, 19-26, at 20.

²¹ *Ibid*, 23-24.

²² World Commission on Environment and Development, *Our common future* (Oxford University Press, 1987) (also known as the Brundtland Report).

²³ For instance, sustainable development was not only made an explicit element of the definition of intangible heritage, but an essential element, as the final sentence of Article 2 (section 1) of the 2003 Convention for the safeguarding of intangible cultural heritage states that ‘for the purposes of this Convention, consideration will be given solely to such intangible cultural heritage as is compatible with existing international human rights instruments, as well as with the requirements of mutual respect among communities, groups and individuals, and of sustainable development.’

²⁴ M. Fitzmaurice, S. M. Dubois, S. Nergi (eds), *Environmental protection and sustainable development from Rio to Rio+20* (Brill Nijhoff 2014) 358; J. Dessein, K. Soini, G. Fairclough and L. Horlings (eds), *Culture in, for and as sustainable development* (Conclusions from the COST Action IS1007 Investigating Cultural Sustainability), available at <https://www.culturalsustainability.eu/conclusions.pdf> (accessed on 15/03/2019); V. Vadi, *Cultural heritage in international investment law and arbitration* (Cambridge University Press, 2014), 53-55.

Resolution adopted by the General Assembly in 2015,²⁵ culture is recognisable as a crucial enabler of sustainable development.²⁶

Reported cases thus far indicate very strongly that cultural sites and cultural objects are genuinely at risk due to mining or construction activities. The bigger the value or size of a mining and construction project is,²⁷ the bigger the harm and damage to cultural heritage sites and cultural objects to be expected to be. The need for cultural heritage protection in the context of international investment projects on mining and construction has become apparent, but is the level of protection sufficiently robust in practice? If not, this thesis will look into ways that it may be improved.

1.1.2 Disputes and conflicts associated with cultural heritage protection in the mining and construction sectors

While international investment projects in mining and construction can benefit both investors and host States, there are latent tensions between them that may come to a head where the protection of cultural heritage in the host State is at risk. Disputes between a foreign investor and a host State often concern about whether the projects should be suspended or terminated. It could be the case that non-State actors such as local communities, nongovernmental organizations, activists or archaeologists opposed the project due to anticipated adverse impacts on cultural heritage. Local communities are referred to residents of inhabited heritage sites or those living within the protected cultural property; for instance, resident communities living amongst the monuments of Angkor in Cambodia. Such oppositions can create tension and conflict about whether the mining plans should be halted and the cultural heritage site to be preserved. In *Carter and Others v. Minister for Aboriginal Affairs and Another*,²⁸ the applicants were elders of the Dja Dja

²⁵ The text is available at <https://sustainabledevelopment.un.org/post2015/transformingourworld> (accessed on 15/03/2019).

²⁶ For further discussion on the link between culture and sustainable development in the post-2015 Development Agenda and in the newly agreed Sustainable Development Goals, see B. Boer, Culture, Rights and the Post-2015 Development Agenda in Durbach, note 15, 35–60.

²⁷ For an analysis of FDI mining and construction projects, see section 1.5.1.

²⁸ *Carter and Others v. Minister for Aboriginal Affairs and Another* [2005] FCA 667. The text is available at <https://plone.unige.ch/art-adr/cases-affaires/gravures-dja-dja-wurrung-2013-musee-de-melbourne-c-dja-dja-wurrung/carter-v-minister-for-aboriginal-affairs-2005-fca-667/view> (accessed on 15/03/2019).

Wurrung people for whom the two bark etching and the ceremonial piece had special cultural significance. This case has cultural elements but is more related to administrative law as the applicants applied to the first respondent (the Minister) to make a declaration for the preservation of the objects under federal legislation to protect indigenous people.²⁹

Disputes should be distinguished from conflicts.³⁰ The concept of a legal dispute is best explained with reference to Article 36(2) of the Statute of the International Court of Justice (ICJ)³¹ – ‘legal disputes concern the existence of any fact which, if established, that would constitute a breach of an international obligation; or the nature or extent of the reparation to be made for the breach of an international obligation.’ The report on the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of other States has the same approach with the ICJ as it stressed that a legal dispute is more than a mere conflict of interest and must concern the existence or scope of a legal right or obligation.³² If there is a disagreement between investors and a host State relating to investment activities, foreign investors may bring a legal action claiming that the host State did not comply with its obligations. Similarly, foreign investors may attempt to enforce legal rights which they may claim have been granted to them under relevant investment treaties. In practice, arbitral tribunals in international investment cases have adopted a similar description of ‘disputes’, and have relied

²⁹ See more at chapter 2, section 2.2.2.1.

³⁰ Scholars have different expressions but agreed that the terms ‘conflict’ and ‘dispute’ are not synonymous. While conflict is a process and tends to escalate, a dispute is just one of the typical by-products of conflict. See further R. Ehandi, *Complementing Investor-State dispute resolution: a conceptual framework for Investor-State conflict management* in R. Ehandi, P. Sauve (eds), *Prospects in international investment law and policy* (Cambridge University Press, 2013) 286. Alternatively, while the term ‘conflict’ is used to signify a general State of hostility between the parties, the term ‘dispute’ is employed to signify a specific disagreement relating to a question of rights or interest. See further J. Collier and L. Vaughan, *The settlement of disputes in international law institutions and procedures – Institutions and procedures* (Oxford University Press, 1999) 1.

³¹ <http://www.icj-cij.org/en/statute> (accessed on 15/03/2019).

³² Report on the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, International Bank for Reconstruction and Development, March 18, 1965, Para. 26. The text is available at <https://icsid.worldbank.org/en/Documents/icsiddocs/ICSID%20Convention%20English.pdf> (accessed on 15/03/2019). For the definition of a legal dispute, see C. Schreuer, *What is a legal dispute* available at <www.univie.ac.at/intlaw/wordpress/pdf/95.pdf> (accessed on 15/03/2019); A. Aust, *Handbook of international law* (Cambridge University Press, 2010) 404-405.

on the ICJ's definition.³³ Tensions between different parties concerned can lead to disputes, disagreements, or conflicts. Disagreements or conflicts may turn into legal disputes for national courts or arbitral tribunals to resolve.

As of December 31, 2018; disputes in the 'oil, gas and mining' sectors represented the most significant portion of all cases registered under the ICSID Convention and Additional Facility Rules³⁴ (24%) while disputes relating to construction ranked fourth, at 8%.³⁵ Statistics on conflicts in the mining and construction projects are published; however, an official source for disputes and claims about the preservation of cultural heritage has not been made available as yet.

Investor-State disputes and claims raised by parties other than a host State can occur at any stage of international investment activities. Disputes concerning cultural heritage preservation include *Clayton/Bilcon v. Government of Canada*³⁶ (with regards to a basalt mine in the coastal Canadian province of Nova Scotia); *Parkerings-Compagniet AS v. Republic of Lithuania*³⁷ (with regards to the construction of a large parking area in the old part of the city which contains an UNESCO Cultural Heritage Sites called the Vilnius Historic Centre); and *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*³⁸ (with regards to the construction of a tourist complex at the pyramids of Giza near the Pyramids World Heritage Site).

³³ *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. v. Argentina*, ICSID Case No. ARB/03/17, Decision on Jurisdiction of 16 May 2006, para 29. The text is available at <https://www.italaw.com/cases/1048> (accessed on 15/03/2019).

³⁴ International Centre for Settlement of Investment Disputes (ICSID) has hosted the majority of all known international investment cases. The *ICSID Caseload - Statistics* is an empirical reference about trends in international investment dispute settlement generally. Publications are available at <https://icsid.worldbank.org/en/Pages/resources/ICSID-Caseload-Statistics.aspx> (accessed on 15/03/2019).

³⁵ The ICSID Caseload-Statistics (Issue 2019-1), 12. The text is available at [https://icsid.worldbank.org/en/Documents/resources/ICSID%20Web%20Stats%202019-1\(English\).pdf](https://icsid.worldbank.org/en/Documents/resources/ICSID%20Web%20Stats%202019-1(English).pdf) (accessed on 15/03/2019).

³⁶ *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware Inc. v. Government of Canada*, UNCITRAL, PCA Case No. 2009-04, available at <https://www.italaw.com/cases/1588> (accessed on 15/03/2019).

³⁷ *Parkerings-Compagniet AS v Republic of Lithuania*, Award on the merits, 11 September, 2007, ICSID Arbitration Case No. ARB/05/8, available at <http://italaw.com/documents/Pakerings.pdf> and <http://investmentpolicyhub.unctad.org/ISDS/Details/201> (accessed on 15/03/2019).

³⁸ *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, ICSID Case No ARB/ 84/3, Award on the merits, 20 May 1992, available at <https://www.italaw.com/cases/3300> (accessed on 15/03/2019).

Claims were made by parties other than the host State in the *Kakadu* case, the *Mapungubwe* case and the *Mes Aynak* case, all of which are mining-related. They do not represent legal disputes between a foreign investor and a host State as such since there is no involvement of national courts or arbitral tribunal. The Kakadu National Park was added to the World Heritage List in 1981 as a mixed site because of its natural and cultural significance to the indigenous Mirarr people.³⁹ In the *Mapungubwe* case, the Vele mining area is adjacent to the Mapungubwe Cultural Landscape which was recognised in 2003 as a World Heritage Site.⁴⁰ The investment contract in the *Mes Aynak* case was mainly for mining on the remains of Mes Aynak in the Bamiyan Valley, which was inscribed on the List of World Heritage in Danger in 2003 as was indicated above. The facts and legal issues arising in these disputes and claims will be analysed in detail in Chapter 3 and Chapter 4.

1.1.3 Dealing with Investor-State disputes and other claims associated with the protection of cultural heritage in the mining and construction sectors

When foreign investors bring a legal dispute against the host State, there are different methods of resolving the Investor-State disputes: (i) amicable ways such as negotiation, conciliation and mediation; (ii) litigation; and (iii) investment arbitration.⁴¹ Given the nature of conflicts or other claims taken by non-State actors such as local communities, cultural organisations or non-governmental entities; amicable approaches may be employed to deal with such concerns about the mining and construction investment activities.⁴²

From the perspective of the disputing parties, the choice of a suitable and effective method plays a significant role in resolving Investor-State disputes and managing other claims. The chosen means should preserve not only the legitimate rights of parties concerned but also the public interest in respect of cultural heritage. More importantly, the way in which a national court or an arbitral tribunal resolves the

³⁹ <http://whc.unesco.org/en/list/147> (accessed on 15/03/2019).

⁴⁰ For further information about the Mapungubwe Cultural Landscape, see <http://whc.unesco.org/en/list/1099> (accessed on 15/03/2019).

⁴¹ Detailed analysis will be conducted in Chapter 3.

⁴² This point will be explained in further Chapter 4.

merits of the dispute should indicate how and to what standards cultural heritage is protected. Similarly, the parties concerned should take into account the significance of protecting cultural heritage in dealing with any conflicts to avoid legal disputes.

1.2 Research question and hypotheses

The thesis is concerned with the level of protection that exists for cultural heritage in-laws; regulations and procedures for dispute settlement; and conflict management in the context of international investment projects on mining and construction. Do these laws, regulations, and procedures respond satisfactorily to the threats that face cultural heritage in international investment projects on mining and construction? If not, what can be done to improve the situation? The issue of protecting cultural heritage in the context of international investment activities needs to be analysed from the perspective of both cultural heritage itself and that of the parties concerned (including the host State, foreign investors and other parties such as non-governmental organisations, the local community and cultural organisations). Disputes and any conflicts or claims should be dealt with in a manner that complies with the law as it relates to cultural heritage; respects and weighs the interests of relevant parties; and maximises the chances of recording and documenting the findings objectively.

The thesis relies on three distinct hypotheses corresponding to Chapters 2, 3, and 4 respectively. The first hypothesis is that current cultural heritage laws and regulations designed for the protection of cultural heritage in foreign investment are ineffective. Chapter 2 will identify limitations of laws and regulations on cultural heritage and archaeological excavation in dealing with threats to cultural heritage sites and cultural items. For example, the existing laws lack the requisite level of detail and the lack of respect for (or ignorance of) the laws regarding cultural heritage that contribute to law enforcement difficulties. International investment law has its tools and strategies that may help to fill in the gaps. Chapter 2 will investigate to which extent such tools and instruments can improve the situation.

The second hypothesis is that, even when cultural factors complicate the reaching of a settlement in Investor-State disputes, investment arbitration qualifies as the most

preferred method. Chapter 3 will address this hypothesis by analysing how arbitration is used in disputes with cultural factors. Since there are a limited number of cases directly relating to the protection of cultural heritage, cases that feature public interest considerations will be examined to underpin a theory that accounts for cultural factors that can be expected to impact on the way that disputes can be arbitrated. Comparisons with cases relating to the protection of public interest illustrate difficulties of the application of investment arbitration in practice.

The third hypothesis is that amicable methods are ideal in theory and more effective than adjudicatory methods in dealing with claims about cultural heritage protection, but that the host States, foreign investors, and other parties lack experience in conflicts which are linked to the protection of public interest in general and cultural heritage in particular. Chapter 4 will examine relevant cases which reveal difficulties in respect of the use of amicable methods, and will then make recommendations to improve the level of success of such methods.

1.3 Gaps in existing literature

Studies on the legal protection of cultural heritage in general have often focused on international instruments on cultural heritage protection⁴³ such as the 1954 *Convention for the Protection of Cultural Property in the Event of Armed Conflicts*,⁴⁴ the 1972 *Convention for Protection of the World Cultural and Natural*

⁴³ Forrest, note 1; S. Borelli, F. Lenzerini (eds), *Cultural heritage, cultural rights, and cultural diversity: new developments in international law* (Martinus Nijhoff Publishers 2012); P. J. O’Keefe and L. V. Prott (eds), *Cultural heritage conventions and other instruments: A compendium with commentaries* (the Institute of Art and Law Ltd, 2011); J. Blake, *International cultural heritage law* (Oxford University Press, 2015); F. Francioni (ed) *The 1972 World Heritage Convention: A commentary* (Oxford University Press, 2008); S. Dromgoole, *Underwater cultural heritage and international law* (Cambridge University Press, 2013); M. J. A. Gómez, *Underwater cultural heritage* (Oxford University Press, 2013); S. Dromgoole, 2001 UNESECO Convention on the protection of the underwater cultural heritage in *International Journal of Marine and Coastal Law*, vol. 18, 2003, 59-91; L. Lixinski, *Intangible cultural heritage in international law* (Oxford University Press, 2013); M. L. Stefano, P. Davis and G. Corsane (eds), *Safeguarding intangible cultural heritage* (Boydell Press, 2012). T. M. Schmitt, The UNESCO concept of safeguarding intangible cultural heritage: Its background and Marrakchi roots in *International Journal of Heritage Studies*, vol.14, 2008, 95-111; R. Craufurd Smith, The UNESCO Convention on the protection and promotion of cultural expressions: building a new world information and communication order? in *International Journal of Communication*, Vol. 1, 2007, 24-55.

⁴⁴ The Hague, 14 May 1954. The text is available at http://portal.unesco.org/en/ev.php-URL_ID=13637&URL_DO=DO_TOPIC&URL_SECTION=201.html (accessed on 15/03/2019).

Heritage,⁴⁵ the 2001 *Convention on the Protection of Underwater Cultural Heritage*,⁴⁶ the 2003 *Convention for the Safeguarding of the Intangible Cultural Heritage*,⁴⁷ the 2005 *Convention for the Protection of the Diversity of Cultural Expressions*,⁴⁸ the 1970 *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*⁴⁹ and the 1995 *UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects*.⁵⁰ There are also publications on national laws for protecting cultural heritage.⁵¹ However, such research studies tend to omit analysis of archaeological standards for professional excavation in the mining and construction sectors.⁵²

Several scholars have focused on the interplay between international investment and other fields of public interests⁵³ including human rights,⁵⁴ sustainable

⁴⁵ Paris, 16 November 1972, 1037 UNTS 151.

⁴⁶ Paris, 2 November 2001. The text is available at <http://www.unesco.org/new/en/culture/themes/underwater-cultural-heritage/2001-convention/> (accessed on 15/03/2019).

⁴⁷ Paris, 17 October 2003. The text is available at http://portal.unesco.org/en/ev.php-URL_ID=17716&URL_DO=DO_TOPIC&URL_SECTION=201.html (accessed on 15/03/2019).

⁴⁸ Paris, 20 October 2005. The text is available at http://portal.unesco.org/en/ev.php-URL_ID=31038&URL_DO=DO_TOPIC&URL_SECTION=201.html (accessed on 15/03/2019).

⁴⁹ Paris, 14 November 1970. The text is available at http://portal.unesco.org/en/ev.php-URL_ID=13039&URL_DO=DO_TOPIC&URL_SECTION=201.html (accessed on 15/03/2019).

⁵⁰ Rome, 24 June 1995. The text is available at <http://www.unidroit.org/instruments/cultural-property/1995-convention> (accessed on 15/03/2019).

⁵¹ See e.g. Prott and O'Keefe, note 19, chapter 2: Development of legal controls; T. Kono (ed), *The impact of uniform laws on the protection of cultural heritage and the preservation of cultural heritage in the 21st Century* (Martinus Nijhoff Publishers, 2010); J. A. R. Nafziger, R. K. Paterson (eds), *Handbook on the law of cultural heritage and international trade* (Edward Elgar Publishing Limited, 2014). Prott and O'Keefe introduced national regulations on cultural heritage protection of around fifty jurisdictions in the world in their book in 1983. Kono's work focuses on fifteen countries including Canada, Croatia, Czech Republic, Denmark, France, Germany, Italy, Japan, Mexico, Netherlands, New Zealand, Spain, Switzerland, Taiwan and the United States. The most recent study in 2014 concentrates on rules of nineteen countries namely Australia, Canada, China, France, Germany, Greece, Ireland, Israel, Italy, Japan, Mexico, New Zealand, Poland, South Africa, Sweden, Switzerland, Turkey, the United Kingdom, and the United States.

⁵² There are studies on archaeological heritage in general, e.g. A. P. Underhill, L. C. Salazar, *Finding solutions for protecting and sharing archaeological heritage resources* (Springer, 2016); R. Skeates, *Debating the archaeological heritage* (Duckworth, 2000); Prott and O'Keefe, note 19.

⁵³ C. Schreuer, U. Kriebaum, From individual to community interest in international investment law, in U. Fastenrath, R. Geiger, D. E. Khan, A. Paulus, S. V. Schorlemer, and C. Vedder (eds), *From bilateralism to community interest essays in honour of Bruno Simma* (Oxford University Press, 2009), 1079-1096; R. Hofmann, C. J. Tams (eds), *International investment law and its others* (Nomos, 2012); S. F. Puvianasinghe, *Foreign investment, human rights and the environment: A perspective from South Asia on the role of public international law* (The Hague: Martinus Nijhoff, 2007).

⁵⁴ P. M. Dupuy, E. U. Petersmann, and F. Francioni (eds), *Human rights in international investment law and arbitration* (Oxford University Press, 2009); F. Baetens (ed), *Investment law within international law* (Cambridge University Press, 2013), part II: International investment and

development,⁵⁵ public health⁵⁶ and particularly environmental protection.⁵⁷ Only a small number of research publications focuses on the interaction between international investment and the preservation of cultural heritage. Amongst them, a handful of publications address laws and regulations on cultural heritage protection.⁵⁸ However, none of them highlights tools and strategies in the area of international investment law that could ultimately improve the level of protection of cultural heritage. The contribution by foreign investment financiers such as the World Bank and investment contracts that make changes to improve the standards for safeguarding cultural heritage have not been covered sufficiently in studies conducted so far.⁵⁹

human rights; A. Kulick, *Global public interest in international investment law* (Cambridge University Press, 2012), chapter 7: Human rights and investment – friends or foes; T. Weiler, International investment law and international human rights law: reuniting two long lost siblings, TDM 5 (2018).

⁵⁵ F. Baetens (ed), note 54, part III: International investment and sustainable development.

⁵⁶ V. Vadi, *Public health in international investment law and arbitration* (Routledge Research in International Economic Law, 2012).

⁵⁷ J. Schokkaert, Y. Heckscher, *International investments protection: comparative law analysis of bilateral and multilateral inter State conventions, doctrinal texts and arbitral jurisprudence concerning foreign investments* (Bruylant, 2009), chapter XII: Environment; A. Kulick, note 54, chapter 6: International investment law and the environment; *International investments and protection of the environment: the role of dispute resolution mechanisms*, papers emanating from the second PCA International Law Seminar, May 17, 2000 / edited by the International Bureau of the Permanent Court of Arbitration; J. E. Vinuales, *Foreign investment and the environment in international law* (Cambridge University Press, 2012); M. E. Footer, BITs and pieces: Social and environmental protection in the regulation of foreign investment in *Michigan State Journal of International Law*, 2009, Vol 18:1, 33-64; P. M Dupuy, J. E. Vinuales (eds), *Harnessing foreign investment to promote environmental protection: incentives and safeguards* (Cambridge University Press 2013).

⁵⁸ For example Vadi, note 24; F. Lenzerini, Property protection and protection of cultural heritage in S. W. Schill (ed), *International investment law and comparative public law* (Oxford University Press, 2010), chapter 17; Y. Radi, Yannick, The ‘Culture of balancing’ of international investment law - Cultural interests and investors' interests in international investment treaties and arbitration in TDM 5 (2013); D. Collins, *An introduction to international investment law* (Cambridge University Press, 2017), chapter 9: Public interest issues: The environment, human rights and culture; V. Vadi (2008), Cultural heritage and international investment law: a stormy relationship in *International Journal of Cultural Property*; V. Vadi (2009), Fragmentation or cohesion: investment versus cultural investment rules, *Journal of World Investment & Trade*, Vol. 10, Issue 4; V. Vadi (2011), When the cultures collide: foreign direct investment, natural resources and indigenous heritage in international investment law in *Columbia Human Rights Law Review*, Vol. 42, 797-889; V. Vadi, Culture, development and international law: The linkage between international investment rules and the protection of cultural heritage in Borelli and Lenzerini (eds), note 43.

⁵⁹ For example C. E. Di Leva, The World Bank’s policy on physical cultural resources in Hoffman, note 1.

In the legal field that connects cultural heritage law and human rights law, there is an emerging body of literature.⁶⁰ In only a few publications has it been discussed in the legal and policy context for the links between cultural heritage and environmental safeguarding.⁶¹ Nevertheless, the mutual connections between the protection of cultural heritage and human rights and between the protection of cultural heritage and environmental safeguarding have not been analysed within the context of international investment law yet.

Both disputes between States about cultural property⁶² and Investor-State disputes in the context of general international investment⁶³ have received much attention in publications. However, studies on disputes between a foreign investor and a host State in which cultural factors play a role are very few.⁶⁴ Claims by parties other than host States for the protection of cultural properties or cultural heritage sites have received even less attention. In fact, disputes and claims raised by parties other

⁶⁰ See e.g. B. Boer and S. Gruber, Human rights and heritage conservation law in J. Blake (ed), *Proceedings of the first international conference on human rights and the environment* (Majd Publishing/UNESCO Chair for Human Rights, Peace, and Democracy, 2009) 90; Borelli and Lenzerini, note 43, Part II: Beyond tangible property: Cultural diversity, intangible cultural heritage and human rights, 29-252; J. Blake, Taking a human rights approach to cultural heritage protection in *Heritage & Society* 2011, Vol. 4 (2), 199-238; H. Silverman and D. F. Ruggles (eds), *Cultural heritage and human rights* (New York, Springer, 2007); M. Langfield, W. Logan and M. N. Craith (eds), *Cultural diversity, heritage and human rights: intersections in theory and in practice* (Abingdon, Routledge, 2010); A. F. Vrdoljak, *The cultural dimension of human rights* (Oxford Press University, 2013).

⁶¹ See e.g. B. Boer, Culture, Rights and the Post-2015 Development Agenda in Durbach and Lixinsk, note 15.

⁶² For instance, the conflict between Cambodia and Thailand over the temple of Preah Vihear led to a dispute before the International Court of Justice. For more on this case, see <http://www.icj-cij.org/en/case/45> (accessed on 15/03/2019). For detailed analysis of disputes between states about cultural property, see e.g. J. P. Fishman, Locating the international interest intransnational cultural property disputes in *Yale Journal of International Law*, 2010 Vol.35, 347-404; A. Chechi, *The settlement of international cultural heritage disputes* (Oxford University Press, 2014); A. Chechi, Evaluating the establishment of an International Cultural Heritage Court in *Art Antiquity and Law*, April 2013; A. Chechi, Some reflections on international adjudication of cultural heritage-related cases in *Transnational Dispute Management*, 2013 Vol.10 (5); I. F. Gazzini, *Cultural property disputes: the role of arbitration in resolving non-contractual disputes* (Transnational Publishers, 2004).

⁶³ See e.g. M. Sornarajah, *The settlement of foreign investment disputes* (Kluwer Law International, 2000); D. Gaukrodger, K. Gordon (2012), Investor-State dispute settlement: A scoping paper for the investment policy community, OECD Working Papers on International Investment, No. 2012/03, OECD Publishing, Paris.

⁶⁴ See e.g. V. Vadi (2011), Cultural diversity disputes and the judicial function in investment law in *Syracuse Journal of International Law and Commerce*, Vol 39, Issue 1, 89-136; V. Vadi (2013), Culture clash? World Heritage and Investors' rights in international investment law & arbitration, *ICSID Review*, Vol.28, No.1, 123-143; V. Vadi (2013), Toward a *Lex Administrativa Culturalis*? The adjudication of cultural disputes before investment arbitral tribunals in *Transnational Dispute Management*, Vol.10 (5), 1-11; Lenzerini, note 58; Radi, note 58.

than the investor or the host State are ignored in the literature on this subject. When international investment projects performed by foreign investors pose threats to cultural heritage, a host State may take action or interfere in the projects leading to Investor-State disputes. If a host State is reluctant to take any measures, non-State actors may initiate claims to ensure that cultural heritage is protected. It is sensible therefore to include in this study disputes lodged by foreign investors against the host State called ‘Investor-State’ disputes, as well as claims raised by parties other than the host State who have an interest in protecting cultural heritage.

Investment arbitration as a form of Investor-State dispute settlement is analysed in depth in some textbooks and articles.⁶⁵ Nevertheless, there are only a few studies on investment arbitration to settle Investor-State disputes which are associated with the protection of cultural heritage.⁶⁶ Scholars have addressed relevant cases decided by the ICSID or under the NAFTA rules, but scholarly writing has not focused on how to deal with the merits of cases about cultural heritage protection in the interest of both the cultural heritage at stake and parties concerned. A host State may rely on legal basis of preserving cultural heritage to take measures that impact on foreign investors’ projects, but existing publications only highlight the violation of investment treaty rights, in general, to protect the interest of foreign investors. The possibility of bringing a counter-claim against the host State in such a scenario has not been identified. More importantly, the strategies which are at the disposal of the

⁶⁵ See e.g. C. McLachlan, L. Shore, M. Weiniger, *International investment arbitration: substantive principles* (Oxford University Press, 2007); M. Sornarajah, *The international law on foreign investment* (3rd edn, Cambridge University Press, 2010); R. Dolzer & C. Schreuer, *Principles of international investment law* (Oxford University Press, 2008); K. N. Schefer, *International investment law: text, cases and materials* (Edward Elgar Publishing, 2016); S. W. Schill (ed), *International investment law and comparative public law* (Oxford University Press, 2010); Z. Douglas, *The international law of investment claims* (Cambridge University Press, 2012); N. Horn and S. Kroll (eds), *Arbitrating foreign investment disputes* (Kluwer Law International, 2004), C. A. Rogers, R. P. Alford (eds), *The future of investment arbitration* (Oxford University Press, 2009); P. Muchlinski, F. Oritino, and C. Schreuer (eds), *The Oxford handbook of international investment law* (Oxford University Press, 2008); C. Binder, U. Kriebaum, A. Reinisch, S. Wittich (eds), *International investment law for the 21st century: essays in honour of Christoph Schreuer* (Oxford University Press, 2009); M. Bungenberg, J. Griebel, S. Hobe, A. Reinisch, Y. Kim (eds), *International investment law* (Oxford: Hart Publishing; Baden-Baden: Nomos, 2015); S. P. Subedi, *International investment law: reconciling policy and principle* (3rd edn Oxford: Hart Publishing, 2016); R. D. Bishop, J. C. James, W. M. Reisman, *Foreign investment disputes: cases, materials, and commentary* (The Hague: Kluwer Law International, 2005); G. C. Harten, *Investment treaty arbitration and public law* (Oxford University Press, 2007).

⁶⁶ See e.g. Lenzerini, note 58; Vadi (2013), Culture clash? World Heritage and investors’ rights in international investment law & arbitration, note 64; Vadi (2013), Toward a *Lex Administrativa Culturalis*? The adjudication of cultural disputes before investment arbitral tribunals, note 64.

host State in such an eventuality have not been identified. In fact, no study sheds light on the question whether investment arbitration is an appropriate means in dealing with Investor-State disputes when cultural factors form part of the dispute and its resolution.

There are studies on peaceful or amicable methods to resolve Investor-State disputes.⁶⁷ Nevertheless, dealing with investment conflicts in general and claims about safeguarding cultural heritage initiated by parties other than a host State mainly remains an unexplored issue; with no more than cursory reference to negotiation and mediation.⁶⁸ It is plausible that the lack of research on claims brought by non-state actors to protect cultural heritage contributes to the gap in scholarly literature.

1.4 Objectives of the thesis

The general purpose of this study is to give recommendations and suggestions for the improvement of the level of protection of cultural heritage when foreign investment results in Investor-State disputes and other conflicts. This work aims to bridge the gap existing in the literature by examining (i) how the mechanism of international investment law can be used to achieve greater protection of cultural heritage sites and cultural items; (ii) how to enhance the legal framework for cultural heritage protection, in the context of international investment projects, for mining and construction; (iii) how to use investment arbitration effectively to resolve Investor-State disputes; and (iv) how to apply amicable methods to deal with cultural property related disputes and manage any cultural conflicts at an early stage to avoid their escalation into legal disputes. Recommendations are based on the understanding of the regulations on cultural heritage protection, the recognition

⁶⁷ See J. Salacuse (2007), Is there a better way? Alternative methods of treaty-based Investor-State dispute resolution? in *Fordham International Law Journal*, Vol.31, Issue 6, 138-185; A. Rovine (ed) *Contemporary issues in international arbitration and mediation: The Fordham papers* (The Netherlands: Martinus Nijhoff, 2009); S. Franck, Integrating investment treaty conflict and dispute systems design in *Minnesota Law Review* 2007, 161-230, available at http://www.minnesotalawreview.org/wp-content/uploads/2012/01/Franck_Final.pdf (accessed on 15/03/2019); C. Huiping, The Investor-State dispute settlement mechanism: Where to go in the 21st century? in *Journal of World Investment and Trade* 2008 Vol. 12, 467-496; R. Echandi, note 30.

⁶⁸ Vadi, Culture clash? World Heritage and Investors' rights in international investment law & arbitration, note 64.

of types of disputes and claims, the factors that can facilitate investment arbitration and amicable ways in resolving disputes or managing conflicts. Cases which are related to environmental protection or human rights or the safeguarding of public interest will also be used to identify, anticipate and analyse lessons to be learned.

1.5 The scope of the thesis

1.5.1 Types and sectors of international investment

In a broad sense, international investment activities⁶⁹ refer to either foreign direct investment⁷⁰ or foreign indirect investment.⁷¹ Foreign direct investment (so-called FDI) involves the transfer of tangible or intangible assets from one country to another for their use in that country to generate wealth. FDI most commonly occurs through an outright merger with an existing company or an acquisition of a wholly new enterprise (known as ‘greenfield’ investment) or by acquiring a controlling share of a national firm’s stock. This study focuses on direct international investment in which foreign investors set up a new enterprise overseas or transfer funds or materials from their home country to an existing firm in a host country to carry out business projects in return for both profits and the management and control of that company.

International investment can be carried out in a variety of types of industries including the primary sectors (agriculture, fisheries, mining, and petroleum); manufacturing sectors (such as food, textiles, electrical and electronic equipment) and services (such as construction, finance, and business services).⁷² Traditionally,

⁶⁹ Investments made in the country of the investor are known as ‘national investment’ or ‘domestic investment’ while those taken abroad by a national investor are called ‘international investment’ or ‘foreign investment.’

⁷⁰ See further J. E. Alvarez, *The public international law regime governing international investment* (Hague Academy of International Law, 2011), 15.

⁷¹ Foreign indirect investment known as portfolio investment is defined as ‘investment that is made to acquire a lasting interest in an enterprise operating in an economy other than that of an investor, the investor’s purpose being to have an effective choice in the management of the enterprise.’ While foreign investors are entitled to get involved in the management and control of company in FDI, they do not have the management rights but the ownership of their shares by using the method of portfolio investment. See Sornarajah, note 65, 8.

⁷² The list of sectors in international investment law can be found at the United Nations Conference on Trade and Development (UNCTAD) report on value of greenfield FDI projects by sector/industry from 2003 to 2017, available at

foreign capital was invested in developing countries primarily to exploit natural resources for the industrialised world. The mining industry supplies markets with raw materials including iron, steel, aluminium, coal, and uranium. The construction industry plays a significant role in social development, as it supports building, infrastructure and industrial development. Large amounts of capital have been invested in infrastructure (e.g. large public works, dams, bridges, highways, water/wastewater and utility distribution) or industry (e.g. refineries, chemical process, power generation, mills and manufacturing plants).⁷³

According to the classification of the United Nations Conference on Trade and Development (UNCTAD), mining belongs to the ‘mining, quarrying and petroleum’ sector while construction is a separate industry in the service sector. Although the number and the value of announced greenfield foreign direct investment (FDI) projects of the ‘mining, quarrying and petroleum’ sector have both declined sharply from 400 to 59 and from 181,646 million USD to 20,628 million USD respectively between 2003 and 2017, it is evident that the average value of each project is still stable around 400 million USD. Coincidentally, this period witnessed a considerable rise in both the number and the value of announced greenfield FDI construction projects. While the former has nearly doubled (from 144 to 276), the latter has expanded nearly five times (from 21,181 million USD to 95,312 million USD).⁷⁴

In the context of international investment, the mining and construction sectors can interlink. For instance, the investment contract for mining in Mes Aynak also envisages roads and railways to the borders of Pakistan and either Uzbekistan or Tajikistan. Thus the mining and construction sectors are well-suited for an examination of how best to deal with the issue of cultural heritage preservation in the context of disputes and conflicts between a host State and foreign investors.

<http://unctad.org/en/Pages/DIAE/World%20Investment%20Report/Annex-Tables.aspx> (accessed on 15/03/2019).

⁷³ See further K. K. Chikara, *Construction project management* (New Delhi: Tata McGraw-Hill Education, 1998), 9-10.

⁷⁴ See the United Nations Conference on Trade and Development (UNCTAD) Report on value of greenfield FDI projects by sector/industry from 2003 to 2017 and Report on number of Greenfield FDI Projects by sector/industry from 2003 to 2017, available at <http://unctad.org/en/Pages/DIAE/World%20Investment%20Report/Annex-Tables.aspx> (accessed on 15/03/2019).

1.5.2 Types of cultural heritage relating to international investment projects on mining and construction

‘Cultural heritage’ is a relatively recent expression.⁷⁵ In most conventions and laws, as in many books and papers, the term ‘cultural property’ is used.⁷⁶ From a legal perspective, the notion of ‘cultural heritage’ is found in both national and international laws and regulations. At a national level, ‘cultural heritage’ can be defined in a variety of ways including by way of enumeration, categorization, or a combination of these two methods or classification.⁷⁷ At the international level, the term ‘cultural heritage’ was adopted by the United Nations Educational, Scientific and Cultural Organization (UNESCO)⁷⁸ in the 1972 Convention for Protection of the World Cultural and Natural Heritage (hereafter the 1972 World Heritage

⁷⁵ Vadi, Culture, development and international law: The linkage between international investment rules and the protection of cultural heritage, note 58, 414. Defining the concept of ‘cultural heritage’ is said to be one of the most difficult problems in the development of legal controls. There have been attempts by scholars to conceptualise this terminology but no unitary definition is reached. For definition of culture heritage see L. V. Prott, Problems of private international law for the protection of cultural heritage in *Collected courses of the Hague Academy of international law* (1989, Martinus Nijhoff Publishers) volume 5, 224; F. Francioni, Culture, heritage and human rights: An introduction in F. Francioni and M. Scheinin (eds), *Cultural human rights* (Martinus Nijhoff, 2008), 6; J. Blake, On the defining the cultural heritage in *International and Comparative Law Quarterly* 2000, Vol. 49(1), 61-85 at 68. For a discussion of the concept of heritage and definitions of its different forms, see B. Boer and S. Gruber, Heritage discourses in K. Rubenstein and B. Jessup (eds), *Environmental discourses in international and public Law* (Cambridge University Press, 2012) 375.

⁷⁶ Early international treaties did not use the term ‘heritage’ and they referred to the narrower concept of ‘cultural property’. The expression ‘cultural property’ was used for the first time in the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and then the 1970 Paris Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property. The 1954 Convention defines cultural property as movable or immovable property of great importance to the cultural heritage of every people. According to the 1970 Convention, cultural property is defined as property which, on religious or secular grounds, is specially designated by each State as being of importance for archaeology, prehistory, history, literature, art or science. While the term cultural heritage is generally used in Europe, in the USA the term cultural resources is in more general use specifically referring to cultural heritage resources. The term heritage is used as it reflects the idea of trusteeship and passing on heritage to future generations. See e.g. L.V. Prott and P. J. O’Keefe, Cultural heritage or cultural property in *International Journal of Cultural Property*, Vol.1, 1992, 307-320; D. Fincham, Distinctiveness between property and culture in *Penn State Law Review*, Vol 115:3, 2011, 641-683.

⁷⁷ While each item that is to be protected appears on an enumerated list, categorization relies on a very general description to establish what is included. In a classification system, protection is extended to a specific object only when an administrative decision is taken to that effect. It means that the authority responsible defines the concept if, and when export becomes imminent. For an analysis of the approaches to define cultural heritage at a national level, see Prott and O’Keefe, note 19, Volume 3: Movement, 26-30.

⁷⁸ <http://en.unesco.org/about-us/introducing-unesco> (accessed on 15/03/2019).

Convention).⁷⁹ Article 1 of the Convention does not provide a definition but distinguishes between three types of cultural heritage namely monuments, groups of building and sites. Concerning the scope of application of the UNESCO conventions, methods for protecting cultural heritage can be categorised according to at least one of three criteria, (a) the form in which the cultural heritage presents itself (tangible or intangible; movable or immovable); (b) its physical location (on land or underwater); or (c) the status of its possession (legal or illegal).⁸⁰

The general categories of cultural heritage are movable and immovable objects. In terms of immovables, cultural heritage may be embodied in material things such as monuments, groups of buildings and sites. Movables encompass works of art,⁸¹ objects of historical importance,⁸² objects of scientific importance,⁸³ evidence of the daily life of early civilisation⁸⁴ and so on. The definition of cultural heritage in accordance with the 1972 World Heritage is meant to deal mainly with the physical, non-movable dimensions of cultural heritage.⁸⁵ Earlier regulations relating to those categories treated them as tangible objects. However, later rules of the 2003 Convention for the Safeguarding of the Intangible Cultural Heritage led to the classification of tangible and intangible forms⁸⁶ of cultural heritage to be preserved under international law. Additionally, dimensions of cultural heritage have been broadened with the development and adoptions of UNESCO Conventions including the UNESCO 2001 Convention on the Protection of Underwater Cultural Heritage

⁷⁹ 'World heritage' is not defined in the Convention; its scope is determined by the definition of the cultural and natural heritage contained in Articles 1 and 2 respectively.

⁸⁰ See Kono, note 51, 116; F. Francioni, The evolving framework for the protection of cultural heritage in international law in Borelli and Lenzerini, note 43, 7. Vadi classifies cultural heritage with five legal components: (1) world cultural heritage including natural and cultural sites of outstanding and universal value; (2) underwater cultural heritage (objects that have been under water for more than one hundred years); (3) cultural diversity including a variety of cultural expression; (4) intangible heritage and (5) indigenous cultural heritage. See Vadi, note 24, 18.

⁸¹ For example: paintings, drawings, sculptures, ceramics, and textiles.

⁸² Such as those related to significant historical figures, objects or archaeological and prehistoric importance (human and animal remains).

⁸³ Such as fossil evidence of biological evolution or early inventions.

⁸⁴ Such as utensils, clothing and weapons.

⁸⁵ K. Whitby-Last, Article 1 definition of cultural heritage in Francioni (ed), note 43.

⁸⁶ According to Article 2 of the Convention, the intangible cultural heritage is defined to include 'the practices, representations, expressions, knowledge, skills as well as the instruments, objects, artefacts and cultural spaces associated therewith that communities, groups and, in some cases, individuals recognize as part of their cultural heritage.' Typical examples of the intangible cultural objects are skills (e.g. samurai sword polishing in Japan), folklore, rituals, music, dance, religious beliefs and intellectual traditions.

and the 2005 Convention for the Protection of the Diversity of Cultural Expressions. Cultural heritage is a very broad concept today which includes movable and immovable cultural objects, and the intangible cultural heritage.

Mining can take place in geographic locations that fall under the sovereignty of a nation as well as in other geographic locations such as on the deep sea bed, in an exclusive economic zone or outer space.⁸⁷ This work focuses on foreign investment in mining projects and construction activities on land within the territorial boundaries of nations. Underwater cultural heritage situated beyond the territorial waters of States under the 2001 Convention on the Protection of the Underwater Cultural Heritage falls outside the scope of this study.

The categories of cultural heritage which this PhD thesis mainly deals with are tangible – immovable cultural heritage sites and movable cultural objects which are closely attached to such sites on land. These categories are represented as cultural sites, mixed sites, cultural landscapes in the 1972 World Heritage Convention and movable cultural objects in accordance with the 1970 Convention and the 1995 UNIDROIT Convention.⁸⁸ The protection of the rights of residents whose cultural identities and histories are tied to cultural heritage sites need to be taken into account, in the context of the emerging recognition of the human right to cultural heritage. The inhabitants of such sites can be an essential part of the sites' cultural significance and may form part of the cultural heritage. Human rights or cultural rights include the rights of local communities to identify, define, access, manage and control their cultural heritage.⁸⁹ Therefore, the thesis will address cultural heritage in both its tangible and intangible manifestations as human dimensions of cultural heritage are embodied in such sites and objects although the focus will be both cultural heritage sites and cultural objects.

⁸⁷ See R. W. Roeder, *Foreign mining investment law: The case of Australia, South Africa and Colombia* (Springer, 2016), 2-3.

⁸⁸ UNIDROIT is an independent intergovernmental organisation. Its purpose is to study needs and methods for modernising, harmonising and coordinating private and, in particular, commercial law between States and groups of States. To take international cooperation, UNIDROIT was asked by UNESCO to develop the Convention on Stolen or Illegally Exported Cultural Objects (1995), as a complementary instrument to the 1970 Convention.

⁸⁹ See further W. S. Logan, Closing Pandora's box: human rights conundrums in cultural heritage protection in H. Silverman and D. F. Ruggles (eds), *Cultural heritage and human rights* (New York, Springer, 2007) 33.

1.5.2.1 Cultural sites, mixed sites and cultural landscapes

Mining projects, as well as constructions plans, tend to take place on sites. Sites are one of the three components of cultural heritage under the 1972 World Heritage Convention.⁹⁰ Article 1 of this Convention provides a list of things which can represent cultural sites – ‘works of man or the combined works of nature and man, and areas including archaeological sites.’ Examples of cultural sites are ritual and ceremonial sites, parks, buildings, remains of ancient cities, and complexes of historical character which show the evolution of modern life or a now abandoned way of living. The most fundamental quality needed to come within the ambit of the Convention is that of ‘outstanding universal value.’ The concept applies both to cultural and natural heritage yet is not defined in the text of the Convention. The World Heritage Committee has the final say on whether a property is inscribed on the World Heritage List. The Committee has established certain criteria in the Guidelines to determine whether a property proposed for inscription in the List may qualify as having outstanding universal value.⁹¹

‘Sites’ could be referred to not only ‘cultural heritage’ but also natural heritage.⁹² A nominated site might become eligible for inscription in the World Heritage List on the basis of criteria associated with the outstanding universal value of both cultural and natural character.⁹³

⁹⁰ ‘Cultural sites’ is the third category of cultural heritage under the 1972 World Heritage Convention. The first two categories are monuments and groups of building.

⁹¹ The most current version of the Operational Guideline for the Implementation of the World Heritage Convention was issued on July 2017. The text of the 2017 Operational Guidelines is available at <http://whc.unesco.org/en/guidelines/> (accessed on 15/03/2019). Para 49 of the current version of the Guidelines defines ‘outstanding universal value’ to mean ‘cultural and/or natural significance which is so exceptional as to transcend national boundaries and to be of common importance for present and future generations of all humanity.’

⁹² The 1972 World Heritage Convention sets out the ‘natural heritage’ to be protected in Article 2 and it emphasises physical areas, features, formations, or sites of outstanding universal value, rather than specific flora and fauna.

⁹³ For more on the topic of natural heritage, see Whitby-Last, note 85; C. Redgwell, Article 2: Definition of natural heritage in cultural heritage in Francioni (ed), note 43; C. Redgwell, Protecting natural heritage and its transmissions to future generations in A. A. Yusuf (ed.), Standard setting in UNESCO, Vol. I: Normative action in education, science and culture. Essays in commemoration of the sixtieth anniversary of UNESCO; Vol. II: Conventions, Recommendations, Declarations and Charters adopted by UNESCO (1948 – 2006) (Leiden/Boston: Martinus Nijhoff Publishers, 2007), 267.

Cultural landscapes are not specifically mentioned in Articles 1 and 2 of the 1972 World Heritage Convention.⁹⁴ Over the past four decades, the concept of cultural landscapes has been found in the fields of cultural geography, architecture, planning, historical research, and in other professions concerned with improving the understanding of people's relationship with nature. No fixed universal definition of cultural landscapes exists. In general, this concept may be applied in respect of two elements: the geographical location (landscape), a real, tangible place; and the impressions, beliefs, and rituals (cultural) associated with that place. Landscapes serve as a fundamental element of the link between cultural and natural heritage. They are basically inscribed in the World Heritage List under the cultural criteria and are therefore considered to fall under the cultural heritage category, albeit with natural heritage values.⁹⁵ In the most recent Operational Guidelines, cultural landscapes are 'cultural properties' and represent the 'combined works of nature and of man.'⁹⁶ The World Heritage Committee adopted three categories of cultural landscapes as qualifying for World Heritage status: (1) designed and created intentionally by man; (2) organically evolved landscapes, which can be either relict landscapes or continuing landscapes; and (3) associative cultural landscapes.⁹⁷

National legislation may employ terms such as cultural sites and cultural landscapes, which may carry a different meaning from those contained the 1972 World Heritage Convention. Concepts vary from country to country.⁹⁸

⁹⁴ See further M. Rossler, *World Heritage – Linking cultural and biological diversity* in Hoffman, note 1.

⁹⁵ See Whitby-Last, note 85, 49.

⁹⁶ The 2017 Operational Guidelines, para 6. In 1992, cultural landscapes were introduced into the Operational Guidelines, which provided a new and innovative approach toward linking culture and nature.

⁹⁷ The 2017 Operational Guidelines, para 10.

⁹⁸ In Vietnam, there are concepts of 'historical – cultural sites' (monuments and locales, as well as the relics, antiques or national treasures at those monuments with historical, aesthetic or scientific value) and 'scenic landscapes' (spots of natural beauty or sites including both natural beauty and architectural monuments with historical, aesthetic or scientific value). The combination of both elements of history and culture in the sense of historical-cultural sites in the 2001 Vietnam Law on Cultural Heritage is understandable considering how difficult it is to differentiate between a cultural object with historical significance and one without it. In South Africa, things which are mostly related to cultural sites and landscapes are geological sites of cultural importance; archaeological and paleontological sites and landscapes. As culture and history are deemed to have a very close connection, sites of significance relating to the history of slavery in South Africa could be sites having cultural elements.

Last but not least, for purposes of international law, certain objects may belong to two or more categories. For instance, cultural sites inhabited by indigenous people could qualify as world cultural heritage because they present outstanding universal value in accordance with the 1972 World Heritage Convention, and at the same time they may represent a form of intangible cultural heritage for their historical associative value under the 2003 Convention for the Safeguarding of the Intangible Cultural Heritage. The tangible and immovable features of cultural sites will be foregrounded in this thesis because this is where the gap in the literature lies.

1.5.2.2 Movable cultural objects

Cultural sites, mixed sites and cultural landscapes may contain items which are movable or embedded in the sites such as cultural artefacts and products of archaeological excavations. The topic of cultural property protection has been studied from different angles, including the protection of cultural property in times of war (or in the event of armed conflicts), the restitution of cultural property that had been pillaged in times of war or for stolen property,⁹⁹ and illicit trafficking.¹⁰⁰ In the context of international investment projects on mining and construction, foreign investors and other actors involved may remove cultural objects from their original place or break or hide them. Statues or other larger items can be damaged or cut up to obtain transportable parts to sell on the art market. Cultural objects may be even stolen or exported which highlights the need to ensure adequate levels of cultural heritage protection.

If there is an international investment project in a cultural heritage site, the protection of the whole area as an archaeological, anthropological, or historical site will fall within the ambit of this study. Movable cultural objects such as artefacts and statues will be mentioned as the second category of cultural heritage which needs to be preserved in mining and constructions projects. It is impossible to

⁹⁹ For the topic of restitution of cultural property, see Prott and O’Keefe, note 77, Chapter 15 Restitution and returns of cultural object, 802-862; Forrest, note 1, Chapter 4: The returns, restitution and repatriation of movable cultural heritage, 132-223.

¹⁰⁰ For the topic of illicit trafficking, see Prott and O’Keefe, note 77, Chapter 1: Protection and movement, 8-80 and Chapter 12: Recovery of illicitly trafficked objects, 611-666.

evaluate the preservation of cultural heritage sites without discussing the need for protection of their movable parts.¹⁰¹

The 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property is the most relevant international instrument on the classification of cultural properties as its Article 1 provides a detailed list of categories. Architectural works and works of monumental sculpture and painting under the category of ‘monuments’ under Article 1 of the 1972 World Heritage Convention can be considered movable cultural objects. National laws may provide categories of cultural objects.¹⁰² Movable cultural objects which may be excavated at mining and construction sites can fall into one of different categories of the 1970 Convention such as specimens of minerals, and objects of paleontological interest, products of archaeological excavations or of archaeological discoveries, antiquities more than one hundred years old, objects of ethnological interest and property of artistic interest.

1.5.3 Aspects of protection in relation to cultural sites, mixed sites, cultural landscapes and movable cultural objects

Implicit in the word ‘heritage’ is also the idea of something cherished and to be preserved.¹⁰³ According to Prott, the word ‘protection’ covers different situations with protecting the physical continuance of the object among them, e.g., by preventing destruction or deterioration of the object, even in its owner’s hands,

¹⁰¹ Gruber, note 2, 257.

¹⁰² For example, there are three types of objects relating to cultural heritage under Vietnamese law namely relics, antiquities and national treasures. Relics are objects handed down from the past with historical, cultural and/or scientific value. Antiquities are objects handed down from the past with significant historical, cultural or scientific value, with an age of one hundred years or more. National treasures are objects handed down from with historical, cultural or scientific value of exceptional significance to the country (Article 4, section 4-6 of the Vietnam Law on Cultural Heritage of 2001). All types of cultural objects in Vietnam are movable and can be objects associated with immovable cultural sites or landscapes. South African regulations refer to seven detailed categories of movable objects under section 3(2)(i) of the 1999 National Heritage Resources Act. The first group of movable objects – ‘objects recovered from the soil or waters of South Africa, including archaeological and paleontological objects and material, meteorites and rare geological specimens’ can be considered cultural objects which attach to immovable cultural sites or landscapes and can be negatively affected by the investment projects.

¹⁰³ Prott and O’Keefe, note 19, 7.

because of the important heritage value of the object.¹⁰⁴ Forrest also considers physical protection to ensure the physical integrity of the cultural heritage. He refers to protection *in situ* to deal with the fact that the removal of cultural heritage from its natural and archaeological context may undermine its value as a means of preserving archaeological and historical evidence.¹⁰⁵

Many cultural heritage regulations at both international and national level are intended to be ‘for the protection of’ the cultural heritage.¹⁰⁶ The meaning of ‘protection of cultural heritage’ has not been addressed in any detail in the current treaty framework. At the international level, neither the 1972 World Heritage Convention nor its Operational Guidelines define what protection means. Article 4 of the Convention focuses on the entity on which the obligation to protect cultural heritage rests. Terminologies which are linked to ‘protection’ such as ‘preservation’ may be mentioned in national laws on cultural heritage. For instance, with regard to cultural sites and landscapes, the Vietnam Law on Cultural Heritage of 2001¹⁰⁷ defines ‘preservation’ and differentiates this term from ‘restoration’¹⁰⁸ and ‘reconstruction.’¹⁰⁹ Preservation of historical-cultural sites, scenic landscapes, relics, antiquities or national treasures consists of activities to prevent or limit the threat of damage to historical-cultural sites, scenic landscapes, relics, antiquities or national treasures, without changing their original character. Therefore, the timeline of ensuring the preservation of cultural heritage in its original form and the best conditions for its existence and development makes room for protection or preservation of cultural heritage as the first crucial step in this process. The 1999 National Heritage Resources Act of South Africa does not define ‘protection’ but employs the term ‘conservation’ which includes protection, maintenance,

¹⁰⁴ The other two situations are (i) a State may be seeking to protect the rights of an owner of the object, e.g. to enable collectors and museums to enforce their rights as owners by recovering stolen objects and (ii) a State may be protecting access to the object, acting as the custodian of the cultural heritage for the community it derives from, by preventing its exportation or requiring its display. See Prott, note 75, 235.

¹⁰⁵ Forrest considers the term ‘protection’ emotive and subjective, designed to ensure that value embodied in the cultural heritage is recognised and treated accordingly. See Forrest, note 1, 14.

¹⁰⁶ The issue of the protection of cultural heritage will be analysed in detail in Chapter 2.

¹⁰⁷ Article 4 section 11, 12, 13.

¹⁰⁸ Restoration of historical-cultural sites or scenic landscapes consists of activities to repair, reinforce or restore historical-cultural sites or scenic landscapes.

¹⁰⁹ Reconstruction of historical-cultural sites or scenic landscapes consists of activities to rehabilitate damaged or destroyed historical-cultural sites or scenic landscapes, based on historical records and scientific data about the historical-cultural sites or scenic landscapes.

preservation and sustainable use of places or objects so as to safeguard their cultural significance.¹¹⁰ The Act is concerned with preventing damage, demolition, export, loss of listed cultural resources or resources that are deemed worthy of conservation.¹¹¹

The preservation of cultural sites, mixed sites, cultural landscapes and movable cultural objects is in the interest of the host State. It adds to a host State's cultural capital and attraction, offering its citizens a society rich in cultural material. On the one hand, the State seeks to protect its property rights over cultural sites or landscapes and cultural objects. National patrimony laws (or so-called 'vesting laws') vest ownership of undiscovered objects in the State – typically all antiquities (of a specific type or older than a specific cut-off date) that lie in the ground or under water anywhere within the national territory.¹¹² On the other hand, the host State seeks to safeguard the physical continuance of sites and movable objects by preventing their destruction or deterioration in the course of international investment projects.¹¹³

Cultural heritage management has traditionally been concerned with the preservation of significant cultural sites and physical heritage assets as well as identification, interpretation, and maintenance. The thesis only investigates the protection of cultural heritage in international investment activities on mining and construction in the post-establishment phase - once the investment is admitted into the host State. It does not cover other aspects of cultural heritage management that are more general.¹¹⁴

¹¹⁰ Section 2 (iii).

¹¹¹ Section 3.

¹¹² M. Papa-Sokal, Beyond the nationalist-international polarisation in the protection of archaeological heritage in *Art Antiquity and Law*, Vol. XIV, Issue 3, October 2009, at 259.

¹¹³ This issue will be analysed in Chapter 2 with relevant domestic rules on excavation especially in the mining area.

¹¹⁴ For the topic of cultural heritage management, See *Why cultural heritage matters - A resource guide for integrating cultural heritage management into communities work at Rio Tinto*, available at

http://www.riotinto.com/documents/ReportsPublications/Rio_Tinto_Cultural_Heritage_Guide.pdf (accessed on 15/03/2019); P. M. Messenger and G. S. Smith (eds), *Cultural heritage management: a global perspective* (University Press of Florida, 2010).

It is worth to recall that both parties in Investor-State disputes can deploy the concept of ‘protection’ tactically. The protection pillar is at the heart of the investment regime, and foreign investors always consider the host State’s rules on protecting rights of international investment and foreign investors before they made decisions of doing business abroad. While a host State could argue that it is lawful to intervene in international investment projects in order to protect its cultural heritage, foreign investors may base their claims on the rules for protection set out in international investment treaties to bring counter-arguments. This issue will be addressed in detail in Chapter 3.

1.5.4 Types of disputes and claims

The thesis prioritises Investor-State disputes in which the protection of cultural heritage featured as a component of the legal grounds advanced by a host State to justify its interference in international investment projects or its decisions on the projects’ termination. This work also addresses cases where parties other than the host State are concerned about the preservation of cultural heritage sites where foreign investment can bring an irreversible adverse impact on their socio-cultural structure and way of life.

Disputes or other claims which are linked to environmental protection or human rights will also be addressed in this work. Boer and Wiffen called for an expansive view of heritage law, wherein the specifics of heritage protection regulations ought to be regarded in the context of more comprehensive environmental protection regimes; cultural heritage law becomes part of the broad remit of environmental law.¹¹⁵ With an analysis of Investor-State disputes relating to the environmental impact assessment, the thesis will consider the possibility of using the cultural

¹¹⁵ B. Boer and G. Wiffen, *Heritage law in Australia* (Oxford University Press, 2006). The definition of environment may encompass cultural aspects. For example, the Australian federal legislation, the 1999 Australia Environment Protection and Biodiversity Conservation Act (EPBC Act) section 528 provides that environment includes (a) ecosystems and their constituent parts, including people and communities; and (b) natural and physical resources; and (c) the qualities and characteristics of locations, places and areas; and (d) heritage values of places; and (e) the social, economic and cultural aspects of a thing mentioned in paragraph (a), (b). The text is available at <https://www.legislation.gov.au/Details/C2016C00777> (accessed on 15/03/2019). See further EPBC Act Policy Statement - Definition of 'Environment' under section 528 of the EPBC Act, available at <http://www.environment.gov.au/resource/epbc-act-policy-Statement-definition-environment-under-section-528-epbc-act> (accessed on 15/03/2019).

impact assessment taken by a host State. As protection of cultural heritage and human rights are integrally linked, conflicts in which local communities oppose foreign investment on the grounds of the violation of cultural rights or human rights will also be taken into account to illustrate potential adverse effects that conflicts with cultural heritage elements may expose; if such conflicts cannot be managed and dealt with appropriately.

The part to follow will clarify which types of disputes and claims fall within the scope of the study.

1.5.4.1 Investor-State disputes associated with the protection of cultural sites, mixed sites and cultural landscapes

Cases in which preserving cultural heritage is the main legal reasoning invoked by a host State to justify interfering with the investment activities of foreign investors are clearly within the scope of this thesis. In *Parkerings-Compagniet AS v. Republic of Lithuania*, the Respondent underlined that construction in the Old Town needed the approval of the Government's Cultural Heritage Commission.¹¹⁶ Significantly, this case illustrated that environmental concerns might be interconnected with cultural heritage concerns. The State Monument Protection Commission of the Republic of Lithuania objected to the parking plan proposed by a Norwegian company on the basis of environmental and cultural protection. Projects of the type similar to the construction of planned underground garages in the Old Town of Vilnius should be developed concurrently taking into consideration the possible direct and indirect environmental impact of planned works.¹¹⁷ In the opinion of the State Monumental Protection Commission, the planned garages would destroy vast areas of an unexplored cultural layer and 'upon installation of garages, a big portion of the archaeological heritage of the old city of Vilnius will be destroyed.'¹¹⁸

The scope of the research is not restricted just to disputes related to investment projects on cultural sites, mixed sites and cultural landscapes where the site concerned has been included on the World Heritage List or the List of World

¹¹⁶ Award on the merits, para 378.

¹¹⁷ *Ibid*, para 385.

¹¹⁸ *Ibid*, para 389.

Heritage in Danger but extends to disputes relating to projects on sites that have not been listed. The issue of whether the 1972 World Heritage Convention applies only to properties which are already included on the World Heritage List or the List of World Heritage in Danger is still much debated.¹¹⁹ The two lists change and are updated, so that a particular site may be listed in future, once the requisite criteria have been properly set out in an application for listing. *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt* (the *Pyramids* case), is an interesting example in the category of cultural sites and landscapes, which highlights issues concerning the temporal dimension of claims. The host State invoked international law on protecting cultural heritage to explain its decision to terminate an investment project. However, such decision was made at the time before the host State had submitted an application for the place to be included on the World Heritage Site. As such, the question was when the obligation to preserve cultural heritage under the 1972 World Heritage Convention comes into play. This issue will be analysed in Chapter 2.

Some disputes have an apparent link to cultural heritage protection but are not associated with cultural sites, mixed sites and cultural landscapes. In *South American Silver Limited (Bermuda) v. The Plurinational State of Bolivia*,¹²⁰ the host State did not employ any legal reasoning directly relating to preserving cultural sites, mixed sites or cultural landscapes. A Bermudan company – South American Silver – obtained title to ten mining concessions on the Malku Khota mineral deposits through the Bolivian operating subsidiary of South American Silver Corporation CMMK. In 2011, the Bolivian Government issued a resolution which prohibited the company from acquiring mineral rights for the areas surrounding the Project Area. South American Silver was suddenly no longer able to freely expand the Project Area to exploit mineralized areas continually or to expand the footprint of the planned mine. Instead, the Company would have to partner with the Bolivian national mining company to do so. According to the Claimant’s Statement of Claim

¹¹⁹ Section 2.2.1.1.3 of Chapter 2 will cover this point.

¹²⁰ *South American Silver Limited (Bermuda) v. The Plurinational State of Bolivia* - UNCITRAL - PCA Case No 2013-15, available at <http://www.italaw.com/cases/2121> (accessed on 15/03/2019).

and Memorial,¹²¹ the Company was facing the opposition of a small group of illegal gold miners who opposed the project in order to continue their illegal, dangerous and polluting activities in the Project Area.¹²² By July 2012, the Government decided that the violent opposition between supporters and opponents of the project justified is taking over the Project. The Government then decided to nationalize the Company's lawfully-acquired property.¹²³ In April 2013, South American Silver commenced arbitration with the Permanent Court of Arbitration against Bolivia. South American Silver, the Claimant, sought reparation for Bolivia's alleged breaches of the UK-Bolivia treaty and international law. According to the Respondent's Counter-Memorial,¹²⁴ there are several Indigenous Communities in the area of the Project, and the Indigenous Communities of the North of Potosí played an essential role in the events that gave rise to the dispute and in the decision of the Reversion.¹²⁵ South American Silver acknowledged the involvement of Indigenous Communities. Bolivia did not argue that the project area falls into the categories of cultural sites, mixed sites and cultural landscapes, but it based its argument on the involvement of Indigenous Communities in the project area and replied upon cultural elements to justify its breach of the treaty. This case will form part of the analysis of Chapter 4 since it serves to illustrate factors which host States should take into account when dealing with disputes or claims.

1.5.4.2 Claims concerning movable cultural objects

There are different types of disputes and conflicts relating to movable cultural property such as disputes concerning ownership – claims for restitution, disputes concerning location – claims for repatriation, disputes concerning stewardship, and disputes concerning authenticity. Disputes in respect of stewardship include claims relating deliberate damaged to items of cultural heritage, claims of inappropriate

¹²¹ The Claimant's Statement of Claim and Memorial, the text is available at <http://www.italaw.com/sites/default/files/case-documents/italaw4041.pdf> (accessed on 15/03/2019).

¹²² *Ibid*, para 5.

¹²³ *Ibid*, para 7.

¹²⁴ The Respondent's Counter-Memorial, the text is available at http://www.italaw.com/sites/default/files/case-documents/italaw4262_0.pdf (accessed on 15/03/2019).

¹²⁵ *Ibid*, para 42.

restoration and dissension between museums and indigenous people about the care of artefacts held in museums.¹²⁶

When foreign investors carry out mining or construction activities on cultural sites or cultural landscapes, movable cultural objects of archaeological and cultural significance could be unearthed or discovered and then removed. Disputes for location – claims for repatriation will likely occur as part of a problem between the host State and foreign investors if movable cultural objects unearthed are and still in the host country but removed away from the place of origin. In this situation, a host State may make requests to foreign investors for the relocation of such items. If cultural items leave a State without the required export licences, the host State may attempt to secure the return of the item. Additionally, the risk of damage to movable cultural objects is real. For instance, in the *Mes Aynak* case, archaeologists have expressed concern that cultural objects may have been damaged and removed.¹²⁷ Claims relating damage to items of cultural heritage, therefore, may be brought by a host State or even non-state actors such as the local community, indigenous groups and cultural organizations. Claims for restitution could occur when there is a dispute arising from the theft of an object of cultural heritage, and if it is the case, such disputing parties could be a host State – the original owner of an object and the person(s) who stole it. It is important to note that in some cases the dispute may fall within more than one category. The issue of stewardship is often related to disputes over the location. For instance, a host State can make a claim for repatriation and another claim relating to damage to an object to cultural heritage simultaneously. In the context of international investment activities, the types of parties to disputes concerning cultural items vary, ranging from individual, corporate entities to groups (such as local communities and indigenous groups) and States.

No dispute concerning movable cultural objects or artefacts arisen in mining and construction projects have been reported. However, as the situations in the *Mes*

¹²⁶ For more on cultural heritage disputes see K. Last, The resolution of cultural property disputes: some issues of definition in Resolution of cultural property disputes, papers emanating from the seventh PCA International Law Seminar, May 23, 2003 / edited by the International Bureau of the Permanent Court of Arbitration. There are terminologies relating to cultural property for the purpose of cultural protection. For the analysis of using different terms such as restitution, return, repatriation, retrieval and recovery see Prott and O'Keefe, note 77, 832-837.

¹²⁷ See chapter 4, section 4.3.1.3.

Aynak case indicate, there may in future be claims relating to the removal of cultural objects from their original spot at the mining site or claims concerning damage to such objects.

1.5.4.3 Claims about cultural heritage protection raised by parties other than the host State

Cases where parties other than the host State are concerned about the protection of cultural heritage and the adverse effects that foreign investment activities can bring to, come within the ambit of the study. Prott and O’Keefe pointed out different parties who may have interest in protecting cultural objects such as right holders, intermediaries and dealers, impoverished local populations, tourists, companies exploiting primary resources, archaeologists and curators, art collectors and scientists, private collectors and art lovers, politicians and historians, citizens and law enforcement officers.¹²⁸ In the context of international investment activities in the mining and construction sectors, parties concerned are local communities, anti-mining groups, activists, cultural organisations and nongovernmental entities and this thesis will focus on claims raised by these actors.

It could be the case that non-State actors do not rely on the protection of cultural heritage to advance their arguments. While the *Wild Coast* conflict¹²⁹ in a remote village on the eastern shore of South Africa serves as an instance where environmental grounds featured, the *South America Silver* case illustrates an internal conflict that arose between the local community and a host State where human rights are concerned. Examples that show human rights or environmental arguments should be taken into account given the strong interrelationship between human rights and cultural heritage; and between environment and cultural heritage.

1.5.5 Geographic scope

The legal frameworks for cultural heritage protection in international investment in the mining and construction fields are examined not from only an international level but also a national level. The interplay between international investment activities in

¹²⁸ For a detailed analysis, see Prott and O’Keefe, note 19, 15-26.

¹²⁹ <https://www.wildcoast.co.za/xolobeni-mining> (accessed on 15/03/2019).

the mining and construction areas and the protection of cultural heritage can be illustrated concerning jurisdictions that have a richness of cultural elements and have cultural sites, cultural landscapes or mixed sites on the World Heritage List. Domestic laws and regulations need to be taken into account because a variety of mandatory domestic rules govern notification, registration and licensing requirements and operations in these sectors. The national regulations in Canada, Australia, South Africa and Vietnam can be constructive because these States have concluded investment agreements (at bilateral, regional and international levels) and they are State parties to the 1972 World Heritage Convention.

Apart from their differences regarding geography (North America, Australia, Africa and Asia), legal systems, national concepts and perceptions of cultural heritage protection, Canada, Australia, South Africa and Vietnam also represent both older and newer national cultural heritage legislation.

Importantly, States selected for this study either have experience in dispute settlement or can be expected to have encountered disputes or conflicts in the fields of mining and construction. The *Bilcon* case – a dispute relating to mining – was set in Canada. About conflicts and claims which are related to mining projects, the *Kakadu* case in Australia was settled whilst the *Mapungubwe* case is still ongoing in South Africa. While there has been no disputes or claims associated with cultural heritage protection in Vietnam to date, conflicts can be expected to arise in this country in the future. Although the study mainly looks at relevant domestic rules and cases from the mentioned countries, best practice in other jurisdictions will be highlighted when needed. National legislation of all of four countries will not necessarily be examined to address a particular point, but the most relevant examples and contributions will be highlighted. For example, the selection of Canada, South Africa, Australia and Vietnam illustrate approaches of national law in respect of types of cultural heritage while the analysis of national laws about the protection of movable cultural objects will focus on Vietnam.

1.6 Research methodology

A combination of various methodological approaches will be employed in this thesis. By identifying the trend of international investment activities on mining and construction and answer the question how international investment agreements deal with the issue of cultural heritage preservation, this study makes use of pre-existing statistical analyses that employ official data on foreign investment that indicates the number of and the value of investment projects. International investment instruments (i.e. bilateral investment treaties, bilateral free trade agreements with investment provisions and multilateral investment agreements) will be analysed to identify which international investment agreements contain cultural exception clauses. The challenge is then to identify criteria for finding instruments that model the best approach to the safeguarding of cultural heritage in the interest of the concerned parties.

For purposes of Chapter 3 and 4 which deal with dispute settlement and conflict management relating to cultural heritage protection in the context of foreign investment activities, the primary method will be case-study and analysis of cultural disputes in the field of international investment and to mining and construction projects. Means of investment dispute settlement will be compared and contrasted to illustrate how the distinctive features of each affect the direction of disputes and claims that have arisen in Canada, Australia, South Africa and Egypt. Conclusions are to be based on the regulatory frameworks in place of each of those jurisdictions.

Generally, the research question requires analysis of the topic from different angles. To find out whether the current regulations are adequate for the protection of cultural heritage in international investment projects on mining and construction, not only legal but also moral and ethical dimensions need to be considered. Statutory provisions, law enforcement and the behaviours of parties concerned in complying with statutory obligation will be addressed. Regarding settling Investor-State disputes and dealing with other claims in the best interest of the parties concerned, the analysis will be based on various perspectives including economic benefits; social benefits including maintenance of relationships and promotion of investment; and factors in politics and social life such as corruption or transparency.

Consequently, a socio-legal methodology is the most important method to be employed.¹³⁰ A socio-legal analysis would consider how the law is applied and how the role-occupants (individuals and businesses to whom the law is addressed) behave in the face of the legal rule. The primary sources of law such as statutes, regulations and case law remain relevant, but non-legal factors which may encourage parties to comply or to circumvent the rules or which prevent them from complying with regulations, are equally important. Non-legal factors can explain why disputes between foreign investors and a host State arise and why parties other than investors may resist or frustrate the execution of investment projects. Non-legal factors also provide clues about the practical difficulties in complying with regulations.

Regarding literature, the study uses both primary and secondary sources relating to international investment law, investment dispute resolution and cultural heritage protection. The primary sources include international investment agreements; international instruments on cultural heritage; investment cases and official publications or reports from governmental bodies and other delegated authorities. This work relies on information obtained from bilateral investment treaties, regional investment treaties, and national legislation on cultural preservation and mining and construction sectors of the selected countries. Secondary sources include academic textbooks, legal journals, and internet websites. Bilateral and regional investment treaties, free trade agreements or other treaties with investment provisions are based on the UNCTAD database.¹³¹ Information on cases supplied on the website of ICSID, the website of UNCTAD and other official sources have been used. The materials drawn from publicly available sources are not only from websites of professional associations, government bodies and arbitration institutes but also from news websites in selected countries. Laws and regulations, official publications and reports from governmental bodies, books, journal articles and news from internet

¹³⁰ Scholars have debated as to 'what is a socio-legal methodology is' because there is no single standard definition. See: M. Salter, J. Mason, *Writing law dissertations: An introduction and guide to the conduct of legal research* (Pearson Education, 2007); R. Cotterrell, Why must legal ideas be interpreted sociologically? *Journal of Law & Society*, 1998, Vol. 25(2), 171-192; D. Harris, The development of socio-legal studies in the United Kingdom *Legal Studies*, 1983 Vol. 2; 315-333; D. Feenan, *Exploring the 'Socio' of socio-legal studies* (Palgrave Macmillan, 2013).

¹³¹ <http://investmentpolicyhub.unctad.org/IIA> (accessed on 15/03/2019).

websites in some countries may not be available in English, but when needed, translations are supplied.

1.7 Structure of the thesis

The thesis consists of five chapters. After this introductory chapter, Chapter 2 analyses the existing laws and regulations on safeguarding cultural heritage in the context of international investment projects on mining and construction. The analysis is from the perspective of both legislation itself and law enforcement to address deficiencies and problems. Chapters 3 and 4 focus on how disputes between foreign investors and a host State and other claims raised by non-state entities can be resolved best, with regard to the interest of cultural heritage itself and the interest of the affected parties. Chapter 3 analyses the application of arbitration in resolving Investor-State disputes relating to the protection of cultural heritage sites to illustrate the preference of this dispute settlement means. Amicable methods and the extent which they contribute to dealing with claims relating to movable cultural objects and avoiding conflicts escalating into serious legal disputes are analysed in Chapter 4. Chapter 5 presents key findings of the PhD thesis and recommendations and suggestions for foreign investors, the host State, and other parties who have an interest in preserving cultural heritage sites and cultural objects. Questions requiring further research will also be highlighted in this final chapter.

2. Chapter 2: Regulations on cultural heritage protection in international investment in the mining and construction sectors

2.1 Introduction

Concern for cultural heritage has engendered a need for a study of the rules relating to how it is to be protected. A critical analysis of regulations on cultural heritage protection is of importance from the perspective of cultural heritage itself. In the context of international investment in the mining and construction sectors, legal frameworks for preserving cultural heritage sites and movable cultural objects will be covered by not only laws on cultural heritage, laws on archaeology, human rights law but also laws on international investment and professional obligations in mining and construction projects. Limitations of laws and regulations on cultural heritage will be identified. More importantly, given that existing cultural heritage laws have gaps in terms of the lack of detailed rules and difficulties in legal compliance (as will be demonstrated in this chapter), this study will explore if international investment law has instruments that are suited to filling these gaps and if these instruments can help to protect it.

The understanding of the law is also necessary and useful for parties concerned as it can impact on the way that the host State, foreign investors and non-state actors react to any disputes or conflicts which are associated with cultural heritage preservation. A host State's decision to terminate or suspend investment activities can be proved to be lawful only when the host State has a clear legal duty to protect cultural heritage and take measures in accordance with international and national regulations. Foreign investors may bring counter-arguments in such situations. For non-state actors, the legal basis for claims when cultural heritage protection is a concern needs to be considered.

Regulations on the protection of cultural heritage under cultural heritage law itself shall be addressed first with an analysis of international conventions, and national

heritage legislation. This section will examine whether the current regulations are inadequate in dealing with threats to cultural heritage and what is the ideal framework for cultural heritage protection.

There is relatively little legal scholarship on rules on protecting cultural heritage in a particular context of international investment activities or mining and construction projects. The analysis on the interaction between investment law and cultural heritage will respond to the first research question regarding the role of investment law in providing effective types of regulations to preserve cultural heritage. Not only international investment agreements and domestic investment laws but also state contracts and rules issued by international public financiers for foreign investment will be addressed. Can the inclusion of a cultural heritage protection clause in international investment agreement, and state contracts be beneficial, and can cultural impact assessment provisions in such regulations or the guidelines of international financiers enhance the level of protection?

Standards for archaeological excavation will be analysed as another source of law to regulate the protection of cultural heritage sites and their detached movable cultural objects. This study will concentrate on the issue of compulsory registration and reporting duties, which is essential in investment projects on mining and construction.

Studies on how professional obligations impact on the preservation and protection of cultural heritage in the context of mining and construction activities are rare. This gap in the literature necessitates covering regulations on the mining and construction sectors at both international and national level.

Non-legal factors may encourage parties to preserve cultural heritage or prevent them from complying with statutory or professional duties. By addressing factors affecting compliance, it will become evident in which situations the protection of cultural heritage is respected and which obstacles stand in the way.

2.2 Cultural heritage law and the safeguarding of cultural heritage sites and cultural objects

In order to represent an ideal framework or an overview of relevant rules on protecting cultural heritage sites and movable cultural objects, laws at both the international and national level need to be examined in an integrated manner in this study. This part deals with questions as to (i) where the duties to protect cultural heritage in the context of international investment activities in the mining and construction sectors originate from and (ii) which measures are most appropriate to be taken by the host State and foreign investors to preserve cultural heritage sites and cultural movable objects. This part also concentrates on recent practical questions as to when the obligations under international law become binding on state parties and how cultural impact assessment is employed.

2.2.1 International conventions

The most important international convention that contains mechanism and rules for the protection of heritage sites on land in peacetime is the 1972 UNESCO Convention for the Protection of the World Cultural and Natural Heritage.¹³² There are other vital conventions on the protection of movable cultural objects such as the 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property and the 1995 UNIDROIT Convention on Stolen or Illegal Exported Cultural Objects. Given that there are intensive studies on the conventions mentioned above, this part will examine how these conventions deal with cultural heritage sites and cultural objects, and practical issues relating to the legal status of an obligation to protect cultural heritage and when such obligations come into play.

¹³² Other conventions cover the protection of cultural heritage. For instance, the 1954 Hague Convention mainly focuses on times of war, but State Parties are obliged to take preventive measures in peacetime to reduce the impacts of armed conflicts on cultural heritage.

2.2.1.1 The 1972 World Heritage Convention and its Operational Guidelines

The UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage (hereafter the World Heritage Convention) is the most widely accepted and comprehensive among international legal tools on cultural heritage preservation¹³³ with 193 States Parties (as of 31 January 2019).¹³⁴ This is probably the most well-known of all the instruments concerned with the protection of heritage sites. The World Heritage Committee establishes the ‘World Heritage List’ – a list of properties forming part of cultural heritage and natural heritage as defined in Article 1 and Article 2 of the Convention.¹³⁵ It also publishes the ‘List of World Heritage in Danger’ – a list of the property forming part of the cultural and natural heritage as is threatened by grave and specific dangers.¹³⁶ As of 31 January 2019, 1092 properties have been inscribed on the World Heritage List, 845 of which are considered of outstanding universal value for cultural reasons and 38 of which are mixed sites of outstanding universal value for both cultural and natural reasons.¹³⁷ 37 of the 54 properties appearing on the List of World Heritage in Danger are cultural sites.¹³⁸

An essential part of the conventional regime is the Operational Guidelines for the Implementation of the World Heritage Convention (hereinafter referred to as the Operational Guidelines) which was adopted by the World Heritage Committee. The Operational Guidelines have been amended on a number of occasions from its first edition on 30 June 1977, and the most recent Operational Guidelines were issued in July 2017. The World Heritage Convention sets out obligations of States Parties

¹³³ Kono, note 51, 228.

¹³⁴ The full list of States Parties is available online at <http://whc.unesco.org/en/statesparties/> (accessed on 15/03/2019).

¹³⁵ Article 11.2.

¹³⁶ Article 11.4. See further, e.g. S. Litton, The World Heritage ‘In Danger’ listing as a taking, in *New York University Journal of International Law and Politics*, Vol. 44 (2001), 219-265. For a topic of the process of inscribing a nominated heritage on the World Heritage List and the List of World Heritage in Danger, See G. P. Buzzini and L. Conderelli, *Article 11 list of World Heritage in Danger and deletion of a property from the World Heritage List* in Francioni, note 41, 175 – 200.

¹³⁷ <http://whc.unesco.org/en/list/> (accessed on 15/03/2019).

¹³⁸ <http://whc.unesco.org/pg.cfm?cid=86> (accessed on 15/03/2019).

relating to the protection of cultural heritage in its chapter II (National Protection and International Protection of Cultural and Natural Heritage).¹³⁹

The following part will explore to what extent the World Heritage Convention can protect cultural heritage in general and cultural heritage sites and movable cultural items in particular at both an international and national level. The host State should pay attention to this if it takes measures to protect cultural heritage because these measures might interfere with international investment projects. This part also answers the three questions as to (i) who has the statutory obligations to protect cultural heritage, (ii) to what extent the parties concerned has to comply with the obligation to protect listed properties under the 1972 UNESCO World Heritage Convention, and (iii) which measures are the most appropriate for the preservation of cultural heritage.

2.2.1.1.1 Twofold models of protection and the duty to protect cultural heritage

The World Heritage Convention uses a twofold model of protection, at an international and national level. Article 7 is the only clarification available on what ‘international protection’ means according to the World Heritage Convention:

For the purpose of this Convention, international protection of the world cultural and natural heritage shall be understood to mean the establishment of a system of international cooperation and assistance designed to support States Parties to the Convention in their efforts to conserve and identify that heritage.

Article 7 implicitly represents the idea that a system of international cooperation and assistance¹⁴⁰ is needed for the international protection scheme and set up by the Convention itself. Actors responsible for building up the system and which steps or measures to be followed in order to establish the system are not identified by this article. The World Heritage Convention does not point out any specific subjects having the duty to conserve cultural heritage at the international level. It is understandable that the Convention has nothing to offer as to connections between a

¹³⁹ Article 4 to Article 7.

¹⁴⁰ For discussion about what is meant by ‘international cooperation and assistance’ see G. Carducci, *Article 4-7 National and international protection of the cultural and natural heritage* in Francioni, note 43, 131; A. Lemaistre and F. Lenzerini, *Article 19-26 International assistance* in Francioni, note 43, 305-324.

host state and foreign investors or concerning how States can protect their national cultural heritage in relation to international investment projects. States have to make use of the national protection mechanism under the World Heritage Convention as a legal basis to justify its actions within its territory.

Apart from imposing a duty on States Parties to conserve cultural heritage from an international perspective, the World Heritage Convention addresses the topic of national protection. Article 4 states as follows:

Each State Party to this Convention recognises that the duty of ensuring the identification, protection, conservation, presentation and transmission to future generations of the cultural and natural heritage referred to in Articles 1 and 2 and situated on its territory, belongs primarily to that State...

Article 4 has been described as ‘abstract and indefinite’ because it does not give any details as to the duty which belongs primarily to State parties and the meaning of the term ‘protection’ is not defined.¹⁴¹ It is not clear how to determine when a State Party has fulfilled its duty to protect cultural heritage as according to Article 4, the state ‘will do all it can to this end, to the utmost of its own resources’ to fulfil its duty. The Operation Guidelines has the same approach as it states that ‘legislative and regulatory measures at national and local levels should assure the protection of the property from social, economic and other pressures or changes that might negatively impact the Outstanding Universal Value, including the integrity and/or authenticity of the property.’¹⁴²

Article 4 of the World Heritage Convention stipulates that the preservation duty rests on the State Party where the cultural heritage is situated. The host State can rely on this rule to justify that it has an obligation under international law to protect all cultural heritage sites in its own territory in any disputes with foreign investors. However, in as far as the illicit trade in cultural property or illegal export or import of movable cultural properties is concerned; there is always a demand in markets where buyers and sellers are looking to make a profit from imported cultural

¹⁴¹ Forrest, note 1, 244.

¹⁴² Para 98.

objects.¹⁴³ In this scenario, the duty to conserve movable cultural objects rests as much with the State where the objects originate from as it does with potential destinations in states that allow importation. Accordingly, this is one of the limitations of the 1972 World Heritage Convention as far as it covers movable cultural properties and the entity concerned with the obligation to protect cultural heritage is the territorial State in which cultural heritage is situated.

National legislation may provide a duty to protect cultural heritage similar to the one established under Article 4 of the 1972 Convention. If a country signs up to the Convention, Article 4 will need to be applied to cultural heritage as defined under Article 1 of the Convention, while pre-existing domestic laws would generally remain applicable to other cultural heritage – generally qualified as having less than outstanding universal value.¹⁴⁴

In summary, the 1972 World Heritage Convention addresses cultural heritage protection at both international and national level with Article 7 and Article 4 respectively. However, the Convention and its Operational Guidelines only provide general principles regarding the duty to protect cultural heritage. In the context of disputes between foreign investors and a host State, the implication of Article 4 is that a host state can assert that it has the duty to protect its cultural heritage sites within its own territory such as cultural sites, mixed sites and cultural landscape. Accordingly, a host state can argue that its decisions to suspend or terminate the permission of foreign investment activities would be mandatory under the World Heritage Convention.¹⁴⁵

2.2.1.1.2 Implementing measures and standards

The 1972 World Heritage Convention addresses the issue of compliance in Article 4 which expressly provides that this is a duty of a State Party to protect its national cultural heritage. However, it is difficult to determine to what extent a State Party has fulfilled this duty since this article does not stipulate the contents of this duty.

¹⁴³ For more on topic of illicit trade, see e.g. Protts and O’Keefe, note 77, Chapter 1: Protection and movement, 8-80 and Chapter 12: Recovery of illicitly trafficked objects, 611-666.

¹⁴⁴ Carducci, note 140, 113.

¹⁴⁵ This point will be analysed in detail in Chapter 3, section 3.5.1.

While the Convention does not give detailed regulations on the protection mechanism at neither national nor international level, the issue of effective and active measures taken for the protection of cultural heritage is mentioned in Article 5. This Article provides a tentative list of measures which, if implemented, will enhance the protection of the cultural heritage in each State Party, in other words at national level only. The Operation Guidelines provide a list of common elements which an effective management system could include in paragraph 111 as States Parties are responsible for implementing effective management activities for a property that qualifies as World Heritage. However, the issue of management system of cultural heritage protection is out of the thesis's scope.¹⁴⁶

There is a set of minimal and basic actions and measures to be taken to ensure the presentation, protection, and conservation and of the cultural heritage. A State Party to the World Heritage Convention is encouraged:

- a, to adopt a general policy which aims to give the cultural and natural heritage a function in the life of the community and to integrate the protection of that heritage into comprehensive planning programmes;
- b, to set up within its territories, where such services do not exist, one or more services for the protection, conservation, and presentation of the cultural and natural heritage with an appropriate staff and possessing the means to discharge their functions;
- c, to develop scientific and technical studies and research and to work out such operating methods as will make the State capable of counteracting the dangers that threaten its cultural or natural heritage;
- d, to take the appropriate legal, scientific, technical, administrative and financial measures necessary for the identification, protection, conservation, presentation and rehabilitation of this heritage; and
- e, to foster the establishment or development of national or regional centres for training in the protection, conservation and presentation of the cultural and natural heritage and to encourage scientific research in this field.

¹⁴⁶ The Operational Guidelines address the issue of the management systems in paragraph 108 to 118 (available at <http://whc.unesco.org/archive/opguide13-en.pdf>) (accessed on 15/03/2019). State Parties should do so in close collaboration with property managers, the agency with management authority and other partners, and stakeholders in property management.

‘Actions and measures listed under Article 5 refer literally to the protection, conservation, and presentation of cultural property’¹⁴⁷ and do not require much by way of clarification. The scope of this article covers a broad field of policymaking, setting up services and developing studies, to research and training.¹⁴⁸ Particularly, section (d) encompasses a variety of necessary measures to be taken at the national level for the cultural heritage protection. Unsurprisingly, under the World Heritage Convention, taking appropriate legal measures is regarded as necessary to preserving cultural heritage. Legislative and regulatory measures at a national level are part of protection and management of World Heritage property in accordance with the 2017 Operational Guidelines. Its paragraph 98 expressly states that ‘legislative and regulatory measures at national and local levels should assure the protection of the property from social, economic and other pressures or changes that might negatively impact the Outstanding Universal Value, including the integrity and/or authenticity of the property’. The subject of legal measures is covered by Article 5 section (d) of the World Heritage Convention, but this provision from the Guidelines addresses the issue in more detail.

State Parties are not required to implement any or all of these measures in reality; only to ‘endeavour’ to do so and only ‘in so far as possible’. The attempts of any State to implement these measures should be evaluated based on whether such measures are ‘appropriate’ for that country. These contingent terms in Article 5 significantly water down the State’s commitment to take effective and active measures for the protection of cultural heritage. Since every state faces different social, cultural and economic conditions, setting up necessary measures for State Parties to take in order to protect cultural heritage is unlikely a feasible mission. The approaches of both the Convention and its Operational Guidelines, therefore, are understandable.

In conclusion, various vital aspects have to be solved on a national level, and the effectiveness of protecting cultural heritage needs detailed regulations at the domestic law level. The 1972 World Convention or other international instruments

¹⁴⁷ Carducci, note 140, 117.

¹⁴⁸ Carducci, note 140, 118.

should, therefore, be supplemented by further principles and guidelines at regional and national levels.

2.2.1.1.3 The obligation to protect cultural heritage and its binding on State Parties

A crucial issue arises as to the State Party's obligation to comply with the obligation to protect cultural heritage under the 1972 Convention. When resolving of Investor-State disputes, the tribunal in practice has not directly addressed the question as to whether the 1972 Convention imposes an obligation to protect cultural heritage. In *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt* (the *Pyramids* case), the Tribunal only dealt with the question as to when the obligations from the UNESCO Convention became binding on Egypt. In response to foreign company's allegations, Egypt invoked in part its obligations under the Convention.¹⁴⁹ The tribunal held that "as a matter of international law," Egypt was "entitled to cancel" the project "situated on its own territory for the purposes of protecting antiquities."¹⁵⁰ Although there is no express view that it is an obligation of the host State to comply with its obligation under the 1972 World Heritage Convention to preserve cultural heritage, the Tribunal in the *Pyramids* case indicated that the 1972 Convention imposed an obligation on Egypt. According to O'Keefe, the Tribunal was correct in the finding that the 1972 World Heritage Convention carries the binding obligations.¹⁵¹ The same approach was taken by the High Court of Australia in 1983 in a national environmental protection case - *Commonwealth v. Tasmania*.¹⁵² The Court confirmed the validity of Australia's national legislation, on the ground that such legislation appropriately implemented Australia's international legal obligations resulting from its status as a party to the World Heritage Convention since 1974.¹⁵³

¹⁴⁹ Award on the merits, 20 May 1992, para 150.

¹⁵⁰ *Ibid*, para 158.

¹⁵¹ P. J. O' Keefe, Foreign investment and the World Heritage Convention in *International Journal of Cultural Property*, 1994 Vol. 3 Issue 02, 259-265, 261.

¹⁵² *Commonwealth of Australia v. State of Tasmania (Tasmanian Dam Case)*, High Court of Australia, 158 CLR (1983).

¹⁵³ At Judgment-2, para. 2 (Mason, J.) and Judgment-3, para. 61 (Murphy, J) cited by International investments and protection of the environment: the role of dispute resolution mechanisms, note 57, 27.

Studies have often focused on the obligations of state parties and non-state parties to implement the 1972 World Heritage Convention. O'Keefe's article addresses the question as to whether the obligation laid down in Article 4 is an obligation owed to all States Parties to the Convention and 'established for the protection of a collective interest of the group.' The author also discusses whether this obligation is enforceable, by all of those Parties if a State Party fails to fulfill it, other Parties (whether alone or acting together) have the right to compel it to do so or to call for it to stop the international wrongful act through judicial proceeding or other countermeasure.¹⁵⁴ His research is conducted from the perspective of public international law - Article 48 of the International Law Commission's Articles on the Responsibility of States for Internationally Wrongful the Responsibility of States for Internationally Wrongful Act.

The obligation to comply with the obligation to protect listed properties under the 1972 UNESCO Convention has not been dealt with in a direct way in research publications. The obligations to implement the convention would be no doubt an appropriate aspect to address this issue. The mechanism to force a state to comply with its obligations under the Convention when an international investment project endangers cultural sites or cultural objects and the host state fails to takes protective measures would be another important aspect when examining this issue.

As discussed in the previous section, State Parties to the 1972 World Heritage Convention are not required to implement any or all of these measures mentioned in Article 5 for the preservation of cultural heritage. Moreover, the Tribunal has not given an indefinite view on this matter as the *Pyramids* case illustrated.

O' Keefe's view is that as law of State responsibility is, in practice, an unlikely and ill-adapted mechanism compelling a State to preserve cultural heritage situated. No organization can force states to comply with their obligations under the Convention or legally penalise them.¹⁵⁵ When an international investment project endangers cultural sites or cultural objects and the host State fails to takes protective measures,

¹⁵⁴ R. O'Keefe, 'World Cultural Heritage: Obligations to the international community as a whole?' in *International and Comparative Law Quarterly*, 2004 Vol. 53, No 1, 189-209 at 190.

¹⁵⁵ *Ibid*, 207.

the World Heritage Committee has limited means to interfere. For instance, in a planned dam and mining projects within and near the World Heritage area of the Three Parallel Rivers of Yunnan Protected Areas, the Committee expressed its concern that these projects could threaten the integrity and values of the property. In order to prevent this from happening, it requested China to submit detailed plans of the proposed dam and mining projects and to present reports on their possible impacts on the World Heritage Site.¹⁵⁶ The World Heritage Committee can publicly admonish State Parties to the Convention in breach of their obligation. For instance, the Committee reprimanded certain states for their granting of mining concessions for areas encroached on World Heritage sites and urged these states to cancel such licenses. This can cause cuts in funding for the host State from the World Heritage Fund and other sources and damage foreign investors' reputation.¹⁵⁷

It can be shown that at present the 1972 Convention has not established regulations on compliance and the role of the World Heritage Committee is also limited if a State Party fails to comply with the Convention's obligations. A mechanism for State Parties to comply with its obligations under the 1972 World Heritage Convention is therefore needed with detailed regulations in both international and national laws for the better protection of cultural heritage.

Another important question that may arise in practice is when the obligation to preserve cultural heritage under the 1972 World Heritage Convention comes into play. The answer can be when a particular site is inscribed on the World Heritage List or at the time the Convention comes into force for a State Party. In *Commonwealth v Tasmania*, the World Heritage Properties Conservation Act was passed in 1983; nine years after Australia became a State Party to the 1972 Convention,¹⁵⁸ but this case has limited implications for the question. The main issue was about the legal debate over the extent of the external affairs power or

¹⁵⁶ For more information about the Three Parallel Rivers of Yunnan Protected Areas, see <http://whc.unesco.org/en/list/1083>; Gruber, note 2, 266; D. Palmo, Damming the three parallel rivers of Tibet (June, 2016), available at <http://tibetpolicy.net/comments-briefs/damming-the-three-parallel-rivers-of-tibet/> (accessed on 15/03/2019); G. Xiaohong and L. Jingrong, Three parallel rivers region under ecological threat (July, 2006), available at http://www.china.org.cn/archive/2006-07/26/content_1175918.htm (accessed on 15/03/2019).

¹⁵⁷ L.I. de Germiny, Considerations before investing near a UNESCO World Heritage Site, TDM 5 (2013), 7.

¹⁵⁸ <http://whc.unesco.org/en/statesparties/au> (accessed on 15/03/2019).

constitutional law. In 1978, the construction of a hydro-electric dam was proposed by the Tasmanian government via Hydro-Electric Commission. The Franklin area was declared a World Heritage site by UNESCO in November 1982. The Labour government, after winning the election, prohibited clearing, excavation and other activities within the Tasmanian Wilderness World Heritage area; by passing the 1983 World Heritage Properties Conservation Act in conjunction with the National Park and Wildlife Conservation Act 1975. The Tasmanian government challenged these actions, arguing that the Australian Constitution gave no authority to the federal government to make such regulations; both governments put their case to the High Court of Australia. The federal parliament is given the power to make laws by Section 51(xxix) of the Australian Constitution with respect to external affairs. The Hawke government claimed that the Act was giving effect to an international treaty to which Australia was a party, in this case, to the World Heritage Convention; when it passed the World Heritage Act under this provision. The High Court held that the federal government had legitimately prevented the construction of the dam and that the World Heritage Act was authorised under the ‘external affairs’ power.¹⁵⁹

In the *Pyramids* case, the project was stopped before the application to add the construction site to the World Heritage List. In February 1974 Egypt ratified the Convention¹⁶⁰ but the Convention entered into force on 17 December 1975.¹⁶¹ In a decree in May 1978, the Ministry of Information and Culture declared the land surrounding the Pyramids to be public property. This decree was issued upon the recommendations of the Egyptian Antiquities Authority about the presence of antiquities in Al Giza Pyramids region.¹⁶² The General Investment Authority then withdrew its approval of the Pyramids Oasis Projects.¹⁶³ On February 26, 1979 – nine months after the project was cancelled – Egypt nominated the ‘Pyramid fields

¹⁵⁹ <http://envlaw.com.au/tasmanian-dam-case/> (accessed on 15/03/2019).

¹⁶⁰ Award on the merits, para 153.

¹⁶¹ *Ibid*, para 150.

¹⁶² *Ibid*, para 63.

¹⁶³ *Ibid*, para 64.

from Giza to Dahshur’ for inclusion in the World Heritage List¹⁶⁴ and the nomination was accepted by the World Heritage Committee later that year.¹⁶⁵

Interestingly, the question as to whether Egypt can employ the 1972 World Heritage Convention when their application to have a site inscribed on the World Heritage List has only just been submitted was not raised by the Claimants. The Convention was mentioned only when the Claimants argued that the Respondent’s expropriatory acts were not based on the Convention and that none of its provisions required termination of the project.¹⁶⁶ When dealing with the lawfulness of the measures taken by the Respondent to cancel the project and the issue of compensation for expropriation, the Tribunal gave its answer to the question. In the Tribunal’s view, the date on which the Convention entered into force with respect to Egypt is not the date on which Egypt became obligated by the Convention to protect and conserve antiquities on the Pyramids Plateau. It was only in 1979, when Egypt nominated the pyramid fields and the World Heritage Committee accepted that nomination, the relevant international obligations emanating from the Convention became binding on Egypt.¹⁶⁷

Even if the Tribunal were disposed to accept the validity of the Claimant’s DFC calculations, it could only award *lucrum cessans* until 1979, *when the obligations resulting from the UNESCO Convention with respect to the Pyramids Plateau became binding on Egypt*. From that date forward, the Claimant’s activities on the Pyramids Plateau would have been in conflict with the Convention, therefore in violation of international law, and any profits that might have resulted from such activities are consequently non-compensable.¹⁶⁸ (emphasis added)

The issue of whether the 1972 World Heritage Convention can be applied before a site is inscribed on the World Heritage List was also expected from the settlement of an environmental case - *Compañía del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica* (the *Santa Elena* case).¹⁶⁹ The property in dispute known as

¹⁶⁴ *Ibid*, para 153.

¹⁶⁵ *Ibid*, para 156.

¹⁶⁶ *Ibid*, para 153.

¹⁶⁷ *Ibid*, para 154.

¹⁶⁸ *Ibid*, para 191.

¹⁶⁹ *Compañía del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/96/1, Final Award 17 February 2000, available at <https://www.italaw.com/cases/3413> (accessed on 15/03/2019).

Santa Elena is an area of naturalistic beauty including Pacific coastline, numerous rivers springs, forests, and mountains.¹⁷⁰ The Claimant – an American owned company was formed primarily for the purpose of Santa Elena and developing it as a tourist resort and residential community.¹⁷¹ Costa Rica issued an expropriation decree for the property in May 1978, citing a need to expand the adjoining Santa Rosa National Park to achieve environment goals. Costa Rica has become a party to the 1972 World Heritage Convention in 1997 and as of July 1, 1998, had submitted an application for addition to the World Heritage List of the Guanacaste Conservation Area. The application was granted by the World Heritage Committee in December 1999.¹⁷²

The fundamental issue before the Tribunal was the amount of compensation to be paid to foreign investors.¹⁷³ The Respondent contended that the relevant date at which the fair market value of the property is to be assessed is the date of the expropriation decree in May 1978.¹⁷⁴ The Claimant stated that the fair market value of the Santa Elena Property is equivalent to its present day value, undiminished by any expropriatory actions of the Government and, in particular, by any environmental statutes or regulations enacted after 1978.¹⁷⁵ The host state thus did not mention the application of the World Heritage Convention but regulations on protecting the environment. Unsurprisingly, the Tribunal only addressed the relevant of the obligation to protect the environment in approaching the question of compensation.¹⁷⁶ The 1972 Convention and the listing had no influence on the valuation. The inclusion of the property in the World Heritage List as of December 1999 would have had a severe impact on the amount of just compensation, had the Tribunal in *Santa Elena* been persuaded to accept a current date of expropriation, and hence valuation.¹⁷⁷

¹⁷⁰ *Ibid*, para 15.

¹⁷¹ *Ibid*, para 16.

¹⁷² <https://whc.unesco.org/en/list/928> (accessed on 15/03/2019).

¹⁷³ *Ibid*, para 54.

¹⁷⁴ *Ibid*, para 75.

¹⁷⁵ *Ibid*, para 75.

¹⁷⁶ *Ibid*, para 71.

¹⁷⁷ International investments and protection of the environment: the role of dispute resolution mechanisms, note 57, 26.

Commentators have criticised the decision in the *Pyramids* case and argued that the obligations of the 1972 Convention should apply even before formal public identification. They agree with the opinion of the Australia High Court in the case *Queensland v. Commonwealth*¹⁷⁸ that the obligations of the 1972 World Heritage Convention apply irrespective of whether the property is included on the List.¹⁷⁹ Australia had nominated an area of Queensland called the ‘Wet Tropics of Queensland’ for inclusion on the World Heritage List. The nomination was accepted on 9 December 1988.¹⁸⁰ The Court was asked whether the inclusion was conclusive with the validity of a Proclamation made by the Governor-General under the 1983 World Heritage Properties Conservation Act prohibiting certain acts which are likely to damage it.¹⁸¹ A joint judgement by six of the judges concluded:

As the inclusion of the property in the List is conclusive of its status in the eyes of the international community, it is conclusive of Australia’s international duty to protect and conserve it.¹⁸²

O’Keefe points out that ‘the judgement of the High Court explored the effect of the 1972 World Heritage Convention in greater detail.’¹⁸³ The judgment of the High Court pointed out that ‘the status of a property as part of the cultural heritage or natural heritage [as defined by the Convention] follows from its qualities rather than from their evaluation either by the relevant State Party or by the World Heritage Committee.’¹⁸⁴ In addition, ‘the fact that a property has not been included in the World Heritage List does not determine that the property does not have an outstanding universal value for purposes other than those resulting from inclusion in the List.’¹⁸⁵

The analysis of cases studies (both international and national) has shown that there is no clear answer to the question as to when the host State has the obligation to preserve cultural heritage under the 1972 World Heritage Convention. Different tribunals can have different approaches to this issue.

¹⁷⁸ *Queensland v. Commonwealth* [1989] 167 Commonwealth Law Reports.

¹⁷⁹ O’ Keefe, note 151, 262.

¹⁸⁰ O’Keefe and Prott, note 43, 79-80.

¹⁸¹ O’ Keefe, note 151, 262.

¹⁸² *Queensland v. Commonwealth* [1989] 167 Commonwealth Law Reports, 242.

¹⁸³ O’ Keefe, note 151, 262.

¹⁸⁴ *Queensland v. Commonwealth* [1989] 167 Commonwealth Law Reports, 241.

¹⁸⁵ *Ibid*, 241.

2.2.1.2 The 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property

Article 7 of this UNESCO Convention obliges the signatory states to take all necessary measures to prevent museum and similar institutions from acquiring cultural property that has been illegally exported from another country, to prohibit the import of such items, and to take appropriate steps to recover and return these items upon request to its state of origin.¹⁸⁶ If a movable cultural item is removed and exported abroad by foreign investors in projects on mining and construction, this Convention provides a legal basis for a ratifying State to make a request for the return or relocation of such items. This aspect is especially crucial to many countries such as China where antiquities are believed to be the largest class of item smuggled out of the country.¹⁸⁷ Significantly, according to Article 8 of the 1970 Convention, all persons who take part in violating import and export restrictions must be subject to penalties or administrative sanctions to be implemented by the State Parties. This provision presents the possibility of criminal charges if anyone including a foreign investor violates specific rules of cultural heritage protection.

2.2.1.3 The 1995 UNIDROIT Convention on Stolen or Illegal Exported Cultural Objects

The 1970 UNESCO Convention and the UNIDROIT Convention are compatible¹⁸⁸ and designed to complement each other and cover two separate areas. As distinct from the UNESCO Convention, the UNIDROIT Convention focuses on the recovery of cultural property, and it applies to international claims for the restitution of stolen cultural objects and the return of illegally exported cultural objects.

¹⁸⁶ The Convention also regulates other obligation of State relating to the establishment of a national inventory of protected cultural property and the development and establishment of appropriate institutions; and obligations to antique dealers. For a comprehensive commentator of this Convention, see P. O’Keefe, *Commentary on the 1970 UNESCO Convention of Illicit Traffic* (Institute of Art and Law, Leicester: 2000); Kono, note 51, 32-42.

¹⁸⁷ P. Newell, The PRC’s law for the protection of cultural relics in *Art Antiquity and Law*, Vol. XIII. Issue 1, April 2008; Gruber, note 2, 267.

¹⁸⁸ On the compatibility between the UNESCO and UNIDROIT Conventions, see L. V. Prott, UNESCO and UNIDROIT: A partnership against trafficking in cultural objects in *Uniform Law Review*, 1996 Vol. 1, 59-71. The text is available at unesdoc.unesco.org/images/0010/001050/105002E.pdf (accessed on 15/03/2019).

The UNIDROIT Convention established a right of return of stolen objects to the original owner. Article 3(2) provides that ‘a cultural object which has been unlawfully excavated or lawfully excavated but unlawfully retained shall be considered stolen, when consistent with the law of the State where the excavation took place’. In some countries, the law states that cultural heritages discovered with unidentified owners and recovered in the course of archaeological exploration and excavation belongs to the entire population and shall be protected.¹⁸⁹ Therefore the UNIDROIT Convention put such countries in an excellent position for reclaiming stolen and illegal excavated cultural heritage items from other signatories.¹⁹⁰ Nevertheless, only 41 states have become members of the 1995 UNIDROIT Convention so far¹⁹¹ which affects the efficacy of this Convention.¹⁹²

In the context of peacetime, international conventions on the protection of movable cultural objects have limited roles in dealing with claims relating to location, claims for restitution, and claims relating to damage to cultural objects. The 1970 UNESCO Convention and the 1995 UNIDROIT Convention do not cover the issue of location unless it is a consequence of illegal export. Moreover, while the former only deals with claims brought by States, the latter mainly address deals with claims initiated by ‘owners’ with the emphasis on individual private property ownership. Claims by groups such as the local communities or indigenous groups are therefore not served well by international cultural instruments.

2.2.2 Domestic heritage legislation

The adoption of the international conventions heralded a significant improvement in the protection of cultural heritage. State Parties to these international conventions are progressively issuing and amending their national standards on cultural heritage

¹⁸⁹ For instance, the 2001 Vietnam Law on Cultural Heritage, Article 7 and 8. Article 5 of the 1982 Law of the People’s Republic of China on the Preservation of Cultural Relics also regulates that cultural heritage items excavated, still undiscovered or buried are owned solely by the state. This underlying idea resonates with the declaration of state ownership in South Africa law in respect of all archaeological objects and paleontological material and meteorites (Section 35(2) of the 1999 National Heritage Resources Act). The text is available at <http://www.china.org.cn/english/environment/34304.htm> (accessed on 15/03/2019).

¹⁹⁰ Gruber, note 2, 269.

¹⁹¹ <https://www.unidroit.org/status-cp> (accessed on 15/03/2019). For an analysis of the 1995 UNIDROIT Convention, see e.g, Kono, note 51, 59-69.

¹⁹² Gruber, note 2, 269.

protection as a result of their participation in international instruments.¹⁹³ However, like many other international legal instruments, international conventions on cultural heritage do not promote uniform national legislation, and they leave it to the signatories to apply their own domestic law.¹⁹⁴ The promulgation of additional national legislation plays a significant role to provide detailed regulations to protect specific categories of cultural heritage in most jurisdictions.

The increasing regulation of cultural heritage is a notable feature of contemporary national legal systems.¹⁹⁵ In the context of the Vilnius Historic Centre in Lithuania, the preservation of this cultural heritage site is ensured by the specific provisions stipulated by the laws on national security, on protection of immovable cultural heritage, on state commission of cultural heritage, on territorial planning on protected areas and other legal acts. Moreover, this site is protected by the Vilnius strategic plan, the Vilnius official plan, the regulation on the protection of the Old Town and the actions taken by the annual Old Town revitalisation programme.¹⁹⁶

There are studies on national laws on protecting cultural heritage in general and cultural heritage sites and movable cultural objects in particular. In the context of cultural heritage preservation in international investment activities, existing publications on cultural heritage protection only focus on international instruments on cultural heritage – municipal regulations are often ignored. The following part will focus on how national laws can deal with the protection of cultural heritage sites and movable cultural items in the context of international investment projects on mining and construction. This analysis provides clarity with regard to the sources of domestic regulations and the contents of relevant rules. The study will identify jurisdictions where national cultural heritage laws cover the obligation of foreign investors to protect cultural heritage. This will be one of the contributions to the knowledge of this PhD thesis. The thesis also highlights the implications of

¹⁹³ For example, Vietnam had its first ever law on cultural heritage in June 2001 dealing with both tangible and intangible forms. The country then amended its law in 2009 in accordance with new UNESCO rules with the 2003 Convention for the Safeguarding of the Intangible Cultural Heritage and the 2005 Convention on the Protection and Promotion of the Diversity of Cultural Expressions.

¹⁹⁴ Gruber, note 2, 267. For the relationship between international law and municipal or domestic law, see e.g. P. E. Dupuy, *International law and domestic (municipal) law* in Max Planck Encyclopedia of Public International Law [MPEPIL] (Oxford Press University, 2011).

¹⁹⁵ Prott, note 75, 227.

¹⁹⁶ <http://whc.unesco.org/en/list/541> (accessed on 15/03/2019).

different levels of protection which has been received less attention from scholars, illustrating unique problems from the perspective of law enforcement.

2.2.2.1 Regulations on cultural heritage protection from various sources of national laws

There are a few countries which have an integrative national law with a single legislative text on the preservation of cultural heritage.¹⁹⁷ The Vietnam Law on Cultural Heritage is an example of such integrative domestic laws in use. Vietnam is a country of multi-nations with fifty-four ethnic groups and a diversified traditional culture. In July 2001, the Law on Cultural Heritage was promulgated in Vietnam (last amended in 2009).¹⁹⁸ This is the first law dealing with the protection of cultural heritage in the country, making the Vietnamese legal framework one of the youngest systems in the world. Vietnam combines core regulations on the protection and preservation of tangible and intangible and of movable and immovable cultural heritage in one legal statute.¹⁹⁹ State agencies, political organisations, socio-political organisations, social organisations, socio-professional organisations, economic organisations, people's armed force units and individuals have the responsibility to protect and promote the values of cultural heritage in terms of Article 10. This article provides a legal basis for both state entities and non-state actors to take actions in order to raise concerns about cultural heritage. Governmental bodies can take measures to interfere international investment projects with the justification on cultural heritage safeguard. Non-state actors can also raise claims about cultural heritage protection if the investment projects are backed by the government or its representative.

¹⁹⁷ Kono, note 51, 117-118.

¹⁹⁸ The English text for the Law is available at http://www.moj.gov.vn/vbpq/en/Lists/Vn%20bn%20php%20lut/View_Detail.aspx?ItemID=9469 (accessed on 15/03/2019). This statute was amended in reaction to the Vietnamese ratification of the 2003 Convention and the 2005 Convention.

¹⁹⁹ For more on law on protecting cultural heritage in Vietnam, see e.g. D. Huffer and D. Chappell, Local and international illicit traffic in Vietnamese cultural property: preliminary investigation, in J. D. Kila and M. Balcells (eds), *Cultural property crime: an overview and analysis on contemporary perspectives and trends* (Leiden; Boston Brill, 2015); Nguyen Kim Dung, Intangible cultural heritage safeguarding system in Vietnam, available at <https://ich.unesco.org/doc/src/00174-EN.pdf> (accessed on 15/03/2019); L. Saltiel, Cultural governance development in Vietnam, *University of Pennsylvania Journal of International Law*, 2014, Vol 35(3), 893-915.

Interestingly, the 2001 Vietnam Law on Cultural Heritage addresses the obligations of investors in construction activities. Foreign investors of projects on construction in places where relics are found have a duty to coordinate with and create conditions for the competent State agencies in charge of culture and to supervise the process of construction of such works.²⁰⁰ Notably, in the process of construction of works, if investors realised that there might be relics or vestiges, antiques, national precious objects, they would be required to suspend the construction and promptly notify the competent State agency in charge of culture and information.²⁰¹

South Africa,²⁰² Australia²⁰³ and Canada²⁰⁴ all have laws on the safeguarding of national heritage in general, but they deal with the cultural heritage protection in different ways. In the Republic of South Africa, the National Heritage Resources Act (Act No 25 of 1999)²⁰⁵ is the legislation concerning the protection of national heritage that is of cultural significance.²⁰⁶ Section 27(18) expressly states that ‘No person may destroy, damage, deface, excavate, alter remove from its original position, subdivide or change the planning status of any heritage site without a permit issued by the heritage resources authority responsible for the protection of

²⁰⁰ Article 37 section 1.

²⁰¹ Article 37 section 2.

²⁰² For more on regulations on protecting cultural heritage in South Africa, see e.g. C. Forrest, The protection of cultural heritage in South Africa, and its implementation of the 1970 UNESCO Convention in armed conflict in *Art Antiquity and Law*, Vol. X. Issue 1, March 2005; Nafziger and Paterson, note 51, 354-380; H. C. (Jatti) Bredekamp, The cultural heritage of democratic South Africa: An overview in T. Bothma, P. Underwood, P. Ngulube (eds), *Libraries for the future progress and development in South Africa libraries* (Pretoria: Library and Information Association of South Africa, 2007) 1-12, available at <http://www.dissanet.com/ifla/pdf/LIASA%2001%20Bredekamp.pdf> (accessed on 15/03/2019).

²⁰³ For more on law on protecting cultural heritage in Australia, see e.g. Prott and O’Keefe, note 19, 70; Nafziger and Paterson, note 51, 44-73.

²⁰⁴ For more on regulations on protecting cultural heritage in Canada, see e.g. C. Bell and V. Napoleon (eds), *First nations cultural heritage and law: Case studies, voices and perspective* (UBC Press, 2008); C. Bell and R. K. Paterson (eds), *The protection of first nations cultural heritage: Law, policy and reform* (UBC Press, 2009); Nafziger and Paterson, note 51, 74-106; Kono, note 51, 223-246.

²⁰⁵ The text is available at http://www.unesco.org/culture/natlaws/media/pdf/southafrica/za_natheritagresources1999_engorof.pdf (accessed on 15/03/2019).

²⁰⁶ Section 3(1) provides that those heritage resources of South Africa which are of cultural significance or other special value for the present community and for future generations must be considered part of the national estate and fall within the sphere of operations of heritage resources authorities.

such site.²⁰⁷ This is one of the most pertinent provisions which foreign investors should take into consideration when conducting their projects in South Africa.

A heritage resources authority may make regulations to preserve any protected area which it has designated, including the prohibition or control of specified activities by any person in the designated area.²⁰⁸ The South African Heritage Resources Agency (SAHRA) or a provincial heritage resources authority may provisionally protect a protected area for a maximum period of two years.²⁰⁹ When this rule is applied in case of immovable cultural areas in South Africa, operation of international investment projects of foreign investors can be suspended up to two years if the authority concludes that such areas are protected areas and need to be protected. Section 35 of the 1999 National Heritage Resources Act provides a legal basis to deal with movable cultural objects particularly in archaeological and palaeontological sites and meteorite found in cultural sites. If foreign investors discover such movable cultural objects in the course of carrying out their project, they are not permitted to destroy, damage, excavate, remove from its original position, collect or own any archaeological or palaeontological material or any meteorite unless the responsible heritage sources issued a permit.²¹⁰

In the *Mapungubwe* case, the site and the buffer zone are protected by various instruments such as the National Heritage Resources Act, the World Heritage Convention Act (No 43 of 1999) and the National Environmental Management Act (No 73 of 1989). The site is also recognized as a protected area in terms of the National Environmental Management Protected Areas (Act 57 of 2003) - any development with a potential impact on the site will be subjected to an environmental impact assessment.²¹¹

²⁰⁷ This rule is reiterated many times in the Act such as Section 28(3) and Section 29(10).

²⁰⁸ According to Section 28 (1) and section 28(2), a protected area is (i) an area of land surrounding a national heritage site as is reasonably necessary to ensure the protection and reasonable enjoyment of such site, or to protect the view of and from such site or (ii) area of land surrounding any archaeological or paleontological site or meteorite as is reasonably necessary to ensure its protection.

²⁰⁹ Section 29 (1).

²¹⁰ Subsection 35(4)(b).

²¹¹ <https://whc.unesco.org/en/list/1099> (accessed on 15/03/2019).

Australia has played a significant role in contributing to the establishment of principles underlying cultural heritage law.²¹² However, no Australian legislation expressly addresses the safeguarding of cultural heritage or cultural heritage sites. The World Heritage Properties Conservation Act 1983 provided for certain protections for World Heritage listed places. Heritage laws which exist at the national (Commonwealth) state and territory levels seek to protect, preserve, present, and transmit the Australian nation's natural, cultural, and historical heritage. The 2003 Australian Heritage Council Act²¹³ is the heritage legislation at the national level. As an intransitive law,²¹⁴ it does not regulate heritage preservation but sets out criteria and procedures for the Australian Heritage Council, an expert body to advise the minister on issues regarding the listing of heritage areas.²¹⁵ The Act provides for the establishment of a Heritage List containing places and areas of national heritage value but does not regulate on protecting national heritage. The Environment Protection and Biodiversity Conservation Act of 1999²¹⁶ is the key national heritage law in Australia. The World Heritage Properties Conservation Act 1983 was replaced by parts of this current law. Australia has the Protection of Movable Cultural Heritage Act of 1986, which regulates a class of movable cultural objects that relates to members of the Aboriginal race of Australia and descendants of the indigenous inhabitants of the Torres Strait Islands.²¹⁷ In *Carter and Others v. Minister for Aboriginal Affairs and Another*, elders of the Dja Dja Wurrung people applied to the first respondent (the Minister) to make a declaration for preservation of the objects under Section 21E of the Aboriginal and Torres Strait Islanders

²¹² P. J. O'Keefe, Development in cultural heritage law: What is Australia's role? in *Australian International Law Journal* 1996, 36-59. The text is available at www.austlii.edu.au/au/journals/AUIntLawJl/1996/4.pdf (accessed on 15/03/2019).

²¹³ The text is available at <https://www.legislation.gov.au/Details/C2007C00073> (accessed on 15/03/2019).

²¹⁴ For the differences between transitive and intransitive legislation, see e.g. A. W. Seidman, R.B. Seidman, N. Abeyesekere, *Legislative drafting for democratic social change* (2001), 157-158.

²¹⁵ <http://www.comlaw.gov.au/Details/C2012C00249> (accessed on 15/03/2019).

²¹⁶ The text is available at <http://www.environment.gov.au/topics/heritage/laws-and-notice> (accessed on 15/03/2019). This Act provides automatic protection for World Heritage Properties by ensuring that an assessment process is undertaken for proposed actions that will, or are likely to, have a significant impact on the world heritage values of a declared world heritage property. This process allows the Commonwealth Minister for the Environment and Water Resources to grant or refuse approval to take an action, and to impose conditions on the taking of an action.

²¹⁷ The text is available at <http://www.comlaw.gov.au/Details/C2005C00122/Html/Text#para805> (accessed on 15/03/2019).

Heritage Protection Act 1984 (Cth).²¹⁸ The two bark etching and the ceremonial piece had been lent to the second respondent for the purposes of an exhibition. Section 21E(1) regulates that a local Aboriginal community (as defined in the Heritage Protection Act) could advise the Minister that a declaration of preservation should be made. Furthermore, Section 21E(2) states that the Minister could also decide, on his or her own motion, that a declaration of preservation should be made. The remainder of Section 21E(2) provides for public consultation and hearing of affected persons before a final decision was made.²¹⁹

Canada has a scattered legal framework for the protection of cultural heritage at the federal level; no comprehensive centralised legislation exists in this field. The federal basis for the protection of cultural heritage is mainly expressed in the 1985 Historic Sites and Monuments Act²²⁰ and the 2000 Canada National Parks Act (last amended on 01 September 2015.)²²¹ Both of these laws were enacted to implement the 1972 World Heritage Convention. Legislation to protect archaeological heritage was proposed in 1990 but was never enacted for a number of reasons.²²² The 1985 Historic Sites and Monuments Act does not provide any specific regulations to protect historic sites but sets out criteria and procedures for the establishment and appointment of the Historic Sites and Monuments Board of Canada. Cultural heritage in association with Aboriginal people is also significant in Canada as is the case in Australia. Section 35 of the 1982 Constitution Act recognises and affirms the ‘existing aboriginal and treaty rights’ of the aboriginal peoples of Canada.²²³ Generally, there are separate laws governing Aboriginal cultural heritage and

²¹⁸ The applicants used the version of the Aboriginal and Torres Strait Islanders Heritage Protection Act 1984 which was valid from 24/05/2001 to 23/03/2005 and has been superseded. The text is available at <https://www.legislation.gov.au/Details/C2004C00350> (accessed on 15/03/2019). The Act was last amended on 21/10/2016 and the text is available at <https://www.legislation.gov.au/Details/C2016C00937> (accessed on 15/03/2019).

²¹⁹ The information about the case is available at <https://plone.unige.ch/art-adr/cases-affaires/gravures-dja-dja-wurrung-2013-musee-de-melbourne-c-dja-dja-wurrung/carter-v-minister-for-aboriginal-affairs-2005-fca-667/view> (accessed on 15/03/2019).

²²⁰ The text is available at <http://laws-lois.justice.gc.ca/eng/acts/H-4/FullText.html> (accessed on 15/03/2019).

²²¹ The text is available at <http://www.canlii.org/en/ca/laws/stat/sc-2000-c-32/latest/sc-2000-c-32.html> (accessed on 15/03/2019).

²²² Bell & Paterson (eds), note 204, 36.

²²³ Under the Canadian Cultural Property Export Control List, ‘aboriginal peoples of Canada’ means, collectively, those persons of Indian or Inuit ancestry, including Métis persons, or persons recognized as being members of an Indian, Inuit or Métis group by the other members of that group, who at any time ordinarily resided in the territory that is now Canada.

historical (sometimes referred to as post-contact or non-Aboriginal) heritage. All states and territories have laws that protect various types of Indigenous heritage.²²⁴ The Commonwealth is responsible for protecting Indigenous heritage places that are nationally or internationally significant, or that are situated on land that is owned or managed by the Commonwealth.

2.2.2.2 Different levels of regulations on safeguarding cultural heritage

In the *Clayton/Bilcon v. Government of Canada*, American investors were four members of the Clayton family and Bilcon of Delaware Inc. They owned and controlled investments in Canada through their ownership and control of Bilcon of Nova Scotia, an unlimited liability company incorporated under the laws of the province of Nova Scotia, and a lease agreement entered by Bilcon of Nova Scotia. The purpose of their investments was to construct and operate a basalt quarry and marine terminal in Whites Point, Nova Scotia, to make aggregate shipments to the US market. The Nova Scotian Minister of Environment and Labour rejected the application for a quarry brought by Bilcon of Nova Scotia. This case raised questions relating to the application of laws at federal and provincial level.

Canada is a federal state with a constitution that divides statute-making authority between the federal Parliament and the provincial legislatures.²²⁵ Provinces and territories have their own legislation concerning the preservation of heritage as they promulgated the Heritage Conservation Act or the Heritage Resources Act.²²⁶ Moreover, New Brunswick²²⁷ and Saskatchewan²²⁸ adopted their own laws to directly regulate the issue of protection of historic places and historic sites. Prince Edward Island has adopted the Heritage Places Protection Act [*Chapter H-3.1*] and

²²⁴ For further information see <http://www.environment.gov.au/topics/heritage/laws-and-notice/indigenous-heritage-laws> (accessed on 15/03/2019).

²²⁵ The Canadian Legal Information Institute website (www.canlii.org) keeps a collection of statutes and regulations from each jurisdiction in Canada. Laws in common law provinces strongly resemble one another, but this similarity is generally absent in Quebec, which has a specific law governing the removal of cultural property from its territory. Under the Cultural Property Act, cultural property that is recognized by the Quebec minister may not be removed from the province without consent and a right of pre-emption exists for property that is offered for sale.

²²⁶ Examples are Alberta, British Columbia, Manitoba, Newfoundland and Labrador, Northwest Territories, Nunavut, Yukon.

²²⁷ Historic Places Protection Act [*Chapter H-6*].

²²⁸ The Historic Sites Regulations [*Chapter P-1.1*].

Archaeological Sites Protection Act [*Chapter A-17*], which play an essential part in protecting cultural sites in this Island.

The Heritage Property Act in Nova Scotia²²⁹ is the provincial instrument to deal with the identification, designation, preservation, conservation, protection and rehabilitation of buildings, public-building interiors, structures, streetscapes, cultural landscapes, areas and districts of historic, architectural or cultural value, in both urban and rural areas, and to encourage their continued use.²³⁰ The Act establishes an Advisory Council on Heritage Property and governs heritage conservation of local and municipal heritage property. Section 26 (1) (ad)-(ae) empowers the Governor in Council to make regulations on determining the standards and guidelines to be used for the conservation of registered provincial heritage property and respecting cultural landscapes. No specific rules and measures for the preservation of cultural heritage in Nova Scotia are provided by this provincial law.

Clayton/Bilcon v. Government of Canada was not a cultural heritage related disputed since the disputing parties' arguments were based on the regulations on environmental protection. Neither the federal government nor the provincial government relied upon cultural heritage protection rules in dealing with this dispute. Accordingly, the two question as to (i) whether cultural laws at both federal and provincial level could be employed and (ii) how these relevant rules could be applied were not come up from this case.

The *Bilcon* case raised the possibility of differences in respect of the criteria for environmental impact assessments between federal and provincial statutes. The assessments undertaken by the Government of Canada, and the Government of Nova Scotia contained a recommendation that the project is discontinued because of the significant adverse effects the project was having on the core values of the surrounding communities. The Respondent submitted that the factors that the Joint Review Panel addressed in the Environmental Assessment were rooted in the

²²⁹ The text is available at <http://nslegislature.ca/legc/statutes/heritage.htm> (accessed on 15/03/2019).

²³⁰ Section 2.

relevant legal and regulatory frameworks of Canada and Nova Scotia.²³¹ The provincial statute, like the federal act, sets out options for environmental screening and assessment. ‘A project might be rejected on a review by the Minister because of the likelihood that it will cause adverse effects or environmental effects that cannot be mitigated.’²³² Under the federal Canada statute, the mandate of a Review Panel is to assess ‘adverse effects’ while under the Nova Scotia statute, ‘positive effects’ must be assessed as well.²³³ The *Bilcon* case, therefore, suggests that foreign investors should be aware of similarities and differences between federal laws and provincial laws as both laws can be employed by a host state to reject an international investment project.

Unitarian states may still have different levels in terms of the regulations on cultural heritage protection. For example, in Vietnam, the Constitution enjoys the highest authority. The next level consists of laws passed by the National People’s Assembly and its Standing Committee, and international conventions that the Standing Committee approved and to which Vietnam is a State Party. On the third level are regulations, decrees, and decisions by the Prime Minister.²³⁴ Regarding governance, cultural heritage in Vietnam can be protected at the national level, provincial level and district level.²³⁵ There are difficulties of central or provincial authorities in enforcing their decisions at lower levels of government. The control over lower levels of government is a general political problem in many countries such as Vietnam, China,²³⁶ especially in more remote areas.

In summary, regulations on cultural heritage sites and cultural items can be found in a variety of national laws that operate at different governmental levels. National

²³¹ Award on Jurisdiction and Liability, 17 March 2015, para 417, the text is available at http://www.pca-cpa.org/showpage.asp?pag_id=1341 (accessed on 15/03/2019).

²³² *Ibid*, para 486.

²³³ *Ibid*, para 487.

²³⁴ For the diagram of law making bodies, see <http://duytho.com/legal-topics/12958-basic-structure-of-vietnam-legal-system.html> (accessed on 15/03/2019).

²³⁵ For information about the structure of Vietnam’s government and hierarchy law, see e.g. E. Dooley, G. Engbring, S. Chapman, Key features of Vietnam’s legal system (2013), available at <https://www.4cmr.group.cam.ac.uk/filecab/redd-law-project/20140819%20Introduction%20to%20Vietnams%20Legal%20System.pdf> (accessed on 15/03/2019).

²³⁶ For the situation in China, see Gruber, note 2, 295; Z. Huo, Legal protection of cultural heritage in China: a challenge to keep history alive in *International Journal of Cultural Policy*, 2016.

laws on heritage can regulate the protection of cultural heritage but different countries have varying levels of details and types of measures, and they are seldom compartmentalised and centralised. Vietnamese law on cultural heritage covers detailed categories of cultural heritage, interpretation of what cultural heritage protection means and provides measures which need to be carried out. South Africa represents another excellent example of a robust legislative framework, where the National Heritage Resources Act contains detailed rules on the conservation of heritage in general and cultural heritage in particular. According to the World Investment Report, foreign investors challenged state conduct in 2017 in respect of the designation of national heritage sites, indigenous protected areas, national parks, and environmental conservation zones.²³⁷ None of these disputes relates to cultural heritage protection. However, foreign investors might take legal actions against a host state in instances where cultural heritage factors could be relevant to State conduct. Since protected areas could be designated in domestic laws in relation to the protection of cultural heritage, the classification of ‘protected areas’ could be used by the host State to justify its measures. National cultural heritage law may impose a duty to protect cultural heritage sites and cultural objects on investors. Nevertheless, in those instances where such obligations have been placed on foreign investors, they are not detailed enough for adequate protection of cultural heritage. Moreover, the implementation of any international tools is generally more or less left to the discretion of the respective State Parties. National implementation differs in comprehensiveness and strictness, depending on the national perception of the protection and preservation of cultural heritage in the legal system in question.

2.3 Investment law and the protection of cultural heritage

This section aims at examining to what extent investment law can improve the protection of cultural heritage. This study will be complementary to other studies as it will pay attention to how international investment law regime can fill the gaps in cultural heritage law itself to help the parties concerned in foreign investment activities protect cultural heritage better.

²³⁷ UNCTAD, *World Investment Report 2017*, 116. The text is available at http://unctad.org/en/PublicationsLibrary/wir2017_en.pdf (accessed on 15/03/2019).

The three parties with fundamental interests in international investment activities are international (or foreign) investors, host states and home states. The issue of cultural heritage conservation in the context of international investment projects will be analysed from four different legal sources: (1) international law; (2) the host state's laws; (3) investment contracts and (4) rules by international public financiers for foreign investment.²³⁸ Since this thesis primarily concentrates on the relationship between private foreign investors and host states, investment rules provided by home states will not be covered.

2.3.1 International investment agreements

This section will focus on international investment treaties because they constitute an important source on the basis of which the principles of international law on foreign investment are established. The first question is whether existing international investment agreements have played any role in protecting cultural heritage. If it is not the case, the next question will be it is possible and necessary to amend investment rules for cultural heritage preservation.

International investment agreements are concluded between states and contain the terms and conditions for private investment by investors of one state in another state.²³⁹ They follow the fundamental principle of treaty law which is that treaties bind only the state parties which have consented to them and must be performed in

²³⁸ Since the early 1960s, the identification of sources of foreign investment law has raised considerable debate among academics, and practitioners. When identifying sources of foreign investment law, some authors use the categories of international law set out under Article 38(1) of the Statute of the International Court of Justice: international convention, international custom, general principles of law and judicial decisions. For example, M. Sornarajah, note 65, 79-88; Schefer, note 65, chapter 2: Sources of international investment law. Grisel divides sources of foreign investment law into the two formal sources namely international law and domestic law; and the material source namely precedent, see F. Grisel, The sources of foreign investment law in Douglas, note 65. Salacuse identifies three legal frameworks of international investment law: international law, national law and investment contracts. See J. W. Salacuse, *The three laws of international investment: national, contractual, and international frameworks* (Oxford University Press, 2013).

²³⁹ Article 2(1) of the 1969 Vienna Convention on the Law of Treaties defines a treaty for the purpose of the Convention as 'international agreement concluded between states in written form and governed by international law.' International Conventions have a variety of designations in their titles: treaty, agreement, protocol, pact, convention, and convent, among others. Despite their differences in names, they have the same binding effect on the states that have consented to them.

good faith. International investment agreements can be classified as one of the following types: multilateral treaties, bilateral treaties and regional treaties.²⁴⁰

While there is no single comprehensive multilateral investment treaty, there has been a steady growth of bilateral investment treaties (BITs). It is estimated that about three thousand BITs are in existence worldwide.²⁴¹ However, in recent years, an increasing number of states such as Bolivia, Venezuela, Ecuador, and South Africa have unilaterally withdrawn from some of their investment treaties. Other countries such as Indonesia and India announced their intentions to terminate or withdraw from many of their investment treaties.²⁴² There has been a debate on whether international investment treaties, particularly BITs, are likely to promote inflows of foreign direct investment.²⁴³

The classical BITs had addressed only issues of foreign investment. More recently there is a trend to negotiate provisions on foreign investment in the context of wider agreements, called free trade agreements (FTAs). The FTAs deal with trade issues and significantly they have incorporated BIT-style provisions into an investment chapter. Investment chapters of FTAs often have similar contents with those of BITs.²⁴⁴ More FTAs which contain provisions on foreign investment have been

²⁴⁰ For a topic of the history and types of international investment agreements, see J. W. Salacuse, *The law of investment treaties* (Oxford University Press, 2010), Chapter 4: History of international investment treaties; Collins, note 58, Chapter 2: Bilateral, regional and multilateral investment agreements and investment contracts; Bungenberg, note 65, Chapter 4: International investments – History, approaches, schools.

²⁴¹ <http://investmentpolicyhub.unctad.org/IIA> (accessed on 15/03/2019).

²⁴² See e.g. C. Fortin (June, 2017) *Bilateral investment treaties: on the eve of major reform*, available at <http://www.ids.ac.uk/opinion/bilateral-investment-treaties-on-the-eve-of-a-major-reform> (accessed on 15/03/2019); *The Financial Times* (March, 2014), B. Band and S. Donna, *Indonesia to terminate more than 60 bilateral investment treaties*, available at <https://www.ft.com/content/3755c1b2-b4e2-11e3-af92-00144feabdc0> (accessed on 15/03/2019); K. Cervantes-Knox, E. Thomas (May, 2017), *Ecuador terminates 12 BITs: a growing trend of reconsideration of traditional investment treaties*, available at <https://www.dlapiper.com/en/mexico/insights/publications/2017/05/ecuador-terminates-12-bits-a-growing-trend/> (accessed on 15/03/2019).

²⁴³ See e.g. J. W. Yackee, *Do bilateral investment treaties promote foreign direct investment? Some hints from alternative evidence in University of Wisconsin Legal Studies Research Paper Series Paper No. 1114*, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1594887 (accessed on 15/03/2019).

²⁴⁴ See C. Lo, *A comparison of BIT and the investment chapter of Free Trade Agreement from policy perspective in Asian Journal of WTO and International Health Law* Vol. 3, No. 1, 2008, 147-170.

concluded such as the North America Free Trade Agreement (NAFTA).²⁴⁵ More than three hundred treaties with investment provision are in force at the present.²⁴⁶

More countries and economies are recently engaged in negotiating international investment and trade agreements²⁴⁷ at regional, sub-regional and mega-regional level.²⁴⁸ Examples are the Association of South East Asia Nations (ASEAN) Comprehensive Investment Agreement,²⁴⁹ the Trans-Pacific Partnership (TPP) Agreement,²⁵⁰ the EU-US Transatlantic Trade and Investment Partnership (TTIP)²⁵¹ and the EU-Canada Comprehensive Economic and Trade Agreement (CETA).²⁵² The EU has played an active role in such trans-regional free-trade agreements.²⁵³ A significant international investment agreement at regional level concluded most recently²⁵⁴ is the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) also known as TPP11 as it has the involvement of 11 countries.²⁵⁵ On December 30, 2018 the CPTPP entered into force among the first

²⁴⁵ The North America Free Trade Agreement (NAFTA) between Canada, Mexico and the United States aims at the free movement and liberalisation of goods, services, people and investment within the NAFTA region. It contains Chapter XI specifically addressing the treatment of investment. North American Free Trade Agreement (NAFTA) 17 December 1992, in force 1 January 1994 (1993) 32 ILM 289. The text is available at <http://www.sice.oas.org/trade/nafta/chap-21.asp> (accessed on 15/03/2019).

²⁴⁶ <http://investmentpolicyhub.unctad.org/IIA> (accessed on 15/03/2019).

²⁴⁷ For more on the topic of trends of international investment and trade treaties, see UNCTAD, *World Investment Report 2015: Reforming international investment governance*, 106-108. The text is available at http://unctad.org/en/PublicationsLibrary/wir2015_en.pdf (accessed on 15/03/2019).

²⁴⁸ For this topic, see further T. Rensmann, *Mega-Regional Trade Agreements*, Springer, 2017.

²⁴⁹ For more information, see <http://investmentpolicyhub.unctad.org/IIA/treaty/3273> (accessed on 15/03/2019).

²⁵⁰ The agreement was concluded in February 2016 between the US, Japan and 10 other Pacific Rim States. For more information, see <http://investmentpolicyhub.unctad.org/IIA/mostRecent/treaty/3624> (accessed on 15/03/2019).

²⁵¹ For more information, see <http://ec.europa.eu/trade/policy/in-focus/ttip/about-ttip/> (accessed on 15/03/2019).

²⁵² For more information, see: http://ec.europa.eu/trade/policy/in-focus/ceta/index_en.htm (accessed on 15/03/2019); M. M. Mbengue, S. Schacherer, *Foreign investment under the Comprehensive Economic and Trade Agreement (CETA)*, Springer, 2019; U. Kriebaum, *FET and expropriation in the Comprehensive Economic Trade Agreement between the European Union and Canada (CETA)*, TDM 1 (2016).

²⁵³ See further C. Titi, *International investment law and the European Union: Towards a new generation of international investment agreements*, in *European Journal of International Law*, 08/2015, Volume 26, Issue 3.

²⁵⁴ For the list of the most recent of international investment agreement, see <https://investmentpolicyhub.unctad.org/IIA/MostRecentTreaties#iiaInnerMenu> (accessed on 15/03/2019).

²⁵⁵ Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore and Vietnam. For more information, see <http://investmentpolicyhub.unctad.org/IIA/mostRecent/treaty/3808> (accessed on 15/03/2019).

six countries to ratify the agreement – Canada, Australia, Japan, Mexico, New Zealand, and Singapore.

International investment agreements differ in their details however their scope and contents have been standardised.²⁵⁶ The basic objective of these agreements is to promote investment liberalisation which is achieved by eliminating or reducing barriers to investment. In addition, international investment agreements are designed to clarify what standards of protection will apply to investment from one country into another and provide a stable environment for foreign investors. The guarantees provided to foreign investors include non-discrimination (both national treatment and most-favoured-nation treatment), minimum standards and fair and equitable treatment.²⁵⁷ Notably, most investment treaties contain provisions on dispute settlement and protection against expropriation in the form of guarantees of compensation in the event of nationalisation.²⁵⁸ Therefore, cultural aspects in general and cultural heritage protection are not referred to directly in such treaties. As investment chapters in free trade agreements often have same clauses to international investment treaties, free trade agreements are unlikely to mention directly the protection of cultural heritage. The following section will clarify this point further when typical investment treaties and free trade agreements concluded by chosen countries are examined.

2.3.1.1 Cultural heritage protection clauses in trade agreements and international investment treaties

Given the increasing convergence of international trade and investment law, it is worth noting how trade agreements deal with concern about cultural heritage before examining solutions from investment treaties.²⁵⁹ Multilateral trade agreements,

²⁵⁶ C. McLachlan, The principle of systemic integration and Article 31(3) of the Vienna Convention, *ICLQ* 54, 2005, 284.

²⁵⁷ For an analysis of features of international investment treaties, see e.g. Salacuse, *The law of investment treaties*, chapter 5: General structure of investment treaties; Salacuse, *The three laws of international investment: national, contractual, and international frameworks*, chapter 15: The nature and content of investment treaties; Sornarajah, note 65, 187-224; McLachlan, note 65, Chapter 2: The basic features of investment treaties.

²⁵⁸ These two topics shall be analysed in detail in chapter 3.

²⁵⁹ While they are conceptually distinct, trade and investment are nonetheless often interrelated because many foreign investments are undertaken to facilitate and foster trade. For a detailed

which are aimed at removing barriers to international trade, might recognise the significance of cultural heritage. For instance, Article XX(f) of the General Agreement on Tariffs and Trade (GATT) provides that exceptions regarding justifying measures taken in derogation from the GATT's general principles include those 'imposed for the protection of national treasures of artistic, historical or archaeological value.'²⁶⁰ Trade agreements, therefore, might allow derogation from their general principles when it is justified by the need to preserve a state's cultural heritage.²⁶¹ However, even if it is the case, international trade agreement does not contain specific provisions on how to preserve cultural heritage.

Investment agreements primarily focus on the protection of the interests of foreign investors in order to promote investment projects. Therefore, they do not often concern the interests of the international community or a host state in the preservation of specific fields such as the environment, human rights and cultural heritage.²⁶² Few investment treaties have responded to the concern over environmental safeguards, and in most treaties, environmental exceptions have not been spelt out. As with the environment, the issue of preserving human rights is seldom addressed in international investment instruments.

In recent years, the new generation free trade agreements (FTAs) with the inclusion of investment chapters²⁶³ have been concluded. For instance, in July 2018, the EU and Vietnam agreed on final texts for the EU-Vietnam Free Trade Agreement (FTA) and the EU-Vietnam Investment Protection Agreement (IPA).²⁶⁴ In terms of protecting public interests, only labour and environmental issues have been

discussion, see Salacuse, note 240, 23; M. E. Footer, *International investment law and trade: the relationship that never went away* in Baetens, note 54.

²⁶⁰ GATT was signed by 23 nations in Geneva on October 30, 1947 and took effect on January 1, 1948. It lasted until the signature by 123 nations in Marrakesh on April 14, 1994 of the Uruguay Round Agreements, which established the World Trade Organization (WTO) on January 1, 1995. However, the original GATT text (GATT 1947) is still in effect under the WTO framework, subject to the modifications of GATT 1994.

²⁶¹ Lenzerini, note 58, 552; Borelli & Lenzerini, note 43, 24.

²⁶² Schreuer & Kriebaum, note 53, 1079-1080.

²⁶³ For this topic, see further Thilo Rensmann, *Mega-Regional Trade Agreements*, Springer, 2017.

²⁶⁴ http://ec.europa.eu/trade/policy/countries-and-regions/countries/vietnam/index_en.htm
EU-Vietnam trade and investment agreements (authentic text as of August 2018), available at <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1437> (accessed on 15/03/2019).

addressed when the former deals with the issue of sustainable development²⁶⁵ as it states that ‘the Parties affirm their commitment to pursue sustainable development, which consists of economic development, social development and environmental protection all three being inter-dependent and mutually reinforcing.’²⁶⁶ The latter has better approach in protecting public interests as Article 2.2 provides that the ‘parties reaffirm their right to regulate within their territories to achieve legitimate policy objectives, such as the protection of public health, safety, environment or public morals, social or consumer protection, or promotion and protection of cultural diversity.’²⁶⁷ The EU-Vietnam Investment Protection Agreement (IPA) therefore gives indications for protecting cultural heritage in a broad manner. Regulations on the preservation of immovable cultural sites and landscapes and movable cultural objects are not specified.

Like the EU-Vietnam Free Trade Agreement (FTA), the CPTPP has also mentioned the importance of environmental protection.²⁶⁸ However, it has broadened the scope of legitimate public welfare objectives which include not only environment but also public health and safety. The Agreement’s Preambles requires State Parties to:

Recognize their inherent right to regulate and resolve to preserve the flexibility of the Parties to set legislative and regulatory priorities, *safeguard public welfare, and protect legitimate public welfare objectives, such as public health, safety, the environment*, the conservation of living or non-living exhaustible natural resources, the integrity and stability of the financial system and public morals... (emphasis added)

These international agreements have illustrated that the protection of cultural heritage as an important aspect of sustainable development is unlikely to be mentioned in the list of legitimate public objectives despite of the significant development of the new generation free trade agreements in the last few years.

²⁶⁵ Chapter 13 - Trade and sustainable development http://trade.ec.europa.eu/doclib/docs/2018/september/tradoc_157373.pdf (accessed on 15/03/2019).

²⁶⁶ Art 13.3

²⁶⁷ The text is available at http://trade.ec.europa.eu/doclib/docs/2018/september/tradoc_157393.pdf (accessed on 15/03/2019).

²⁶⁸ It has Chapter 20 ‘Environment’ with 23 articles. The text is available at <https://www.mfat.govt.nz/assets/Trans-Pacific-Partnership/Text/20.-Environment-Chapter.pdf> (accessed on 15/03/2019).

It should be noted that protecting public interest has been recognized as an essential manifestation of the State's police powers in the part of international investment instruments concerning expropriation.²⁶⁹ According to the Tribunal in *Philip Morris v. Uruguay*,²⁷⁰ the police powers doctrine has found confirmation in recent trade and investment treaties.²⁷¹ The Tribunal gave a view that there is a consistent trend in favor of differentiating the exercise of police powers from indirect expropriation emerged after 2000 as a range of investment decisions have contributed to develop the scope, content and conditions of the State's police powers doctrine, anchoring it in international law.²⁷² The 2012 U.S. Model BITs provides that 'except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriation.'²⁷³ The EU-Canada Comprehensive Economic and Trade Agreement has a similar approach as it states as follows:

For greater certainty, except in the rare circumstance when the impact of a measure or series of measures is so severe in light of its purpose that it appears manifestly excessive, non-discriminatory measures of a Party that are designed and applied to protect *legitimate public welfare objective*, such as *health, safety and the environment*, do not constitute indirect expropriations.²⁷⁴ (Emphasis added)

The same provision is also to be found in the EU-Singapore FTA.²⁷⁵ These examples have again shown that current international investment instruments have often mentioned examples of legitimate public interest such as public health, safety,

²⁶⁹ See further section 3.6.1.2.

²⁷⁰ *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7 (formerly *FTR Holding SA, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*), <https://www.italaw.com/cases/460> (accessed on 15/03/2019).

²⁷¹ Award, para 300.

²⁷² *Ibid*, para 295

²⁷³ Annex B, 4(b). The text is available at <https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf> (accessed on 15/03/2019).

²⁷⁴ Comprehensive Economic and Trade Agreement between the European Union and Canada ("CETA") Annex 8.A. "Expropriation," section 3. The text is available at <https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/text-texte/08-A.aspx?lang=eng> (accessed on 15/03/2019).

²⁷⁵ European Union-Singapore Free Trade Agreement, Annex 1, "Expropriation," section 2. The text is available at http://trade.ec.europa.eu/doclib/docs/2018/april/tradoc_156733.pdf (accessed on 15/03/2019).

public security and order and the environment. As the list is not a closed list, a host state still may argue that cultural heritage protection is one dimension of the public interest. However, the legal basis of preserving cultural heritage would be firmer if such agreements put cultural heritage directly into the list.

The part to examine (i) how international investment treaties deal with the protection of cultural heritage sites, cultural landscapes and movable cultural objects and (ii) whether a cultural clause in an investment treaty can be a useful tool to deal with any disputes and conflicting interest between a host State and foreign investors in respect of cultural heritage protection.

2.3.1.2 The use of a list of exceptions

In order to promote investment liberalisation – one primary objective of international investment treaties, a host State should open the market for foreign investors. However, some domestic industries may be exempt and a list of exceptions which can be found in the annexe of a modern investment treaty. Concerning such industries, there is no market access or a host state can impose higher regulations and foreign investors might have to satisfy all requirements in order to enter the market and carry out investment projects. This section will examine whether the conservation of cultural heritage can find its way into investment treaties through such a list of exceptions.

The FTAs negotiated by many countries such as the United States adopt a negative list approach in which all services are covered in a free trade agreement, except those that are specifically carved out by the parties.²⁷⁶ For instance, during the negotiations of the Australia-United States Free Trade Agreement (AUSFTA),²⁷⁷ Australia insisted that local contents requirements in audiovisual and broadcasting media were necessary to preserve its culture. The parties then used a ‘negative list’ approach by which all services are covered except for those specifically reserved

²⁷⁶ Vadi, *Culture clash? World Heritage and Investors’ rights in international investment law & arbitration*, note 64, 141.

²⁷⁷ The text is available at <http://dfat.gov.au/trade/agreements/ausfta/official-documents/Pages/official-documents.aspx> (accessed on 15/03/2019).

and the ‘non-conforming measures’ are listed in Annex I the AUSFTA.²⁷⁸ Therefore, if Australian authorities wished to withdraw investment licenses of American investors or impose higher requirements to do business in the field of audiovisual and broadcasting media, they could rely on the necessity of cultural protection. However, Australian government entities have justified intangible cultural heritage as a reserved service in this context and not in relation to the mining and construction sectors.

Other examples include the reasonably comprehensive bilateral trade agreement (BTA) between Vietnam and the United States, which was signed in 2000 as part of the post-war ‘trade normalisation’ process between the two countries. Chapter IV is titled Development of Investment Relations.²⁷⁹ According to Annex H of this BTA, the two countries have exceptions to the obligation to accord national treatment to covered investments in particular sectors. The distribution of cultural products in Vietnam is the only sector in the list of exceptions which may be relevant to culture, but this item bears no relation to the subject of the thesis. From the perspective of the USA, a license for the broadcast sector is the only exemption which may be relevant to the culture. However, the purpose of protecting this industry is not related to the cultural heritage preservation and immovable cultural sites and landscapes and movable cultural objects.

The 2002 Vietnam-UK BIT contains an Annex which provides exceptions to national treatment and most favoured nation (MFN) treatment to investments that are covered.²⁸⁰ The list containing industries includes broadcasting; television; press; published works; cinematic products; import and distribution services; telecommunication services; marine transportation of cargoes and passengers; tourism services; banking services; insurance services; exploitation of oil and gas; fisheries. Exempt industries are associated with intangible cultural protection with

²⁷⁸ The text is available at http://dfat.gov.au/about-us/publications/trade-investment/australia-united-states-free-trade-agreement/Documents/Annex_I_combined.pdf (accessed on 15/03/2019).

²⁷⁹ The text is available at < http://www.usvtc.org/trade/bta/text/full_text.htm > (accessed on 15/03/2019).

²⁸⁰ The text is available at <http://investmentpolicyhub.unctad.org/Download/TreatyFile/2376> (accessed on 15/03/2019).

regard to the broadcasting, media, publication area, and not with the preservation of cultural sites and movable cultural objects in the mining and construction areas.

Canada has drafted a model bilateral investment treaty in 2004 for the promotion and protection of investments of foreign investors. Section 1 of Article 10 of the Canadian Model BIT²⁸¹ contains the general exceptions for necessary measures adopted or enforced by a State (a) to protect human, animal or plant life or health; (b) to ensure compliance with laws and regulations that are not inconsistent with the provisions of this Agreement; or (c) for the conservation of living or non-living exhaustible natural resources. This article indicates that a wide range of environmental concerns and human rights concerns can fall within the general exceptions. Nonetheless, the provisions of the Canadian model BIT do not contain the exception to liability for interference with the foreign investment on cultural heritage grounds.

The Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) - one the of most recent international investment treaties at regional level provides that each Party may establish appropriate measures to respect, preserve and promote traditional knowledge and traditional cultural expressions in its Chapter 29 about exception and general provisions. However, it does not specifically target at preserving cultural sites or cultural objects.²⁸²

2.3.1.3 The inclusion of ‘cultural industries’ in international investment treaties

The new generation of bilateral investment treaties after the 1990s and regional investment treaties may have a specific exemption provision related to ‘cultural industries’ with regard to the protection of its cultural sector. The NAFTA²⁸³ and

²⁸¹ The text is available at <<http://italaw.com/documents/Canadian2004-FIPA-model-en.pdf>> (accessed on 15/03/2019).

²⁸² Article 29.8: Traditional Knowledge and Traditional Cultural Expressions. The text is available at <https://www.mfat.govt.nz/assets/Trans-Pacific-Partnership/Text/29.-Exceptions-and-General-Provisions.pdf> (accessed on 15/03/2019).

²⁸³ According to Art 2107 of the NAFTA, *cultural industries* means persons engaged in any of the following activities:

- (a) the publication, distribution, or sale of books, magazines, periodicals or newspapers in print or machine readable form but not including the sole activity of printing or typesetting any of the foregoing;
- (b) the production, distribution, sale or exhibition of film or video recordings;

Canada-United States Free Trade Agreement (CUSFTA)²⁸⁴ refer ‘cultural industries’ to the creation, production, and distribution of goods and services that are cultural in nature. These investment agreements thus link ‘cultural industries’ to the protection of intellectual property rights. The protection of immovable cultural heritage sites and movable cultural objects, therefore, are addressed by neither the NAFTA nor the Canada-United States Free Trade Agreement.

2.3.1.4 Best practice

The EU-South Africa Agreement on Trade, Development and Cooperation²⁸⁵ has Article 85 called ‘Culture’, but its contents focus on cultural cooperation in order to promote a thorough knowledge and better understanding of cultural diversities. This agreement does not directly mention any aspects of cultural heritage preservation and measures to be taken to protect cultural elements are not covered.

Regulations on exceptions of international investment treaties do not give a legal basis to protect cultural heritage and immovable cultural sites or landscapes and movable cultural objects. Analysis of all existing international investment agreements at both regional and bilateral levels concluded by the four chosen countries²⁸⁶ indicates only one exception to this rule, namely the 2009 ASEAN Comprehensive Investment Agreement which came into force on 29 March 2012.²⁸⁷ The objective of this Agreement is to create a free and open investment regime in ASEAN in order to achieve the end goal of economic integration. Section 1(e) of Article 17 called ‘General exceptions’ states that ‘nothing in this Agreement shall

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

²⁸⁴ Article 2005. The text of the CUSFTA is available at http://eur-lex.europa.eu/resource.html?uri=cellar:df28bbd2-29f1-4cea-86ab-81d81c47903b.0004.02/DOC_3&format=PDF (accessed on 15/03/2019).

²⁸⁵ http://eur-lex.europa.eu/resource.html?uri=cellar:df28bbd2-29f1-4cea-86ab-81d81c47903b.0004.02/DOC_3&format=PDF (accessed on 15/03/2019).

²⁸⁶ The texts of all international investment agreements are available at <http://investmentpolicyhub.unctad.org/IIA/IiasByCountry#iiaInnerMenu> (accessed on 15/03/2019).

²⁸⁷ The Association of Southeast Asian Nations (ASEAN) is a political and economic organisation of ten Southeast Asian countries. If ASEAN were a single entity, it would rank as the seventh largest economy in the world, behind the US, China, Japan, Germany, France, and the United Kingdom.

be construed to prevent the adoption or enforcement by any Member State of measures imposed for the protection of national treasures of artistic, historical or archaeological value.’ Therefore, cultural sites and landscapes and movable cultural objects with historical or archaeological value are to be preserved by the host State. Each ASEAN country is entitled to take measures incompatible with the principles of the 2009 ASEAN Comprehensive Investment Agreement in order to protect its national cultural heritage.

To sum up, an analysis of specific investment treaties at both regional and bilateral level indicates that the preservation of cultural sites and landscapes and movable cultural objects is not included. Industries exempted in such treaties are involved with aspects of intangible cultural protection with regard to the broadcasting, media, and publication area, without any connection to the mining and construction sectors. Cultural industries or a provision called ‘Culture’ may be included but the protection of tangible types of cultural heritage is not addressed.

2.3.2 National investment laws

International investment activities need to be analysed through the prism of not only international law but also domestic law. The national legal framework consists of regulations, administrative acts and judicial decisions of the governmental authorities of countries. This section is devoted to relevant provisions to preserve cultural heritage from investment laws of selected countries.

Municipal law on foreign investment often covers a wide range of issues such as the definition and classification of permitted investment; incentives and guarantees offered to foreign investment; and controls over foreign investment operations. Specific provisions on protecting cultural sites, cultural landscapes and movable cultural objects are seldom mentioned directly.

In Canada, the Investment Act is the principal mechanism for conducting foreign investment.²⁸⁸ The most relevant element of the protection of cultural heritage from the perspective of the host state from the Investment Canada Act is expected to be

²⁸⁸ The text is available at <http://laws.justice.gc.ca/eng/acts/I-21.8/> (accessed on 15/03/2019).

addressed by the regulations on investment in a cultural business. However, the concept of ‘cultural business’ under Investment Canada Act²⁸⁹ is similar to those from the NAFTA, and other BITs concluded by Canada and does not deal with the conservation of immovable cultural sites and landscapes and movable cultural objects but tangible cultural things.

In Vietnam, according to the 2005 Law on Investment,²⁹⁰ the protection of culture, in general, is mentioned as a legal basis for the rejection of an investment proposal as its Article 30 section 2 covers ‘projects which are detrimental to historical and cultural traditions and ethics, and Vietnamese fine customs.’ However, a similar provision is not included in the most recent version – the 2014 Law on Investment.²⁹¹ Specific measures of preserving cultural heritage have not been expressly mentioned in either the previous or the current version of investment law in Vietnam.

Only the 2015 Protection of Investment Act in South Africa mentions the issue of protecting cultural heritage but in a very broad manner. The Department of Trade and Industry in South Africa published the Promotion and Protection of Investment Bill²⁹² in November 2013 for public comment and Protection of Investment Act was approved by the President on 13 December 2015.²⁹³ According to Article 12, the government or any organ of state may, in accordance with the Constitution and applicable legislation, take measures to ‘promote and preserve cultural heritage.’²⁹⁴ This rule is similar to the one which was introduced in the Promotion and Protection

²⁸⁹ Section 14.1.6.

²⁹⁰ The text is available at [http://www.vietnamlaws.com/freelaws/Lw59na29Nov05CIL\[10Apr06\].pdf](http://www.vietnamlaws.com/freelaws/Lw59na29Nov05CIL[10Apr06].pdf) (accessed on 15/03/2019).

²⁹¹ The text is available at http://www.xaydung.gov.vn/en/legal-documents/-/legal/TB4r/en_US/18/250755/55213 (accessed on 15/03/2019).

²⁹² The text is available at https://www.thedti.gov.za/gazettes/Promotion_Protection_Investment_Bill.pdf (accessed on 15/03/2019). For topic of changes in investment laws in South Africa, see e.g. A. Freidman, Flexible arbitration for the developing world: Piero Foresti and the future of bilateral investment treaties in the Global South in *Brigham Young University International Law and Management* (2010) Vol. 7, Issue 1.

²⁹³ http://www.gov.za/sites/www.gov.za/files/39514_Act22of2015ProtectionOfInvestmentAct.pdf (accessed on 15/03/2019).

²⁹⁴ Subsection 1(d).

of Investment Bill.²⁹⁵ Accordingly, national investment law in South Africa provides legal grounds for authorities to suspend or terminate foreign investors' investment activities for the purposes of protecting cultural heritage. However, such regulations can be concretised and spell out the measures that can be taken to protect cultural heritage.

2.3.3 State contracts

Contracts are an inherent part of organising and operating any foreign direct investment. Other legal instruments including international and national law might rank lower than state contracts, although the contractual framework is often shaped and influenced by the national legal framework. There are various kinds of contracts with different types of parties involved such as investors, investment enterprises and government entities.²⁹⁶ In case of large-scale and long-term investment projects, investors and host states often negotiate investment agreements which are called investment contracts²⁹⁷ or state contracts²⁹⁸ or Investor-State contracts. Sometimes the documents used by the foreign investors and the host states are referred to as 'grants' or 'concessions'. The name is necessary to clarify the nature of the project and the kind of interests concerned.²⁹⁹ In terms of substantive contents, investment contracts often deal with the allocation of rights, tasks, risks, and responsibilities of the two parties.³⁰⁰ While the Operational

²⁹⁵ Art 11.1(d).

²⁹⁶ For an analysis of state contracts, see Salacuse, note 238, 41-42; J. Schokkaert, Y. Heckscher, Investment contracts between sovereign states and private companies – Link between BITs and state contracts in *Journal of World Investment and Trade* 2010 vol.11, issue 6, 903-963, Bungenberg, note 65, Chapter 3: State contracts and the relevance of investment contract arbitration; J. O. Voss, *The impact of investment treaties on contracts between host states and foreign investors* (Martinus Nijhoff Publishers, 2011), 15-25; State contracts, UNCTAD Series on issues in international investment agreements, available at https://unctad.org/en/docs/iteit200411_en.pdf (accessed on 15/03/2019); J. Arato, The logic of contract in the world of international investment treaties, TDM 5 (2018).

²⁹⁷ See Dolzer & Schreuer, note 65, Chapter 5: Investment contracts. The term 'international investment contract' and 'foreign investment contract' are sometimes used to refer only to contracts and agreements between foreign investors and host country governments. See, e.g. L. Cotula, Foreign investment contracts (International Institute for Environment and Development, August, 2007) available at <http://pubs.iied.org/17015IIED.html> (accessed on 15/03/2019).

²⁹⁸ J. W. Salacuse uses the term 'state contracts' in his work - *The three laws of international investment: national, contractual, and international frameworks*. According to Salacuse, state contracts take many different forms and bear many different names: investment accords, development contracts, public service concessions, and tax stabilization agreements.

²⁹⁹ Dolzer & Schreuer, note 65, 79.

³⁰⁰ See Salacuse, note 238, chapter 10: The nature and content of international investment contracts.

Guidelines do not constitute a legally binding instrument but instead perform a valuable policy function in guiding the implementation of the 1972 World Heritage Convention, foreign investors and a host state are legally bound by state contracts.

A state contract must be entered into by the foreign investors on the one hand and the host State or government entities of the State having jurisdiction over the investment projects such as the Ministry of Construction, the Ministry of Transport, and the Ministry of Mineral Resources. The Tribunal in *Duke Energy Electroquil Partners and Electroquil S.A. v. Republic of Ecuador*³⁰¹ held that an investment contract could not be concluded by a state-owned entity or a local company established by the investor.

2.3.3.1 State contracts in construction

Before 1970, state contracts were popular in the oil and gas producing projects by multinational companies.³⁰² Since the early 1990s, host country laws and policies have created new opportunities for foreign investors in infrastructure in general and construction in particular through project models of build-operate-transfer (BOT), build-operate-own (BOO). Other variations on the BTO and BOO models include: build-transfer (BT); build-lease-transfer (BLT); build-transfer-operate (BTO); build-transfer (BT); contract, add and operate (CAO); develop, operate and transfer (DOT); rehabilitate, operate and transfer (ROT); and rehabilitate, own and operate (ROO).³⁰³ National investment law may have specific definitions of and guidelines on state contract.³⁰⁴ In some developing countries such as Vietnam, a large

³⁰¹ *Duke Energy Electroquil Partners and Electroquil S.A. v. Republic of Ecuador* (ICSID Case No. ARB/04/19), Award, 18 August 2008, para 182. The text is available at <http://www.italaw.com/sites/default/files/case-documents/ita0256.pdf> (accessed on 15/03/2019).

³⁰² See Bishop, note 65, 215-222.

³⁰³ For a detailed analysis see Salacuse, note 238, 219-233.

³⁰⁴ For example, Article 3 of the 2005 Vietnam Law on Investment defines some types of state contracts as follows:

Build-operate-transfer contract (BOT) means the investment form signed by a competent State body and an investor in order to construct and operate commercially an infrastructure facility for a fixed duration; and, upon expiry of the duration, the investor shall, without compensation, transfer such facility to the State of Vietnam.

Build-transfer-operate contract (BTO) means the investment form signed by a competent State body and an investor in order to construct an infrastructure facility; and, upon completion of construction, the investor shall transfer the facility to the State of Vietnam and the Government shall grant the investor the right to operate commercially such facility for a fixed duration in order to recover the invested capital and gain profits.

percentage of international investment construction projects are conducted in the form of state contracts.³⁰⁵

2.3.3.2 The issue of cultural heritage protection in state contracts

Since state contracts have become increasingly popular in the field of construction, a country may have specific laws on main contexts of project proposals and model state contracts. For example, the Government in Vietnam issued Decree No. 108/2009/ND-CP in 2009 on investment in the form of build-operate-transfer, build-transfer-operate or build-transfer contract³⁰⁶ and the Minister of Planning and Investment issued Circular No. 03/2011/TT-BKHDT in 2011 to guide a number of Provisions of the Government's Decree No. 108/2009/ND-CP.³⁰⁷

These two laws only consider one aspect of the protection of public interest - the issue of environmental preservation. According to Decree No. 108/2009/ND-CP, a project proposal should comprise the project's impacts on the eco-environment,³⁰⁸ and environmental solutions will be examined before investment certificate is granted.³⁰⁹ Moreover, the competent state agency shall supervise and assess the fulfilment of obligations of the investor and the project enterprise in satisfying with the requirements on environmental protection.³¹⁰ Circular No. 03/2011/TT-BKHDT

Build-transfer contract (BT) means the investment form signed by a competent State body and an investor in order to construct an infrastructure facility; and, upon completion of construction, the investor shall transfer the facility to the State of Vietnam and the Government shall create conditions for the investor to implement another project in order to recover the invested capital and gain profits or to make a payment to the investor in accordance with an agreement in the BT contract.

However, the current version – the 2014 Vietnam Law on Investment does not mention again those types of state contracts.

³⁰⁵ Article 23 section 2 of the 2005 Law on Investment states that 'Investors shall be permitted to sign a BOT, BTO and BT contract with the competent State body in order to implement projects for new construction, expansion, modernization and operation of infrastructure projects in the sectors of traffic, electricity production and business, water supply or drainage, waste treatment and other sectors as stipulated by the Prime Minister of the Government.'

³⁰⁶ The English version is available at <http://vietnamlawmagazine.vn/decreed-no-108-2009-nd-cp-of-november-27-2009-on-investment-in-the-form-of-build-operate-transfer-build-transfer-operate-or-build-transfer-contract-4795.html> (accessed on 15/03/2019).

³⁰⁷ The English version is available at <http://vbqppl.mpi.gov.vn/en-us/Pages/default.aspx?itemId=a883e27d-dfc6-474c-ae3-01e6616b484b&list=documentDetail> (accessed on 15/03/2019).

³⁰⁸ Art 12.2.c.

³⁰⁹ Art 25.2.d.

³¹⁰ Art 31.3.

also has regulations on technical standards for evaluation of bid dossiers or proposal dossiers which include environmental protection.³¹¹ Vietnamese authorities evaluate investment license applications and supervise the investment projects using a number of criteria which include environmental protection.

In practice, the issue of environmental protection could be addressed in more detail in some domestic project contracts in Vietnam. For instance the BT and BOT contract on Construction Investment of Ca Pass road tunnel project – National Highway 1 between Ministry of Transport and Deo Ca Investment Joint Stock Company in November 2012³¹² cited the 2005 Law on Environment and guiding decrees and circulars as legal basis for the Contract signature. Notably, the contracts were concluded after Decision No. 315/QĐ-BTNMT dated 16/3/2012 of Ministry of Natural resources and Environment approving the environmental impact report of Ca pass road tunnel project was issued. This contract complies with the Decree No. 108/2009/ND-CP and Circular No. 03/2011/TT-BKHDT as its Article 5 section 1 provides that national technical norms are mandatory applied to the construction activities of project including: survey, design, construction, taking over of project and that it is mandatory applied the standards on environmental protection. Regarding requirements of the construction implementation, construction work shall ensure the planning, reviewed design and the environmental regulations.³¹³ The governmental body - the Ministry of Traffic and Transport is one party to the BT and BOT contract and it has the rights and obligations: (a) to examine, require the investor to implement the measures to ensure the environmental construction and (b) to suspend the implementation of the contract if the investor fails to apply the measures to ensure environmental management on construction sites.³¹⁴

Significantly, the contract has an article called ‘Provisions on natural resources and environment protection’ which expressly states that during construction, management and exploitation process of the BOT Project, the Investor shall implement the environmental protection in accordance with the Environmental

³¹¹ Art 28.3.b.

³¹² The author has a private access to this contract.

³¹³ Article 26.1.a.

³¹⁴ Article 33.2

Protection Law, the Construction Law, and the commitment to environmental protection has been certified by the local government at the same time subject to the inspection, supervision and inspection by the competent authorities.³¹⁵ Moreover, The Investor is responsible for coordination or notification to the local government, the Ministry of Transport in preventing and handling the following acts:

- a) Prevention of organizations and individuals that discharge wastes causing air and water pollution, or dump solid wastes, hazardous wastes on the land handed over to the Investor;
- b) Prevention of other actions adversely affected the environment or cause damage to the Investor, delay or affect the construction or operation of the BOT project;
- (c) Pollute the environment, cause some event, condition, other conditions that impede, obstruct the work progress of the BOT Project, the commercial exploitation or prevent the Investor in the compliance with environmental standards³¹⁶

It would be fair to say that cultural heritage conservation has not been appropriately weighted in domestic laws on state contracts and practical project contracts which seem to put much focus on environmental protection. There has been none reported Investor-States disputes in which the State's measures to preserve cultural heritage have been challenged and a state contract was concluded. However, the way that project contracts in Vietnam deal with cultural heritage protection should be taken into consideration with a view to assisting the parties in drafting requirements of the safeguarding of cultural heritage.

Overall, in the construction sector, State contracts can be used as a useful legal tool to regulate the relations between host states and foreign investors in carrying out investment projects. Construction contracts or concession agreements concluded by some countries for e.g. Vietnam might consider only the issue of environmental preservation. In the event that there is a state contract but no terms of cultural preservation, foreign investors and host states have to consider other regulations provided by international and national law. However, since the parties are bound by contractual terms, state contracts can provide a legal basis for strengthening the

³¹⁵ Article 74.1.

³¹⁶ Article 74.2.

protection of cultural heritage by including the requirements for cultural heritage assessment and archaeological surveys before and during the performance of investment activities.

2.3.4 Rules and policies by foreign investment financiers

International investment projects on mining and construction have often required many funds. In 2017, the average value of a project on mining and construction was more than 20,600 million USD and 95,300 million USD respectively.³¹⁷ Foreign investors, therefore, may resort to international public institutions with a view to obtaining financing or export credit. The part to follow will explore whether lending institutions have concerned about cultural consequences of international investment projects in which they were involved and how they can enforce cultural protection standards as a precondition to providing overseas financing or project insurance.

2.3.4.1 The World Bank standards and guidelines

The World Bank, formally known as the International Bank for Reconstruction and Development,³¹⁸ along with its affiliates the International Finance Corporation³¹⁹ and the International Development Association³²⁰ are significant investors in development projects throughout the world. The World Bank is a United Nations international financial institution founded in 1944 and now owned by 189 member countries.³²¹ This institution has been providing loans to developing countries for capital programmes.

Beyond the international and national regulations that preserve and manage physical cultural resources, the World Bank set out to develop its own internal policies with its first publication. According to the 1986 Policy on Management of Cultural Property in bank-financed Projects, the World Bank assists in the preservation of

³¹⁷ United Nations Conference on Trade and Development (UNCTAD) report on value of greenfield FDI projects by sector/industry from 2003 to 2017.

³¹⁸ Articles of Agreement of the International Bank for Reconstruction and Development (IBRD Articles of Agreement (Washington, D.C., December 27, 1945, 2 UNTS 134).

³¹⁹ Articles of Agreement of the International Finance Corporation (IFC Articles of Agreement (Washington, D.C., May 25, 1964, 264 UNTS 118, 2197 TIAS 3620).

³²⁰ Articles of Agreement of the International Development Association (IDA Articles of Agreement (Washington, D.C., January 26, 1960, 439 UNTS 249).

³²¹ <http://www.worldbank.org/en/who-we-are> (accessed on 15/03/2019).

cultural property and does not finance projects that will significantly damage irreplaceable cultural property. It seems that with this policy, the World Bank concentrates on prevention during the period of preparation for the execution of investment projects. This policy marked the beginning of the process that saw lending institutions issue cultural protection guidelines and procedures for their implementation.

Later on, in 1987, a technical paper, entitled ‘The management of Cultural Property in World Bank Assisted Projects: Archaeological, Historical, Religious and Natural Unique Sites’ was issued.³²² This document identified positive trends in the incorporation of cultural property policy in World Bank loan agreements. Significantly, in projects where a cultural survey was included as part of an environmental assessment, the effects of such project on potential cultural heritage sites were determined early.

In its publication in 2001 - *Cultural Heritage and Development: A framework for Action in the Middle East and North Africa*,³²³ the World Bank identified the importance of incorporating physical cultural resources into its overall development strategy. It expressly states that ‘culture and cultural heritage cannot be left out of development assistance programs.’ The World Bank is the first development bank to incorporate the international community’s commitment of protecting physical cultural resources into its operations. More than 250 bank-funded projects have included a component of physical cultural resources.³²⁴

The current operational policies and bank procedures relating to cultural protection are embodied in OP/BP 4.11 Physical Cultural Resources. This policy directive was issued in 2006 and revised in April 2013 to take into account the recommendations

³²² World Bank Technical Paper No WTP 62. The text is available at <http://documents.worldbank.org/curated/en/172981468739305512/The-management-of-cultural-property-in-World-Bank-assisted-projects-archaeological-historical-religious-and-natural-unique-sites> (accessed on 15/03/2019).

³²³ World Bank, Middle East and North Africa Region, *Cultural heritage and development: A framework for action in the Middle East and North Africa*, 4 (World Bank 2001), available at <http://documents.worldbank.org/curated/en/406981468278943948/Cultural-heritage-and-development-a-framework-for-action-in-the-Middle-East-and-North-Africa> (accessed on 15/03/2019).

³²⁴ Leva, note 59, 246.

in ‘Investment Lending Reform: Modernizing and Consolidating Operational Policies and Procedures.’³²⁵ According to section 1 of the OP 4.11 Physical Cultural Resources, ‘physical cultural resources’ are defined as movable or immovable objects, sites, structures, groups of structures, and natural features and landscapes that have archaeological, paleontological, historical, architectural, religious, aesthetic, or other cultural significance.³²⁶ The policy emphasises the vital link for cultural resources as economic and social assets. Importantly, the policy continues to apply to all components of a project irrespective of whether or not it receives direct funding from the World Bank.

The World Bank assists countries to avoid or mitigate adverse impacts on physical cultural resources from development projects that it finances. As stipulated in the policy directive introduction, OP/BP 4.11 Physical Cultural Resources should be read in conjunction with OP/BP 4.01 Environmental Assessment, illustrating how closely connected environmental and cultural protections are under the World Bank Guidelines. The borrower has to address impacts on physical cultural resources in projects proposed for Bank financing, as an integral part of the environmental assessment (EA) process.³²⁷ The borrower identifies physical cultural resources likely to be affected by the project and assesses the project’s potential impacts on these resources as an integral part of the EA process³²⁸ in accordance with the Bank’s EA requirements.³²⁹ Those guidelines and procedures came to constitute one of the criteria by which they evaluate project finance, insurance or loan

³²⁵ The OP 4.11 is available at <https://policies.worldbank.org/sites/ppf3/PPFDocuments/Forms/DispPage.aspx?docid=1571> (accessed on 15/03/2019). The BP 4.11 is available at <https://policies.worldbank.org/sites/ppf3/PPFDocuments/Forms/DispPage.aspx?docid=1583> (accessed on 15/03/2019). For an analysis of previous Operation Policies and bank procedures relating to cultural protection of the World Bank, see Leva, note 53, 245-248.

³²⁶ Under this policy cultural resources are also known as ‘cultural heritage’, ‘cultural patrimony’, ‘cultural assets’ or ‘cultural property.’

³²⁷ Section 4.

³²⁸ Section 7.

³²⁹ It is worth to recall that it was the adoption of the Environmental Assessment guidelines that first formalised a policy tool that supported physical cultural resources. In 1980, the World Bank and several UN agencies adopted a Declaration of Environmental Policies and Procedures Relating to Economic Development. For an analysis of the Declaration and the environmental protection requirements of lending institutions based on the World Bank Guidelines, see R. G. Volterra and A. Bisiaux, A brief practitioner’s view of foreign investment and international environmental standards: The developing custom of Non-State practice in *International investments and protection of the environment: the role of dispute resolution mechanisms*, note 57.

applications. The impacts on physical cultural resources resulting from project activities, including mitigating measures, may not contravene the borrower's national legislation, or its obligations under relevant international environmental treaties and agreements. This includes the 1972 UNESCO Convention concerning the Protection of the World Cultural and Natural Heritage. Therefore, if a borrowing country is a State Party of the 1972 World Heritage Convention, the lending requirements of the World Bank relating to cultural protection will be familiar to any duties to preserve cultural heritage which the State has under the Convention.

Foreign investors who seek World Bank financing must ensure that the cultural heritage safeguards for their project development plans conform to the standards set out by the Operational Policies. Section 10 provides that the Bank reviews, and discusses with the borrower, the findings and recommendations related to the physical cultural resources aspects of the environmental assessment, and determines whether they provide an adequate basis for processing the project for Bank financing. The details of the Operational Policies and Bank Procedures are beyond the scope of this work, but the fact that the overall aim of these Operational Manuals is to ensure that development options are enduring from a cultural perspective and that cultural consequences are recognized at early stage in the project cycle are included in the project scheme, are noteworthy.

Significantly, cultural rights of inhabitants of cultural heritage sites are also covered by the World Bank's regulations. Where the cultural heritage site or movable cultural objects in questions are related to the local communities, the Bank's policy on Indigenous People³³⁰ is applicable. For all projects that are proposed for Bank financing and affect Indigenous Peoples, the Bank requires the borrower to engage in the process of free, prior, and informed consultation. The World Bank has comprehensive rules on protecting cultural heritage as it addresses both tangible and intangible aspects of cultural heritage and the rights of Indigenous People.³³¹

³³⁰ The OP 4.10 is available at <https://policies.worldbank.org/sites/ppf3/PPFDocuments/Forms/DispPage.aspx?docid=1570> (accessed on 15/03/2019).

³³¹ See further M. M. Cernea, *Cultural heritage and development: A framework for action in the Middle East and North Africa*, orientations in development series, Washington DC: World Bank

Given that state contracts in practice have not dealt with the protection of cultural heritage properly, the specific standards and checklists of the World Bank or other lending institutions would be a good model for drafting contracts. Project contracts need to require foreign investors to address potential impacts on physical cultural resources (including sites and objects) in projects proposed as they often do in terms of environmental safeguarding. The assessment of the project's potential impacts on cultural heritage could be done separately or within the environmental assessment. Detailed clauses on cultural heritage protection could be based on the details of the World Bank's Operational Policies. For instance, the steps to be taken should follow the sequence of screening; developing terms of reference (TORs); collecting baseline data; impact assessment; and formulating mitigating measures and a management plan.³³² Moreover, a state contract may require the public consultations with the involvement of relevant project-affected groups, concerned government authorities, and relevant nongovernmental organizations.³³³

In short, the World Bank has developed a series of particular standards and guidelines relating to cultural resource preservation. The specific standards, guidelines, and checklists of the World Bank can serve as a reference for public lending and funding organisations in addressing cultural heritage issues in project finance agreements. These guidelines should be taken into consideration by foreign investors who need financial support from lending organisations.

2.3.4.2 Policies and requirements of other lending institutions

At the regional level, conventional lending institutions are the Asian Development Bank (ADB), the African Development Bank (AfDB), the European Bank for Reconstruction and Development, the Inter-American Development Bank and the Caribbean Development Bank. Funding is crucial to carry out investment projects in developing countries such as Vietnam and South Africa. This section will analyse the rules of the AfDB and the ADB in order to evaluate whether these lending

2001, Chapter 2: Cultural heritage and the World Bank policies. The text is available at <http://documents.worldbank.org/curated/en/406981468278943948/Cultural-heritage-and-development-a-framework-for-action-in-the-Middle-East-and-North-Africa> (accessed on 15/03/2019).

³³² OP 4.11, section 4-9; BP 4.11, section 3, 6, 8-11.

³³³ OP 4.11, section 11; BP 4.11, section 7.

institutions consider cultural heritage protection as an essential element for financial support to be granted to investors.

The African Development Bank Group (AfDB) is a multilateral development finance institution established to contribute to the economic development and social progress of African countries. The AfDB was founded in 1964 and comprises three entities: The African Development Bank, the African Development Fund and the Nigeria Trust Fund.³³⁴ The African Development Bank issued the Environmental Assessment Guidelines (EAG) in 1992³³⁵ and the Integrated Environmental and Social Impact Assessment Guidelines in 2009.³³⁶ The assessment process presented in these Guidelines clearly identifies the environmental and social assessment requirements at each phase of the cycle. However, the protection of cultural heritage is not a social requirement for assessing Bank-financed projects, programmes and plans. AfDB-funded projects on mining and constructions thus might cause problems as foreign investors are not obliged to preserve cultural heritage under the AfDB's terms.

Founded in 1966, the Asian Development Bank³³⁷ aims for an Asia and Pacific free from poverty.³³⁸ Significantly, construction is one of the main areas in which an investment project can qualify for funding from the Asian Development Bank (ADB).³³⁹ Cultural heritage is one of the items in the 2003 ADB Environmental Assessment Guidelines³⁴⁰ which expressly states that cultural heritage is legally protected in almost every country. The Asian Development Bank requires that the impacts on cultural heritage be assessed as part of the overall environmental assessment of a project. Cultural heritage also termed cultural property, cultural

³³⁴ The official website is at <http://www.afdb.org/en/> (accessed on 15/03/2019).

³³⁵ The text is available at <http://www.afdb.org/fileadmin/uploads/afdb/Documents/Policy-Documents/ENVIRONMENTAL%20AND%20SOCIAL%20ASSESSMENT%20PROCEDURES.pdf> (accessed on 15/03/2019).

³³⁶ The text is available at <http://www.afdb.org/en/documents/document/integrated-environmental-and-social-impact-assessment-guidelines-17094/> (accessed on 15/03/2019).

³³⁷ <http://www.adb.org/> (accessed on 15/03/2019).

³³⁸ From 31 members at its establishment in 1966, ADB has grown to encompass 67 members - of which 48 are from within Asia and the Pacific and 19 outside <<http://www.adb.org/about/members>> (accessed on 15/03/2015/03/201919).

³³⁹ <http://www.adb.org/about/overview> (accessed on 01/05/2018).

³⁴⁰ The text is available at http://www.adb.org/sites/default/files/pub/2003/Environmental_Assessment_Guidelines.pdf (accessed on 15/03/2019).

patrimony or cultural resources, is defined as the present manifestation of the human past. It refers to sites, structures, and remains of archaeological, historical, religious, cultural, or aesthetic value. Cultural sites and cultural landscapes are mentioned in Table 22 of the Guidelines.³⁴¹ The former includes sacred sites (burial sites,³⁴² sites of religious or spiritual significance)³⁴³ and archaeological sites (pre-historic sites,³⁴⁴ historical sites,³⁴⁵ engineering and industrial sites,³⁴⁶ submerged or marine sites,³⁴⁷ sites within biologically diverse areas or protected reserves.)³⁴⁸

To sum up, the World Bank provides a general set of principles and guidelines in preserving physical cultural resources. It requires the project's potential impacts on cultural resources as an integral part of the Environmental Impact Assessment Process. Public financiers of foreign investment such as the ADB have followed the approach of the World Bank policies on cultural protection. The standards of the World Bank and other global financial institutions should be taken into consideration seriously by foreign investors before any decision to carry out international investment projects is made. Even if a project does not have any involvement any of these institutions, the criteria they have established can still be adopted by the local bank of the financing agency.³⁴⁹

2.4 Rules of archaeological excavation and the requirements for cultural heritage protection

As excavation and archaeological exploration became systematic and widespread, legal regulations on archaeological excavation have increased rapidly in order to prevent destruction, and wasteful and secret forms of exploitation.³⁵⁰ At international level, the 1990 ICOMOS Charter for the Protection and Management

³⁴¹ *Ibid*, 93.

³⁴² For example: Xian in China; Tomb Fields in Bahrain

³⁴³ For example: Mecca in Saudi Arabia; Buddhist pilgrimage sites in Nepal.

³⁴⁴ For example: Mounds, middens, caves.

³⁴⁵ For example: Historic roads, bridges, dams and other water works, fortifications, and walls.

³⁴⁶ For example: Marib Dam in Yemen; the Great Wall in China; nineteenth century industrial sites (train stations, early woollen mills).

³⁴⁷ For example: Ancient coastal settlements in the Mediterranean and Central America; sunken ships.

³⁴⁸ For example: Tikal in Guatemala; sacred groves in Ghana.

³⁴⁹ Hoffman, note 1, 243.

³⁵⁰ Prott and O'Keefe, note 19, Chapter 2: Development of legal controls.

of the Archaeological Heritage³⁵¹ is a relevant instrument to the protection of cultural heritage. Cultural sites, cultural landscapes and movable cultural objects often contain archaeological significance according to Article 1 of the 1972 World Heritage Convention. In practice this charter can be adapted to national policies and conditions of countries such as Australia, providing legal protection to archaeological heritage.

The Charter was drafted by the International Committee for Archaeological Heritage Management (ICAHM) in 1990 in response to the increasing threats to archaeological sites worldwide, especially from looting and land development. According to Article 2, the protection of the archaeological heritage should be integrated into planning policies at international, national, regional and local levels. Cultural, environmental and educational policies should also include considerations of archaeological heritage. The Charter outlines principles for a variety of processes including survey, excavation, investigation, maintenance, conservation, presentation, information and reconstruction.³⁵²

The Charter contains guidelines and serves as a source of ideas for policies and practice of governments as well as scholars and professionals. It can also serve as a framework for good practice in the context of FDI. These guidelines can help inform managers or foreign investors of mining and construction projects about the best approaches to tangible cultural heritage protection and management.

Rules on archaeological excavation at the regional level may be employed by competent state agencies in order to express their concern about the performance of investment projects. In the *Parkerings* case, the State Monument Protection Commission of the Republic of Lithuania stated that ‘In case construction of underground garages in the old city of Vilnius embarked, it can be stated that Lithuania failed to perform obligation undertaken upon signing in November 1999

³⁵¹ The text is available at http://www.icomos.org/charters/arch_e.pdf (accessed on 15/03/2019).

³⁵² For a detailed analysis, see e.g. R. J. Elia, ICOMOS adopts archaeological heritage Charter: Text and commentary in *Public Archaeology Forum* 1993, 97-104, available at <http://orcp.hustoj.com/wp-content/uploads/2016/01/1993-Public-Archaeology-Forum.pdf> (accessed on 15/03/2019).

of the Convention for the Protection of the Architectural heritage of Europe and the European Convention on the Protection of the Archaeological heritage.’³⁵³

National laws may deal with the issue of archaeological excavation.³⁵⁴ The law at the federal level in Australia does not contain detailed regulations on archaeological excavation; however, a territory may have relevant regulations on protecting cultural heritage, particularly historical archaeological sites. For example, the protection of archaeological places, objects, sites and relics is mentioned in Victorian legislation.³⁵⁵ Section 131 of the Heritage Act 1995 (Vic.)³⁵⁶ sets out the legislative requirements for archaeological surveys. A ‘Notice of Intention to carry out an Archaeological Survey’ form must be lodged with Heritage Victoria prior to conducting an archaeological field survey or a desktop study. All historical archaeological sites in Victoria older than 50 years are protected under the Heritage Act 2006, regardless of whether they are recorded by Heritage Victoria. For example, if a site is uncovered in the course of a building project, it is an offence to knowingly disturb, damage or excavate it without obtaining the appropriate consent from the Executive Director, Heritage Victoria. Prior to conducting fieldwork, there are sources which must be consulted including the cultural heritage register, archaeological reports, and cultural heritage studies and environmental histories.³⁵⁷

Significantly, the issues of compulsory registration and reporting of cultural heritage sites and cultural items are often emphasised in national laws. Anyone who discovers an archaeological site during a survey must record and report that site.³⁵⁸

³⁵³ Award on the merits, para 388.

³⁵⁴ For a detailed analysis of archaeological excavation, Prott and O’Keefe, note 19, chapter 7-9.

³⁵⁵ The current Victorian legislation includes Aboriginal Heritage Act 2006, Coroner’s Act 1985, Heritage Act 1995, Mineral Resources (Sustainable Development) Act 1990, Planning and Environment Act 1987, and Planning and Environment (Planning Schemes) Act 1996. See Heritage Council of Australia, Guidelines for Conducting Historical Archaeological Surveys, available at https://www.heritage.vic.gov.au/__data/assets/pdf_file/0019/61507/SurveyGuide.pdf (accessed on 15/03/2019).

³⁵⁶ The text is available at http://www.austlii.edu.au/cgi-bin/viewdb/au/legis/vic/consol_act/ha199586/ (accessed on 15/03/2019).

³⁵⁷ Heritage Council of Australia, Guidelines for Conducting Historical Archaeological Surveys, 6.

³⁵⁸ For instance, Section 132 of the Heritage Act 1995 (Vic.) ‘Discovery of relics to be reported’:

(1) A person who discovers an archaeological relic must as soon as practicable report the discovery to the Executive Director or an inspector unless he or she has reasonable cause to believe that the relic is recorded in the Heritage Register.

Penalty: In the case of a natural person: 120 penalty units.

In the case of a body corporate: 240 penalty units.

It is anticipated that a systematic and rigorous approach to the recording of archaeological sites will provide a sound basis for the protection and management of historical archaeological resource.³⁵⁹ For the interest of foreign investors, the issue of reporting should be taken into account because the host State can take legal action against investors if they fail to report cultural objects. It is also recommended that cultural heritage registers, archaeological reports, heritage studies and environmental histories must be consulted prior to conducting fieldwork.³⁶⁰

2.5 Mining and construction activities and professional obligations to preserve culture heritage

2.5.1 At an international level

In 2003 the International Council of Mining and Metals has issued the ICMM's Sustainable Development Framework – a set of ten Principles for mining and metals companies to address issues of sustainability in the industry.³⁶¹ These principles were refined in 2015 and serve as a best-practice framework for sustainable development in the mining and metals industry. Membership of ICMM requires a commitment to the ICMM 10 Principles. As of 31 December 2018, 27 of the world's leading mining and metals companies and over 30 mining associations and global commodity associations are members of the ICMM.³⁶²

Cultural heritage protection is not directly referred to in any particular principles in the same way that environmental safeguarding is referred in Principle 6. The ICMM is an international organisation dedicated to improving the social and environmental performance of the mining and metals industry. Principle 3 is the only principle specifically relevant to cultural heritage. It embodies a general guideline – ‘the culture, customs and heritage of local communities, including indigenous peoples

(2) If an archaeological relic is discovered in the course of any construction or excavation on any land, the person in charge of the construction or excavation must as soon as practicable report the discovery to the Executive Director.

Penalty: In the case of a natural person: 120 penalty units.

In the case of a body corporate: 240 penalty units.

³⁵⁹ Heritage Council of Australia, Guidelines for Conducting Historical Archaeological Surveys, 4.

³⁶⁰ *Ibid*, 6.

³⁶¹ <https://www.icmm.com/en-gb/about-us/member-commitments/icmm-10-principles/the-principles> (accessed on 15/03/2019).

³⁶² <https://www.icmm.com/en-gb/members> (accessed on 15/03/2019).

shall be respected.’ This principle does not provide any detailed rules on how to protect cultural heritage but it does set a standard for the industry that makes it clear that the protection of cultural heritage cannot be ignored.

2.5.2 At a national level

Domestic laws on mining activities may address the issue of cultural heritage protection. For instance, in the Republic of South Africa, the 1999 National Heritage Resources Act gives a special instruction in the mining sector. According to section 28(4), with regard to an area of land covered by a mine dump SAHRA must make regulations providing for the protection of such areas as are seen to be of national importance in consultation with the owner, the Minister of Minerals and Energy and interested and affected parties within the mining community. In addition, no investor may bring onto or use at an archaeological or palaeontological site any excavation equipment or any equipment which can be used in the detection or recovery of metals or archaeological and palaeontological material or objects or use such equipment for the recovery of meteorites.³⁶³

Some countries have discrete laws to deal with minerals. For example, international investment projects involving mining and use of natural resources and minerals in Vietnam must be implemented in accordance with the 2010 Mineral Law.³⁶⁴ Areas banned from the mineral activities include land areas with historical-cultural relics or scenic places already ranked or delimited for protection under the Law on Cultural Heritage.³⁶⁵ Areas temporarily banned from mineral activities shall be delimited for the reason of conserving the nature, historical-cultural relics or scenic places which are considered by the State for recognition or discovered in the process of mineral exploration or mining.³⁶⁶ Additionally, investment activities in

³⁶³ Subsection 35(4)(d).

³⁶⁴ Vietnam Mineral Law provides for geological baseline surveys of minerals; protection of unexploited minerals; mineral exploration and mining; state management of minerals in the mainland, islands, internal waters, territorial sea, contiguous zone, exclusive economic zone and continental shelf of the Socialist Republic of Vietnam. Oil and gas and natural water other than mineral water and natural thermal water are not governed by this Law (Article 1). The English version is available at <http://vietlaw4u.com/vietnam-mineral-law-2010-602010qh12/> (accessed on 15/03/2019).

³⁶⁵ Article 28, section 1(a).

³⁶⁶ Article 29, section 2(b).

conditional sectors including mining are subject to a more complicated licensing process as investment projects that must be approved by the Prime Minister regardless of capital source and size.

The Canadian Parliament has not enacted any legislation concerning the preservation of archaeological heritage on federal Crowns lands. A draft federal law was tabled in 1991 (the Archaeological Heritage Protection Act) which would have established such a system, but it was not pursued.³⁶⁷

National rules relating to construction activities may cover the aspect of cultural heritage protection. For instance, Article 31 of the 2007 China Law on Urban and Rural Planning³⁶⁸ provides as follows:

In the reconstruction of an old urban area, attention shall be paid to the preservation of the historical and cultural heritage and traditional style and features, rational determination of the scale of demolition and construction, and planned reconstruction of the places where clusters of dilapidated houses are located, and the infrastructures are outdated.

The famous historical and cultural cities, townships and villages shall be preserved, and the buildings under preservation shall be maintained and used in compliance with the provisions of the relevant laws and administrative regulations and of the regulations of the State Council.

Cultural elements are not addressed under the Vietnamese national investment law but can be found in the 2014 Construction Law.³⁶⁹ ‘Foreign organizations and individuals are encouraged and facilitated to preserve, restore and promote the value of historical, cultural heritage.’³⁷⁰ Moreover, constructing works in zones of historical cultural relics is strictly prohibited, and for historical cultural works and landscapes, sights have been ranked, and technical infrastructure works must have

³⁶⁷ See Kono, note 51, 237.

³⁶⁸ The text is available at http://www.npc.gov.cn/englishnpc/Law/2009-02/20/content_1471595.htm (accessed on 15/03/2019).

³⁶⁹ This Law prescribes on rights, obligations, responsibilities of offices, organizations, individuals in construction investment activities (Article 1). The English version is available at http://www.xaydung.gov.vn/c/document_library/get_file?p_l_id=50018&folderId=29703&name=39308 (accessed on 15/03/2019).

³⁷⁰ Article 10, section 1 and Article 14 (1)(d).

written approval of the need to build and works scale of the cultural state management bodies.³⁷¹

2.6 Factors affecting the effectiveness of and compliance with regulations on cultural heritage protection

When it comes to the question as to whether regulations on cultural heritage protection is effective and well-complied, the answer ultimately depends on the sufficiency of the protection scheme of cultural heritage itself in a particular state, and how such regulations have been compiled and implemented.³⁷² The effectiveness of laws and regulations is undoubtedly determined by the manner that enforcement entities deal with violations and judicial bodies (such as courts and arbitral tribunals) interpret the laws and resolve disputes. The perception of and interest of parties concerned in cultural heritage protection plays a big part in determining the level of their compliance with legal rules. Both legal and non-legal factors can affect the effectiveness and compliance of cultural heritage preservation regulations.

The part that follows analyses cases in order to illustrate (i) how enforcement bodies can improve the compliance of cultural heritage protection regulations and (ii) the role of the good perception of parties concerned about the need for cultural heritage to be protected in improving the compliance with legal rules. The issue of how judicial bodies deal with Investor-State disputes and the issue of balancing conflicting interests will be addressed in Chapter 3 and Chapter 4 respectively.

A good decision about whether a violation has occurred and appropriate punishments imposed from national courts are necessary for improving the legal compliance at a national level. For instance, in 2010, a large multinational mining company was fined under Australian law for a breach of cultural heritage legislation. The company carried out a cultural heritage survey in 2008 which found out that a ridgeline contained artefacts of importance to the local people. However,

³⁷¹ Article 96, section 4.

³⁷² For more on the implementation of the cultural heritage protection, see F. Francioni and J. Gordley, *Enforcing international cultural heritage law*, (Oxford University Press, 2013); Prott and O'Keefe, note 19, chapter 11: Enforcement, 330-370.

later in that same year, workers using a bulldozer to upgrade a road at the base of the ridgeline damaged or disturbed cultural heritage objects in the vicinity of the cultural heritage site. It was submitted to the court that the workers' actions amounted to the company breaching its duty of care. The court found that the company had failed to take reasonable measures to ensure that cultural heritage was not harmed and that the company should have had better internal procedures to protect the site.³⁷³ The decision, therefore, reinforces the importance of companies understanding and complying in practice with their cultural heritage obligations under legislation. It could be the case that national laws provide a range of penalties for not complying with reporting duties³⁷⁴ or consider that damaging or destroying valuable cultural objects shall constitute a crime.³⁷⁵ However, sanctions for the destruction or damaging of cultural sites or objects can be handled lightly for instance in China.³⁷⁶

The case involving Palabora Mining Company in South Africa illustrates that good perceptions about cultural heritage protection and legal obligations in respect of the cultural heritage register can foster and promote sustainable development of an investment project. The case is an excellent example of legal compliance. The Palabora Mining Company (Palabora) has operated a massive copper mine in the Limpopo province of South Africa since 1956. In the Phalaborwa region, which is an area rich in cultural heritage resources dating as far back as the Stone Age, the Palabora mine operates. Palabora owns in total 13 archaeological sites, which have been found in the mine lease area. Two of these, Shankare and Phutwane, are considered to be of outstanding historical significance for their evidence of early human settlement.

³⁷³ Rio Tinto - Why cultural heritage matters: A resource guide for integrating cultural heritage management into communities work at Rio Tinto, note 114, 40-41.

³⁷⁴ For example, Section 132 of the Heritage Act 1995 (Vic.) - Discovery of relics to be reported. See section 2.4 of this chapter.

³⁷⁵ For instance, The 1982 Law of the People's Republic of China on the Protection of Cultural Relics, Art 64 (2). The text is available at http://www.unesco.org/culture/natlaws/media/pdf/china/china_lawprotectionclt_entof (accessed on 15/03/2019).

³⁷⁶ S. Gruber, The tension between rights and cultural heritage protection in China in Durbach and Linxinsk, note 15, 149-163, at 154.

Legislative reforms to address the management and protection of its rich heritage sites and resources have been engaged in by South Africa. Section 39 of the National Heritage Resource Act requires the Palabora mine to compile an inventory or heritage register for the area where it operates. Although there is no regular format, the Act No 25 of 1999 provides general guidelines to what was available to shape Palabora's cultural heritage register. Consequently, the level of compliance with regulations on cultural heritage protection depends mainly on the attitude of foreign investors.

Palabora has had to meet these legal requirements while simultaneously developing heritage register for the site that is publicly accessible, which has been challenging. Though legislative requirements were the impetus for Palabora to develop a register, it was also created as a tool to manage future activities and to demonstrate to both the local communities and government that their cultural heritage was being managed and preserved effectively. Using the South African legislation as a stepping stone rather than an end goal, Palabora used the opportunity to make their cultural heritage register a robust and interactive tool available online to the public. Besides being a comprehensive record of the existing conditions, the register also ensures that future mining and development activities are sensitive to these heritage sites, preventing future loss and damage. Palabora demonstrates how a business can comply with legislation and meet its internal cultural heritage management requirements, as well as further its commitments to transparency, community respect and public education by taking a proactive approach in composing this type of register.³⁷⁷

2.7 Conclusion

This chapter has examined regulations on the protection of cultural heritage in the context of international investment projects on mining and construction from both a national and international level. The legal framework has been analysed from laws on cultural heritage, laws on investment, rules on archaeological excavation and laws on mining and construction. At a national level, unsurprisingly, different

³⁷⁷ Rio Tinto - Why cultural heritage matters: A resource guide for integrating cultural heritage management into communities work at Rio Tinto, note 114, 40-41.

domestic laws deal with the subject of safeguarding cultural sites, mixed site, cultural landscapes and movable cultural objects in a different manner. At an international level, it is the duty of the state and individuals to protect cultural heritage sites found within its own territory and cultural objects according to the 1972 World Heritage Convention and the 1970 Convention respectively. Nevertheless, the lack of details will likely lead to difficulties in guiding parties concerned to comply with measures to protect cultural heritage. The safeguarding of cultural heritage sites and cultural objects are not addressed in the vast majority of investment treaties. Cultural heritage protection has not received as much attention in the current international investment treaties as environmental preservation has. However, international investment law has its unique technique in dealing with the issue of protecting cultural heritage – state contracts and rules and policies from foreign investment financiers. The World Bank has provided a general set of principles and guidelines in preserving physical, cultural resources, and its guidelines have become a framework of reference for the cultural protection rules of many lending institutions and drafting state contracts as well. A host state may employ cultural heritage protection rules which have been stipulated by international financiers and implemented as an integral part of the Environmental Impact Assessment process or by state contracts even when the 1972 World Heritage Convention and national laws do not directly mention this issue.

3. Chapter 3: Investor-State disputes relating to the protection of cultural heritage sites and dispute settlement

3.1 Introduction

This chapter will evaluate the second hypothesis of the thesis that investment arbitration still qualifies as a preferred method in resolving Investor-State disputes even when there are cultural heritage factors that complicate the reaching of a settlement. It also aims at providing recommendations to the disputing parties so that they can use investment arbitration to resolve their disputes in the most effective way possible.

To establish the context this chapter first provides a background of investment arbitration in resolving Investor-State disputes in general before cases with cultural factors are to be analysed. Following sections of this chapter deal with particular scenarios where it disputes between foreign investors and a host State in relation to the protection of cultural heritage sites in respect to the jurisdiction of the arbitral tribunal, applicable law and merits of the disputes. Procedural aspects of investment arbitration will not be discussed in great detail in this chapter because arbitration cases with cultural heritage factors are likely conducted with the same manner as general Investor-State cases do in terms of procedures.³⁷⁸ Pertinent Investor-State arbitration cases in the mining and construction areas will be analysed to illustrate the approaches adopted by arbitral tribunal and identify the best practice among these. Other investment arbitration cases that can assist the identification of scenarios potential difficulties in using arbitral tribunals to settle Investor-State disputes with cultural factors are also discussed. Finally, the chapter will address the

³⁷⁸ Publication has discussed aspects of international investment arbitration proceedings such as initial phase of proceedings (composition of the arbitral tribunal, qualification and impartiality of arbitrators and place of arbitration), provisional and final remedies, allocation of costs and the issue of enforcement and execution of arbitration award. The literature on these above issues is extensive. See e.g Dolzer & Schreuer, note 65, 278-288 and 310-312; Binder, note 65, part III: Procedure, 131- 342; M. Sornarajah, note 63, chapter 9: The award and its enforcement, 279-314; Collier and Vaughan, note 30, chapter 8: Arbitral process; Schefer, note 65, chapter 6, section 2: ICSID arbitration dispute proceedings; UNCTAD, Course on dispute settlement, Model 2.7: ICSID procedural issue; Model 2:9: ICSID: Binding force and enforcement, available at http://unctad.org/en/Docs/edmmisc232add6_en.pdf and http://unctad.org/en/Docs/edmmisc232add8_en.pdf (accessed on 15/03/2019).

question as for whether investment arbitration is still an appropriate method to settle disputes between foreign investors and a host state concerning to the preservation of cultural sites, mixed sites and cultural landscapes.

3.2 The use of investment arbitration in resolving Investor-State disputes

In general, disputes between foreign investors and a host State can be settled by using litigation and alternative dispute resolutions methods which include arbitration and amicable means such as negotiation, mediation and conciliation.³⁷⁹ There are numbers of studies that focus on investment arbitration,³⁸⁰ and arbitration has been analysed as the most frequently used method of settling disputes between foreign investors and a host state by scholars and practitioners.³⁸¹ This part will highlight some key aspects of investment arbitration including types of investment arbitration, and legal basis of using this method. In order to illustrate characteristics of arbitration, other means of investment dispute resolution, particularly the possibility of using domestic courts and the interrelation between arbitration and litigation will be analysed. While this is not the central theme of this study, this section of the chapter prepares the ground for investment arbitration, and cases concerning cultural heritage protection will be analysed in the following sections.

Investment arbitration uses a mechanism initially developed for the settlement of commercial disputes between private parties.³⁸² There is no universal definition of

³⁷⁹ In the past, foreign investors had limited options for the redressing international law violations. See further J. D. Salacuse, Explanations for the increased recourse to treaty-based investment dispute settlement: Resolving the struggle of life against form? in K. P. Sauvant (ed.), *Appeals mechanism in international investment disputes* (Oxford University Press 2008) 105-125; S. Franck, note 67, 190-191.

³⁸⁰ *Infra*, footnote 65.

³⁸¹ C. Schreuer, Consent in arbitration in Muchlinski, note 65, 831.

³⁸² Arbitration is a common method to resolve international commercial disputes with the increase in international business activities. For a topic of international commercial arbitration, see e.g N. Blackaby, C. Partasides, A. Redfern and M. Hunter, *Redfern and Hunter on international arbitration* (6th edition, Oxford University Press, 2015); P. Fouchard, E. Gaillard, B. Goldman, J. Savage, *Fouchard Gaillard Goldman on international commercial arbitration* (Kluwer law International, 1999); M. Huleatt-James and N. Gould, *International commercial arbitration: A handbook* (2nd ed., London Hong Kong, 1999); D. M. Lew, L. A. Mistelis, and S. M. Kroll, *Comparative international commercial arbitration* (Kluwer Law International, London, 2003); S. Balthasar (ed), *International commercial arbitration: international conventions, country reports and comparative analysis* (Oxford: Hart Publishing, 2016); G. Cordero-Moss (ed), *International*

arbitration as a means of dispute resolution. Arbitration has been considered ‘the process by which a dispute or differences between two or more parties as to their mutual legal rights and liabilities is referred to and determined judicially and with binding effect by the application of law by one or more persons (arbitral tribunal) instead of by the court of law.’³⁸³ Neither the UNICITRAL Model Law on International Commercial Arbitration³⁸⁴ nor any bilateral investment treaty provides a definition of arbitration. The main features of commercial arbitration often present in investment arbitration such as independence, impartiality, and confidentiality.³⁸⁵ Investors have a wide range choice of institutional arbitration or *ad hoc* arbitration.³⁸⁶ Arbitration bodies relevant to investment arbitration can be based domestically.³⁸⁷

Investment arbitration has differences from commercial arbitration. The Convention on the Settlement of Investment Disputes between states and nationals of other states (the Washington Convention)³⁸⁸ established a system of arbitration that is

commercial arbitration: different forms and their features (Cambridge University Press, 2013); R. H. Kreindler, T. Kopp, International commercial arbitration in Max Planck Encyclopedia of Public International Law [MPEPIL] (Oxford Press University, 2013).

³⁸³ Halsbury’s Laws of England (4th ed., Butterworths, London, 1991), para 601, 332.

³⁸⁴ It was adopted by the United Nations Commission on International Trade Law on 21 June 1985 and amended in 2006. The Model Law is not binding, but individual states may adopt by incorporating it into their domestic law.

³⁸⁵ Dolzer & Schreuer, note 65, 286-288. Confidentiality has come under attack, leading to calls for more transparency. See G. B. Born, E. G. Shenkman, Confidentiality and transparency in commercial and Investor-State international arbitration in Rogers & Alford, note 65; N. Rubins, B. Lauterburg, Independence, impartiality and duty of disclosure in investment arbitration in C. Knahr, *Investment and commercial arbitration - Similarities and divergences* (Utrecht: Eleven International Publishing, 2010), 153-180.

³⁸⁶ For an analysis of institutional and *ad hoc* arbitration, see A. Reinisch & L. Malintoppi, Methods of dispute resolution in Muchlinski, note 65, 707-712.

³⁸⁷ For example, in Canada, they are the British Columbia International Commercial Arbitration Centre (<http://bcicac.com/>), the Canadian Commercial Arbitration Centre (<http://www.ccac-adr.org/en/>), the ADR Institute of Canada (<http://www.adrcanada.ca/>), and ADR Chambers (<http://adrchambers.com/ca/>). In Vietnam, among seven commercial institutional arbitrations, only the Vietnam International Arbitration Centre (<http://eng.viac.vn/index.php>) is qualified to deal with commercial disputes with foreign elements and Investor-State disputes. <http://eng.viac.vn/statistical/types-of-disputes-a277.html> (accessed on 15/03/2019). South Africa has failed to establish institutions that would make it an attractive centre for international arbitration. Parties who are looking to have disputes internationally arbitrated would choose to arbitrate such disputes in other jurisdictions. For information about this see <http://asilaw.co.za/is-arbitration-a-preferred-method-of-dispute-resolution-in-south-africa/> (accessed on 15/03/2019).

³⁸⁸ The Convention was drafted in the framework of the World Bank, was adopted on 18 March 1965, and entered into force on 14 October 1966. It provides a system of dispute settlement that is designed exclusively for Investor-State disputes with regulation on both arbitration and conciliation.

distinct from international commercial arbitration.³⁸⁹ The Convention also created an international institution named the International Centre for Settlement of Investment Disputes (ICSID). Institutional arbitrations which designed to deal with disputes arising out of commercial transactions can be qualified to settle Investor-State disputes such as the ICC (International Chamber of Commerce) International Court of Arbitration,³⁹⁰ the London Court of International Arbitration (LCIA)³⁹¹ and the Permanent Court of Arbitration (PCA).³⁹² The International Centre for the Settlement of Investment Disputes (the ICSID) or the International Chamber of Commerce (the ICC) has not developed a model dispute settlement clause but a set of model clauses to facilitate the drafting of an arbitration clause in investment contracts.³⁹³ Most cases have been brought under the ICSID, and it has become the primary forum for the settlement of disputes between foreign investors and the host state.³⁹⁴ Moreover, Investor-State arbitration differs fundamentally from traditional

³⁸⁹ That is why the Convention is commonly referred to the ICSID Convention. The Centre itself does not engage in arbitration, instead, it facilitates the establishment of arbitral tribunals in accordance with its provisions. Not all states have become parties to the ICSID Convention but as of 31 January 2019, 162 states were parties to the Convention. <https://icsid.worldbank.org/en/Pages/about/Database-of-Member-States.aspx> (accessed on 15/03/2019). See further, S. P. Subedi, note 65, 47-49. For the topic of the ICSID Convention, see A. R Parra, *The history of ICSID* (Oxford University Press, 2012), C. H. Schreuer, L. Malintoppi, A. Reinsisch and A. Sinclair, *The ICSID Convention: A commentary* (2nd ed., Cambridge University Press, 2009); C. Schreuer, *International Central for International Investment Disputes* in Max Planck Encyclopedia of Public International Law [MPEPIL] (Oxford Press University, 2013).

³⁹⁰ The International Chamber of Commerce is a provider of dispute resolution services seeking alternatives to court litigation. Its current rules on arbitration and mediation date from March 2017 and January 2014 respectively. See at <http://www.iccwbo.org/about-icc/organization/dispute-resolution-services/icc-international-court-of-arbitration/> (accessed on 15/03/2019).

³⁹¹ The LCIA has existed since 1986 as the successor of the London Chamber of Arbitration established in 1892. Its current Rules were adopted in 2014. Regardless the nationalities of the parties, the LCIA is designed to deal with disputes arising out of commercial transactions including Investor-State disputes. <http://www.lcia.org/> (accessed on 15/03/2019).

³⁹² The PCA has its seat in The Hague and is not a court. It only administers or facilitates arbitration, conciliation, and fact-finding. The current procedural rules of the PCA are based on the 1976 UNCITRAL Rules. Both PCA and ICC Court only provide technical assistance and list of arbitrators, but will not themselves render a judgment or award. http://www.pca-cpa.org/showpage.asp?pag_id=363 (accessed on 15/03/2019). See further N. Ando, *Permanent Court of Arbitration (PCA)* in Max Planck Encyclopedia of Public International Law [MPEPIL] (Oxford Press University, 2013).

³⁹³ For a general discussion of the arbitration clauses in state contracts, see Sornarajah, note 63, 51-52.

³⁹⁴ The topic of ICSID arbitration is often paid much attention in publications on Investor-State dispute settlement in general and investment arbitration in particular. See e.g., C. H. Schreuer, *The ICSID Convention: a commentary on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (Cambridge University Press, 2009); J. D. M. Lew, ICSID Arbitration: Special features and recent developments in Horn, note 65, 267-282; Binder, note 65; Dolzer & Schreuer, note 65, 235-312; Schokkaert & Heckscher, note 57, 520-533; Collier

commercial arbitration in that its basis lies in treaties between states (either bilateral or multilateral), rather than in private agreements.³⁹⁵ The part to follow will examine how international investment agreements refer arbitration as a method of settling disputes between foreign investors and a host state.

3.2.1 Legal basis of using arbitration as a method of Investor-State dispute settlement

Means of resolving Investor-State disputes can be established by national regulations or a dispute settlement clause in concession agreements (or investment contracts) or investment treaties or national regulations. While concession agreements or the host state laws may contain one provision for the resolution of disputes between investors and a host state, modern investment treaties (both bilateral and multilateral) often include a dispute settlement clause. The preference of arbitration has been shown from the perspective of consent to arbitration.³⁹⁶ The section to follow will analyse how legal techniques give consent to arbitration and refer to arbitration as a preferred method of resolving Investor-State disputes. Significantly, the interaction between an arbitral tribunal and domestic courts will be addressed in order to identify possible complications in using arbitration when parties can resort to litigation.

National investment laws of the host state may offer consent to arbitration to foreign investors. However, it could be the case that national laws mention both arbitration and litigation in order to resolve Investor-State disputes. For example,

& Vaughan, note 30, 59-73; R. Hofmann, C. Tams (eds) *The International Convention on the Settlement of Investment Disputes (ICSID : Taking stock after 40 years)* (Nomos, Baden-Baden, 2007).

³⁹⁵ For the similarities and differences between commercial and investment arbitration, see e.g. C. Knahr, note 385; G. C. Moss, Commercial arbitration and investment arbitration: Fertile soil or false friends in Binder, note 65, 782-800. There is a distinct difference between the UNCITRAL Model Law on International Commercial Arbitration and the UNCITRAL Arbitration Rules. The Model Law is directed at States, while the Arbitration Rules are directed at potential (or actual) parties to a dispute. Its Rules of Arbitration was revised in 2010 <<http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf>> (accessed on 15/03/2019).

³⁹⁶ For an analysis of consent to arbitration, see e.g. UNCTAD, Course on dispute settlement, Model 2.3: Consent to arbitration, available at http://unctad.org/en/Docs/edmmisc232add2_en.pdf (accessed on 15/03/2019); Z. Douglas, note 65, chapter 4: Consent to the arbitration of investment disputes, 151-161; Voss, note 296, part B: The consent to investment arbitration on investment treaties, 59-81; Dolzer & Schreuer, note 65, 254-264.

Article 14 (4) of the 2014 Vietnam, Law on Investment provides that any dispute between a foreign investor and a competent State agency of Vietnam relating to business investment activities in the territory of Vietnam shall be resolved by an arbitration body or Vietnamese court, unless otherwise agreed under a contract or otherwise stipulated in international treaties of which the Socialist Republic of Vietnam is a member. This example also illustrates the host state's offer to investment arbitration contained in its legislation may be not applicable if there is consent to arbitration from the parties' agreement or through international investment treaties. Those contemplating investment projects abroad thus should be aware of respective provisions in the host state's laws.

The consent to arbitration may be included in a direct agreement between the parties. Dispute settlement clauses providing for investment arbitration with respect to existing or future disputes can be found in contracts between the host state and foreign investors. For example, in *SGS v. Pakistan*,³⁹⁷ the investor from Switzerland entered into a contract with the government of Pakistan to provide inspection services to aid in Pakistan's customs revenue collection. The contract contained a dispute settlement clause providing for 'any dispute, controversy or claim arising out of or relating to the agreement to be arbitrated in Islamabad, Pakistan, under the Arbitration Act of Pakistan.'³⁹⁸ The parties can set the limits of their consent to arbitration by excluding certain types of disputes to be resolved by arbitration, or by listing the questions they are submitting to arbitration.³⁹⁹

Consent to arbitration is also offered by international investment treaties. Shortly after the adoption of the ICSID Convention, international investment treaties contain provisions for settling Investor-State disputes through arbitration. The first BIT to include an ICSID clause was the 1968 Netherlands-Indonesia

³⁹⁷ *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision of the tribunal on objections to jurisdiction (Aug 6, 2003), available at <http://www.italaw.com/sites/default/files/case-documents/ita0779.pdf> (accessed on 15/03/2019).

³⁹⁸ *Ibid*, para 15.

³⁹⁹ ICSID has developed a set of model clauses to facilitate the drafting of consent clauses in investment contracts. See ICSID model clause available at <https://icsid.worldbank.org/en/Pages/resources/ICSID-Model-Clauses.aspx> (accessed on 15/03/2019).

treaty.⁴⁰⁰ Treaties negotiated in the following years provided a legal ground for investment arbitration in general and ICSID arbitration in particular. According to the vast majority of international investment treaties, disputes between foreign investors and a host state can be submitted to arbitration. An OECD study which was conducted in 2012 and examined 1,660 BITs and bilateral agreements with investment chapters has shown that only 6.5 percent of them do not provide for Investor-State arbitration.⁴⁰¹ The first Investor-State arbitration to establish jurisdiction on the basis of an investment treaty was the 1990 case of *Asian Agricultural Products Ltd. v. Republic of Sri Lanka*.⁴⁰² Most Investor-State arbitration cases in recent years have been based on jurisdiction established through investment treaties. About two-thirds of investment arbitrations in 2016 were brought under BITs.⁴⁰³

A dispute settlement clause in international investment treaties often mention several methods of resolving Investor-State disputes⁴⁰⁴ but it may not establish a

⁴⁰⁰ It was replaced by the 1994 Netherlands-Indonesia BIT. Article 9 (4) provides that if the investor-state dispute could not be settled amicably, the dispute shall, at the request of the national concerned, be submitted either to the judicial procedures provided by the Contracting Party concerned or to international arbitration and conciliation. It further provides that each contracting party to the treaty consents to submit any legal dispute arising between that Contracting party and a national of the other Contracting party concerning an investment of that national in the territory of the former Contracting Party to ICSID.

⁴⁰¹ J. Pohl, K. Mashigo and A. Nohen (2012), Dispute settlement provisions in international investment agreements: A large sample survey, OECD Working Papers on International Investment, 2012/02, OECD Publishing, 11. The text is available at https://www.oecd.org/investment/investment-policy/WP-2012_2.pdf (accessed on 15/03/2019).

⁴⁰² *Asian Agricultural Products Ltd. v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Award, 27 June 1990, available at <https://www.italaw.com/sites/default/files/case-documents/ita1034.pdf> (accessed on 15/03/2019). The tribunal relied on Article 8 (1) of the 1980 UK-Sri Lanka BIT (the text of the treaty is available at <http://investmentpolicyhub.unctad.org/Download/TreatyFile/2293> - accessed on 15/03/2019) which provided that ‘each Contracting Party hereby consents to submit to ICSID for settlement by conciliation or arbitration ... any legal disputes arising between that Contracting Party and national or company of the other Contracting Party concerning an investment of the latter in the territory of the former.’ Without a specific arbitration clause and with little discussion, the tribunal decided the treaty provision was sufficient to establish Sri Lanka’s consent to arbitrate and that the filing of a request for arbitration was adequate evidence of the UK investor’s content.

⁴⁰³ UNCTAD, World Investment Report 2017, 116.

⁴⁰⁴ For instance, the dispute settlement clause of the 1998 Czech Republic-South Africa BIT (Article 8) may be described as a ‘cafeteria style’ approach as it gives the investor a choice between a range of dispute settlement *fora*, including the courts of the host State, and a number of arbitral tribunals such as the International Centre for Settlement of Investment Disputes (ICSID) or an arbitrator or international *ad hoc* arbitral tribunal. The 2009 ASEAN Comprehensive Investment Agreement is another example of multilateral treaties which offers amicable settlement with conciliation, consultation, and negotiation; and adjudication with litigation and arbitration. See further McLachlan, note 65, chapter 3: Dispute resolution provisions.

priority between such methods.⁴⁰⁵ Investment treaties normally indicate amicable settlement and to which particular forum which foreign investors may have recourse in order to resolve a dispute with a host country. The BITs or regional investment treaties concluded by Canada, Australia, South Africa and Vietnam tend to provide that, if a dispute has not been settled amicably, it may be submitted by the investor to arbitration.⁴⁰⁶ Investment treaty provisions on arbitration could not be considered an arbitration agreement because the investor, while a national of a contracting state, was not a party to the treaty. Through investment treaties, each contracting state gives consent to arbitration but leave the decision as to whether or not to arbitrate to an investor. Investors may accept that offer in different ways, including the submission of a request for arbitration or some other mechanisms offered in the treaty. Most investment treaties do not specifically state how an investor makes manifest its consent. In most instances, the nature and form of consent to arbitration will be determined by the rules of arbitral process under the treaties.⁴⁰⁷

Given that consent to arbitration is often established by international investment treaties or concession agreements, foreign investors can bring a claim against the host State on the basis of treaty violation or contractual violation. It is crucial and practical to distinguish between contract claims and treaty claims arising out the same facts for the purposes of not only determining the jurisdiction of an arbitral tribunal but also resolving the merits of the disputes.⁴⁰⁸ This is also the primary

⁴⁰⁵ McLachlan, note 65, 46.

⁴⁰⁶ For example, Article 8(2) of the 2002 UK-Vietnam BIT provides that ‘disputes between a national or company of one Contracting Party and the other Contracting Party ... which have not been amicably settled shall... be submitted to international arbitration if either party to the dispute so wishes.’ The writer has analysed existing BITs which were concluded by the four countries as of 15/03/2019 and available in English at <http://investmentpolicyhub.unctad.org/IIA> (accessed on 15/03/2019).

⁴⁰⁷ Salacuse, note 238, 382. For example, in case of ICSID arbitration, one would look to the ICSID Convention rules to determine whether the consent manifested meets ICSID requirements.

⁴⁰⁸ Cremades and Cairns identified five criteria that serve to distinguish a treaty claim from a contract claim arising in the context of the same dispute. The source of rights is the unique distinguishing feature of a treaty claim without any possible of overlap with a contract claim. The cause of action of the former is a right established and defined in an investment treaty, while the basis of the latter is a contract. The other four criteria are the content of the right, the parties to the claim, the applicable law and the liability of the host State. These criteria may overlap or coincide in particular cases but they remain analytically distinct. See B. M. Cremades, D. J.A. Cairns, Contract and treaty claims and choice of forum in foreign investment disputes in Horn, note 65, 327-332. For a topic of the distinction between contract claims and treaty claims, see also C. McLachlan, *Lis Pendens* in international litigation, Collection courses of the Hague Academy of International Law 2008 (Martinus Nihoff Publishers, Leiden/ Boston 2009) 389-393; Voss, note

issue which an arbitral tribunal have had to confront in considering the impact of other forms of dispute resolution including litigation or other arbitral tribunals upon their jurisdiction.⁴⁰⁹

In short, investment arbitration is not the exclusive choice given by the investment treaties but the way of wordings in three different sources including the host state legislation, concession agreements and investment treaties has shown that arbitration has been referred as a preferred method. Arbitration has become a common feature of investment contracts and international investment treaties. While the majority of investment treaties now contain provisions on Investor-State arbitration, those provisions are by no means uniform. The precise legal effect of such clauses depends upon their wordings and the choice between means of dispute which lies with foreign investors.

3.2.2 The interaction between investment arbitral tribunal and domestic courts

The relationship between arbitral tribunals and domestic courts is one of the most important and also challenging issues of international investment arbitration especially from the perspective of jurisdiction.⁴¹⁰ Litigation is another adjudication method which leads to a legal binding effect. However, foreign investors do not consider using local courts an attractive, reliable and effective remedy.⁴¹¹ They are bound to fear a lack of impartiality from the courts of the state against which it wishes to pursue their lawsuits.⁴¹² At any stages of the arbitral proceeding, a national court can get involved in resolving disputes between foreign investors and

296, 160-179; J. J. H. Hof, A. K. Hoffmann, The relationship between international tribunals and domestic courts in Muchlinski, note 65, 964-971; Y. Shany, Contract claims vs. treaty claims: Mapping conflicts between ICSID decisions on multi sourced investment claims in *American Journal of International Law*, 2005 Vol. 99, No. 4, 835-851.

⁴⁰⁹ C. McLachlan, note 408, 389. See further section 3.5.4.

⁴¹⁰ International commercial arbitration is also very familiar with the issues raised by conflicts between national courts and international arbitration tribunals. On this topic, see generally B. Cremades, J. D. M. Lew (eds), *Parallel state and arbitral procedures in international arbitration* (ICC publication, 2005); C. McLachlan, note 408.

⁴¹¹ For a discussion of the limited usefulness of domestic courts in investment dispute, see e.g. Dolzer & Schreuer, note 65, 235-236.

⁴¹² For a discussion on impartiality of arbitrators, see e.g., L. Malintoppi, Independence, impartiality, and duty of disclosure of arbitrators in Muchlinski, note 65.

a host state. For instance, in the *Pyramids* case, an award was rendered by the ICC tribunal, however, the Respondent appeal the ICC award to Court of Appeal. The award was set aside by the French Court on the ground that the arbitrators had no jurisdiction - the Respondent was not a party to the Heads of Agreement and therefore was not bound by the arbitration clause contained therein.⁴¹³ In the *Bilcon* case, Canada sought an order setting aside the Tribunal's Award in Federal Court of Canada, arguing that the majority of the Tribunal erred in finding that the environmental assessment was not carried out in accordance with applicable federal and provincial legislation. However, the application was dismissed in May 2018 as the Judge concluded that errors attributed to the majority of the Tribunal do not involve true question of jurisdiction.⁴¹⁴

Investment arbitration was created in order to enable investors to avoid the courts of the countries in which they invest. However, only a small number of treaties, all concluded in the 1990s, provide for Investor-State disputes to be settled through international arbitration exclusively. For instance, the 1997 South Africa – Iran BIT provides:

2. In the event that the host Contracting Party and the investor can not agree within six months from the date of notification of the claim by one party to the other, either of them may refer the dispute, with due regard to their own laws and regulations, to an arbitral tribunal of three members...

3. *National courts shall not have jurisdiction over any dispute referred to arbitration.* However, the provisions of this paragraph do not bar the winning party to seek the enforcement of the arbitral award before national courts.⁴¹⁵ (emphasis added)

Investment treaties cannot exclude all recourse to State courts as their provisions may leave it open to the claimant to seek its remedies in those courts. Some treaties do mention the possibility of submitting a dispute either to domestic courts or arbitral tribunal. Article 8 (2) of the 1998 Czech Republic-South Africa BIT, Article

⁴¹³ Award on the merits, para 71.

⁴¹⁴ Judgment of the Federal Court of Canada, 2 May 2018, paras 1-2 & 6. The text is available at <https://www.italaw.com/sites/default/files/case-documents/italaw9696.pdf> (accessed on 15/03/2019).

⁴¹⁵ Art 12, section 2 and section 3. The text of the treaty is available at <http://investmentpolicyhub.unctad.org/Download/TreatyFile/1657> (accessed on 15/03/2019).

8 (2) of the 1997 Czech Republic-Vietnam BIT,⁴¹⁶ Article 8 (2) of the 1994 Vietnam- Poland BIT,⁴¹⁷ and Article 9 (2) of the 1994 Vietnam-Romania BIT⁴¹⁸ are examples. According to these bilateral investment treaties, if any dispute between an investor of one Party and the other Party cannot be thus settled, the investor shall be entitled to submit the case either to (a) competent courts or administrative tribunals of the Party which is the party to the dispute; or (b) the International Centre for Settlement of Investment Disputes (ICSID) or (c) an arbitrator or international ad hoc arbitral tribunal. Concerning regional investment treaties, for instance, the 2009 ASEAN Comprehensive Investment Agreement allows investors to submit a claim to the courts or administrative tribunals of the host State or to arbitral arbitration.⁴¹⁹ The wordings of such provisions do not suggest that the choice of any particular dispute settlement option will preclude resort to any other options.

The requirements of prior recourse to domestic courts are intended to balance the right of foreign investors to arbitrate with the preference of host states to resolve investment disputes in their domestic courts.⁴²⁰ Provisions giving consent to investment arbitration do not require the exhaustion of local remedies before arbitral proceedings are instituted. Requirements of prior recourse to domestic courts are not typical of BIT dispute resolution provisions. It is more usual to provide for a straightforward choice by the investor between domestic courts and investment arbitration,⁴²¹ for example the 1998 Czech Republic-South Africa BIT.⁴²² BITs concluded by Argentina⁴²³ present an exception as they give preference to dispute resolution by domestic courts by placing conditions on the election of international arbitration. Before being able to exercise a right to

⁴¹⁶ The text of the treaty is available at <http://investmentpolicyhub.unctad.org/Download/TreatyFile/999> (accessed on 15/03/2019).

⁴¹⁷ The text of the treaty is available at <http://investmentpolicyhub.unctad.org/Download/TreatyFile/2191> (accessed on 15/03/2019).

⁴¹⁸ The text of the treaty is available at <http://investmentpolicyhub.unctad.org/Download/TreatyFile/2223> (accessed on 15/03/2019).

⁴¹⁹ Art 33.1(a). The text of the treaty is available at <http://investmentpolicyhub.unctad.org/IIA/treaty/3273> (accessed on 15/03/2019).

⁴²⁰ It is derived from considerations of national sovereignty and supported historically by the Calvo Doctrine. See Cremades & Cairns, note 408, 345.

⁴²¹ Cremades & Cairn, note 408, 346.

⁴²² *Supra* footnote 404.

⁴²³ For example, Art X of the 1991 Argentina-Spain BIT an English version is available at Cremades & Cairns, note 408, 344.

arbitrate, the investor might first have to seek to resolve the dispute in domestic courts, and allow those domestic courts a defined period to resolve the dispute. For instance, Article X of the 1991 Argentina-Canada BIT⁴²⁴ states as follows:

- (1) Disputes ... which have not been amicably settled, shall be submitted, at the request of the Parties involved, to the decision of *the competent tribunal of the Contracting Party* in whose territory the investment was made.
- (2) The aforementioned disputes may be submitted to international arbitration by one of the parties to the dispute in one of the following circumstances:
 - (i) where the Contracting Party and the investor have so agreed;
 - (ii) *where, after a period of eighteen months elapsed from the moment when the dispute was submitted to the competent tribunal of the Contracting Party in whose territory the investment was made, the said tribunal has not given its final decision*
 - (iii) where the final decision of the aforementioned tribunal has been made but the Parties are still in dispute (emphasis added)

In investment arbitration, there is a risk of duplication of proceedings between arbitral tribunals and municipal courts⁴²⁵ or parallel treaty-based arbitration and contract-based litigation.⁴²⁶ This problem is already anticipated by many investment treaties with two techniques of election and waiver.⁴²⁷ Investment treaties could provide either that the claimant must elect between pursuing a claim before arbitration or domestic courts, or alternatively must waive claims in any other forum as a pre-condition to arbitral tribunal.

An umbrella clause is a provision in investment treaties that guarantee the observance of obligations assumed by the host state in relation to foreign investors.⁴²⁸ Accordingly, the clarity of the distinction between breach of treaty and

⁴²⁴ <http://investmentpolicyhub.unctad.org/Download/TreatyFile/77> (accessed on 15/03/2019).

⁴²⁵ Voss, note 296, 301-331.

⁴²⁶ The issue of parallel treaty arbitration is mentioned in McLachlan, note 408, 408-415.

⁴²⁷ Voss discusses treaty provisions on the avoidance of parallel proceedings from three aspects including the 'fork in the road clause', prior resource to state courts for a fixed period of time and alternative proposals on jurisdictional conflict mitigation. See Voss, note 296, 290-301.

⁴²⁸ Such clauses have also been referred to as 'observance of undertakings' clauses. On a topic of the umbrella clause, see K. Yannaca-Small, What about this 'Umbrella clause' in K. Yannaca-Small (ed) *Arbitration under international investment agreements* (2010) 479; K. Yannaca-Small, Interpretation of the umbrella clause in investment agreements, OECD Working Papers on International Investment, No. 2006/03, OECD Publishing, Paris; J. J. H. Hof, A. K. Hoffmann, note 370, 2(b) Application of umbrella clauses by international tribunals, 974-984; Voss, note 296, 221-

breach of contract is potentially disturbed by umbrella clauses. Such a clause can frequently be found in international investment treaties. For instance, Article 2 (4) of the 1998 Greece – South Africa BIT, or Article 10 (3) of the 1997 Korea-South Africa BIT provides that ‘each Contracting Party shall observe any obligation it may have entered into with regard to the treatment of investments of nationals of the other Contracting Party.’ When the parties to an investment treaty agree that any dispute arising between foreign investors and a host State may be submitted to an arbitral tribunal under the provisions of the treaty, the important issue raised by an umbrella clause is whether the inclusion of such a clause in the treaty could transform the nature of the obligation being enforced. If an umbrella clause does have the effect of transforming a breach of contracts into those of treaty, an arbitral tribunal constituted to hear investment disputes by treaty may have jurisdiction over the investment contract claims between investor and host State.⁴²⁹

Several decisions in Investor-State arbitration have addressed the issues of the allocation of jurisdiction between arbitral tribunals and municipal courts by discussing the difference between contract and treaty claims and the significance of the umbrella clause contained in investment treaties.⁴³⁰ Most of the decisions have come to similar conclusions limited or no jurisdiction of the treaty-based arbitration over purely contractual claims especially whether the contract at issue contains a local forum selection.⁴³¹

Existing investment arbitration cases have shown that parties concerned should pay attention to the interrelation between arbitration and litigation. A host state may have conditions for their consent to arbitration on the prior exhaustion of local remedies. There are also possibilities for duplication of proceedings between local courts and arbitral tribunals or parallel contract-based litigation and treaty-based

277; Salacuse, note 238, chapter 11: Treatment of state obligations (The ‘Umbrella clause’), 271-284; Dolzer & Schreuer, note 65, 166-178.

⁴²⁹ McLachlan, note 408, 403.

⁴³⁰ For instance, *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13; *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6; *Joy Mining Machinery Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/03/11; *Salini Costruttori S.p.A. and Italstrade S.p.A. v. The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/02/13.

⁴³¹ See further McLachlan, note 408, 401-407; Hof & Hoffmann, note 408, 977-979.

arbitration. Such challenging issues could likely come up in Investor-State disputes with cultural heritage elements.

3.3 Disputes over jurisdictional matters

The issue that whether an arbitral tribunal has jurisdiction to resolve a case is a typical type of disputes between foreign investors and the host State.⁴³² When investors bring the case against a host State to an arbitral tribunal, the host state could argue against the assumption of arbitral jurisdiction. The host state then may bring the dispute to a national court to decide whether the arbitral tribunal has jurisdiction over the case or to review the decision of the arbitral tribunal about its competence to resolve the dispute. For instance, in *Philip Morris v. Uruguay*, in raising jurisdictional objections, the host State based on Article 2 of the Switzerland-Uruguay BIT⁴³³ which provides that Investor-State disputes shall be settled amicably and that if such a dispute cannot be settled within a period of six months after it was raised, the dispute shall be submitted to the competent courts. Notably, if within a period of eighteen months after the national proceedings have been instituted no judgment has been passed, the investor concerned may appeal to an arbitral tribunal. Uruguay argued that mandatory preconditions to investment arbitration under the BIT – at least 18 months of domestic litigation has not been satisfied in this case.⁴³⁴ However, the Tribunal interpreted the word ‘dispute’ in that provision as embracing either domestic law claims or BIT claims.⁴³⁵

⁴³² For a topic of the jurisdiction of investment tribunals, see C. F. Amerasinghe, *International arbitral jurisdiction* (Martinus Nijhoff Publishers, 2011), H. E. Kios, *Applicable law in investor-state arbitration: the interplay between national and international law* (Oxford University Press, 2013), chapter 4: The scope of the arbitration agreement: Claims and counterclaims of a national and or international nature; Douglas, note 65, chapter 4-8; M. Sornarajah, note 65, chapter 8: Treaty-based investment arbitration: jurisdictional issues; Dolzer & Schreuer, note 65; Salacuse, note 232, 245-251; A. C. Smutny and E. R. Hellbeck, *Allocation of jurisdiction between international arbitral tribunals and local courts in Investor-State disputes*, available at <https://www.lexology.com/library/detail.aspx?g=cd9bbf97-5c07-40f9-9bcc-4a547e005e8d> (accessed on 15/03/2019).

⁴³³ The text is available at <https://investmentpolicyhub.unctad.org/Download/TreatyFile/3121> (last accessed on 15/03/2019)

⁴³⁴ Decision on Jurisdiction, 2 July 2013, para 92. The text is available at <https://www.italaw.com/sites/default/files/case-documents/italaw1531.pdf> (last accessed on 15/03/2019).

⁴³⁵ *Ibid*, para 111.

A related question is whether substantive claims from investors can be resolved by arbitration in case the host state agrees that the arbitral tribunal has jurisdiction over the case in general but that the claim cannot be arbitrated by the arbitral tribunal. No Investor-State cultural heritage related dispute in the mining and construction sectors has yet seen the jurisdiction of arbitral tribunal challenged. This section will consider jurisdiction of an arbitral tribunal in Investor-State disputes in relevant cases such as the *Parkerings* case and the *Pyramids* case.

With reference to disputes relating to the infrastructure sector, the issue of jurisdiction *ratione personae* arose in *Parkerings-Compagniet AS v. Republic of Lithuania*. In the *Parkerings* case, the Claimant contended that the ICSID Tribunal has jurisdiction⁴³⁶ because Parkerings-Compagniet AS is a company incorporated under the laws of Norway and is an investor subject to the protection of the 1992 Lithuania-Norway BIT.⁴³⁷ The Claimant specified that it owns 100 percent of the shares of the Lithuanian company UAB Baltijos Parkingas (BP), which constitutes an investment in Lithuania.⁴³⁸ However, the Respondent argued that Parkerings' claims fell outside the scope of the Tribunal's jurisdiction under the Treaty and then submitted that the claims should be dismissed for lack of jurisdiction.⁴³⁹

The first question for the Tribunal to resolve was whether the Claimant is an investor in Lithuania. BP was registered with the Lithuanian Company Register. Parkerings is the owner of sixty five thousand (65,000) ordinary shares of BP for the value of one hundred (100) Litai each which comprise 100% of the authorized capital of BP.⁴⁴⁰ In this case, the Tribunal accepted that Parkerings has 100 percent ownership interest in BP constitutes an investment in Lithuania within the meaning of the Treaty.⁴⁴¹ The Arbitral Tribunal was therefore of the opinion that Parkerings is an investor in Lithuania for the purpose of the ICSID Convention and within the

⁴³⁶ Award on the merits, para 237.

⁴³⁷ The text of the treaty is available at <http://investmentpolicyhub.unctad.org/IIA/treaty/2420> (accessed on 15/02/2019).

⁴³⁸ *Ibid*, para 238.

⁴³⁹ *Ibid*, para 214.

⁴⁴⁰ *Ibid*, para 251.

⁴⁴¹ *Ibid*, para 253.

meaning of the BIT,⁴⁴² since it owns the entirety of the shares of a Lithuanian company which is BP. Furthermore, the phrase ‘any dispute [...] in connection with the investment’ as provided by Article IX (1) of the BIT is a general provision that provides the basis for an arbitral tribunal’s competence over any disputes related to an investment.⁴⁴³ From the view of the Tribunal, the conditions *rationae personae* of the ICSID Convention have been met, the parties being a company incorporated in the Kingdom of Norway, and on the other hand, the Republic of Lithuania.⁴⁴⁴

The *Pyramids* case raised the issue of consent of disputing parties to arbitration. According to the Agreement dated 12 December 1974 concluded by foreign investors and the Egyptian General Company for Tourism and Hotels, any dispute would be ‘referred to arbitration of the International Chamber of Commerce in Paris, France.’ In 1983, the ICC Tribunal awarded US\$ 12.5 million in damages.⁴⁴⁵ However, the award was set aside by the Court of Appeal of Paris on the ground that the arbitrators had no jurisdiction and the Egyptian Government not being party to the Agreement containing the clause providing for settlement of disputes by arbitration under the rules of the ICC.⁴⁴⁶ In 1985, SPP (Middle East) filed a request for arbitration at ICSID, asking for relief in the same matter. SPP later joined as claimant alongside SPP (Middle East) to the case, claiming damages for breach of the Agreements from the Egyptian Government. However, the host State challenged the ICSID’s jurisdiction alleging that Article 8 of Law No.43 of 1974 does not suffice to establish Egypt’s consent to the Centre’s jurisdiction. This article states as follows:

Investment disputes in respect of the implementation of the provisions of this Law shall be settled in a manner to be agreed upon with the investor, or within the framework of the agreements in force between the Arab Republic of Egypt and the investor’s home country, or within the framework of the Convention for the

⁴⁴² Article I of the 1992 Lithuania-Norway BIT gives the definition of ‘Investment.’ The term ‘Investment’ means every kind of asset invested in the territory of one contracting party in accordance with its laws and regulations by an investor of the other contracting party and includes in particular, though not exclusively:

(...)

(II) Shares, debentures or any other forms of participation in companies

⁴⁴³ *Ibid*, para 261.

⁴⁴⁴ *Ibid*, para 245.

⁴⁴⁵ Award on the merits, para 68.

⁴⁴⁶ *Ibid*, paras 71- 72.

Settlement of Investment Disputes between the State and the nationals of other countries to which Egypt has adhered by virtue of Law No. 90 of 1971, where such Convention applies.⁴⁴⁷

Egypt argued that this clause required a separate implementing agreement with the investor.⁴⁴⁸ However, the tribunal rejected this contention. In the tribunal's view there was nothing in the legislation requiring a further *ad hoc* manifestation of consent to the Tribunal's jurisdiction.⁴⁴⁹

In short, the *Parkerings* case and the *Pyramids* case have illustrated that cases which are related to the issue of protecting cultural heritage can be challenged with the jurisdictional matters. While the former is associated with jurisdiction in respect of parties to the dispute, the latter relates to the issue of consent to arbitration. Investor-State disputes with cultural heritage elements in the future may encounter with various types of jurisdictional matters which have arisen in general Investor-State disputes such as subject matter of the dispute.

3.4 Disputes over applicable laws

The law applicable to Investor-State disputes is one of the most important issues in investment arbitration.⁴⁵⁰ In the process of resolving investment disputes, foreign investors and a host State might disagree on the law to be applied when deciding the case on its merits. An arbitral tribunal has to decide which sources of laws to consult in order to resolve the merits of the dispute. In case the dispute has been submitted by the investor to arbitration, it can be settled in conformity with the rules of the ICSID Convention when both Contracting Parties are bound by it. Where either the disputing Contracting Party or the Contracting Party of the investor, but not both, is a party to the ICSID Convention, the Additional Facility Rules can be

⁴⁴⁷ Decision on Jurisdiction, 27 November 1985, 3 ICSID Reports 112, para 70.

⁴⁴⁸ Award on the merits, paras 71-73.

⁴⁴⁹ *Ibid*, paras 89-101.

⁴⁵⁰ For this topic, see e.g. I. Begic, *Applicable law in international investment disputes* (Utrecht, Eleven International Publishing, 2005), R. H. Kreindler, The law applicable to international investment disputes in Horn and Kroll, note 65; H. E. Kios, note 431; Douglas, note 65, Chapter 2: Applicable laws, 39-133; Schokkaert & Heckscher, note 65, Chapter XV: Applicable law on investments; O. Spiermann, Applicable law in Muchlinski, note 65; K. Yannaca-Small (ed.), *Arbitration under international investment agreements: A guide to the key issues* (Oxford University Press, 2010), chapter 9: The law applicable in investment treaty arbitration.

applied.⁴⁵¹ Investment arbitrations under can be also conducted the UNCITRAL Arbitration Rules of 1976 (revised in 2010) and under the ICC Arbitration Rules of 2012 even though Investor-State disputes are resolved by institutions such as ICSID if the two parties have chosen such rules as applicable law in concession agreements. The determination of the basis of the claim (whether treaty or contract) will determine the applicable substantive law of Investor-State disputes.

With regard to contract-based arbitration, the arbitral tribunal will resolve the dispute in accordance with provisions agreed by both parties in state contracts. The host state and foreign investors may agree on the governing law, and most cases such as an agreement include international rules as well as municipal laws of the host state.⁴⁵² In case of treaty-based arbitration, international investment treaties may contain choice-of-law clauses and direct the arbitral tribunal to decide the dispute in accordance with various sources of law including the BIT itself, the law of the contracting state, the rules and principles of international law.⁴⁵³ In some situations, applicable law clauses of international investment treaties could refer exclusively to the treaty itself and rules of international law without mentioning the laws of the contracting party.⁴⁵⁴ It should be noted that not all investment treaties contain express stipulations on the law applicable to the merits of any dispute. If a treaty does not contain a provision on governing law and any reference to choice of law rules, the tribunal would first apply the investment treaty provisions to decide

⁴⁵¹ In 1978 the Administrative Council of ICSID created the Additional Facility. The Additional Facility Rules are available at <https://icsid.worldbank.org/en/Pages/icsiddocs/ICSID-Additional-Facility-Rules.aspx> (accessed on 15/03/2019). International investment treaties concluded by non-contracting state to the ICSID Convention such as South Africa and Vietnam have similar approaches in relation to the application of the Additional Facility Rules. For instance, Article 8 of the 1998 Finland-South Africa BIT (the text is available at <http://investmentpolicyhub.unctad.org/Download/TreatyFile/1215> (accessed on 15/03/2019)) and Article 8(2) of the 2002 UK-Vietnam BIT (the text is available at <http://investmentpolicyhub.unctad.org/Download/TreatyFile/2376> (accessed on 15/03/2019)).

⁴⁵² Dolzer & Schreuer, note 65, 288.

⁴⁵³ For example, Article X (4) of the 1991 Argentina-Canada BIT states ‘The arbitral tribunal shall decide the dispute in accordance with the provisions of this Agreement, with reference to the laws of the Contracting Party involved in the dispute, including its rules on conflict of laws; terms of any specific agreement concluded in relation to such an investment and principles of international law, as may be applicable.’ Article 30 (1) of the 2012 Canada-China BIT states ‘a Tribunal established ... shall decide the issues in dispute in accordance with this Agreement, and applicable rules of international law, and where relevant and as appropriate, take into consideration the law of the host Contracting Party.’

⁴⁵⁴ For instance, NAFTA Article 1131 and Article 35 (1) of the 2013 Benin-Canada BIT provide that a tribunal shall decide the issues in disputes in accordance with this Agreement and applicable rules of international law.

the dispute arising under the treaty. The arbitral tribunal then is instructed to apply the principles of international law or public international law.⁴⁵⁵ It means that arbitrators may take into consideration law on cultural heritage such as the 1972 World Heritage Convention and regulations of international financiers when the dispute is associated with cultural heritage conservation. The Annulment Committee in *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic* (the Vivendi case)⁴⁵⁶ have confirmed that each Investor-State claim will be determined by reference to its own proper or applicable law – by international law in the case of treaty-based claims or by proper law of the Concession Contract in the case of contract-based claims.⁴⁵⁷

The *Pyramid* case represented the issue that whether principles of international law are to be applied even if the parties have not expressly agreed to apply them in their choice-of-law provision in the concession agreement. In this case, a disagreement arose concerning the law applicable to the dispute and the manner in which Article 42(1) of the ICSID Convention is to be applied. Article 42(1) provides as follows:

The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.

The Respondent contended that the Parties have implicitly agreed to apply Egyptian law so the case falls into the scope of the first sentence of Article 42 (1).⁴⁵⁸ The Respondent argued that in this case the choice of Egyptian law results from the preamble of the contract entitled ‘Heads of Agreement’, which refers to Egyptian Laws No.1 and No.2 of 1973 and the Law No. 43 of 1974.⁴⁵⁹ According to the

⁴⁵⁵ Kreindler, note 449, 414.

⁴⁵⁶ *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Annulment Decision, 3 July 2002, available at <http://www.italaw.com/sites/default/files/case-documents/ita0210.pdf> (accessed on 15/03/2019).

⁴⁵⁷ *Ibid*, para 96. For further information about the Vivendi case, see section 3.5.4 of this chapter.

⁴⁵⁸ Award on the merits, para 75.

⁴⁵⁹ *Ibid*, para 44.

The Preamble of the Heads of Agreement, which was expressly made part of the Agreement by Article 1, provides that:

... This agreement is issued in accordance with laws No.1 for the year 1973 relating to Hotels, Installations and Tourism, and law No.2 for the year 1973 relating to the supervision by the Ministry of Tourism on touristic sites and the development of such areas, and law 43 of the year

Respondent, the second sentence of Article 42 (1) is not applicable because it operates only in the absence of such agreement.⁴⁶⁰

The Claimants did not agree that the Parties should be deemed to have agreed implicitly to the exclusive application of Egyptian law. They acknowledged that their investment in Egypt was governed primarily by Law No. 43 of 1974 but they contended that the provisions of Law No.43 do not cover every aspect of the dispute. The Claimants also argued that there is no agreement between the Parties on the rules of law to be applied by the arbitral tribunal. In the Claimants' view, in the absence of agreement the second sentence of Article 42 (1) became operative, so that the Tribunal should apply 'the law of the Contracting State party ... and such rules of international law.'⁴⁶¹

According to the Tribunal, the Parties' disagreement as to the manner in which Article 42 is to be applied has very little, if any, practical significance. Both Parties agreed that Law No. 43 is applicable to the dispute. Significantly, the Tribunal said that 'the law of the ARE, like all municipals legal systems, is not complete and exhaustive, and where a lacunae occurs it cannot be said that there is agreement as to the application of a rule of laws which, *ex hypothesi*, does not exist.'⁴⁶² The *Pyramids* case illustrated the complication of the application of international laws even in the presence of an agreement on the governing law. The Tribunal accepted the Respondent's view that the Parties have implicitly agreed to apply Egyptian law. However, since the governing law stated in the agreement does not resolve every aspect of the dispute, it could be considered that there was actually 'absence of agreement.' Accordingly, applicability of international law cannot be entirely excluded as the second sentence of Article 42 (1) would come into play.⁴⁶³ The same result may be achieved in certain international investment treaties, depending upon their formulation, and their reference to the law of the host state and international law in a manner similar to the second sentence of Article 42 (1) of the

1974 relating to Arab and foreign funds invested in the A.R.E. with particular reference to government guarantees long term tax holidays, exemptions from import custom duties. etc

⁴⁶⁰ *Ibid*, para 76.

⁴⁶¹ *Ibid*, para 77.

⁴⁶² *Ibid*, para 80.

⁴⁶³ *Ibid*, para 80.

ICSID Convention. A widely held theory on the relationship of international law to host state law under the second sentence of Article 42 (1) is the doctrine of the supplemental and corrective function of international law *vis-à-vis* domestic law.⁴⁶⁴

It should be noted that even when the parties have not agreed, directly or indirectly, to the application of international principles, international law may already be internally applicable as part of the domestic law chosen by the parties or deemed to apply by the tribunal in the absence of express agreement.⁴⁶⁵ In the domain of international commercial arbitration, the principle of ‘party autonomy’ is generally accepted. Accordingly, arbitration will apply the law that the parties have agreed upon to govern their transaction to decide the issues in dispute. Investment arbitration is a field in which the principle of party autonomy,⁴⁶⁶ although of indisputable importance, does not reign supreme.⁴⁶⁷ Commentators have shared the view that international law is nonetheless to be considered even in the absence of an agreement to apply it.⁴⁶⁸

The *Pyramids* case had important implications for resolving Investor-State disputes with cultural dimensions in relation to the application of the 1972 World Heritage Convention. When arguing that international law can be applied indirectly through those rules and principles incorporated in Egyptian law such as the provisions of treaties ratified by the Arab Republic of Egypt, the Respondent referred to the 1972 UNESCO Convention for the Protection of the World Cultural and Natural Heritage as an example of international instruments.⁴⁶⁹ The Claimants themselves acknowledged that the 1972 Convention obligated the Respondent to abstain from acts or contracts contrary to the Convention during the proceedings before the French Court of Appeal (*Cour d’ Appel.*) Therefore, the Tribunal said that question as to the UNESCO Convention is relevant has very little practical significance⁴⁷⁰

⁴⁶⁴ Dolzer & Schreuer, note 65, 290.

⁴⁶⁵ I. F. I. Shihata and A. R. Parra, Applicable substantive law in disputes between States and privates foreign parties: The case of arbitration under the ICSID Convention in *ICSID Review – Foreign Investment Law Journal* (1994) Vol.9, Issue 2, 183-213, 189.

⁴⁶⁶ For a topic of party autonomy in investment arbitration, see Spiermann, note 449, 299-303; Kreindler, note 449, 402-407.

⁴⁶⁷ Spiermann, note 449, 90.

⁴⁶⁸ Schreuer, note 394, note on Art.42.

⁴⁶⁹ *Ibid*, para 76.

⁴⁷⁰ *Ibid*, para 78.

because both disputing parties did not have disagreement about the application of the 1972 Convention in case that international law is to be applied.

3.5 Disputes concerning measures taken by the host state

Disputes between investors and a host State can arise in many different contexts, and have differing degrees of importance. A dispute may start when the host State or its local authorities takes an administrative decision to withdraw or revoke the business license; or decides to terminate a foreign investors' project following the cultural impact assessment outcome. A cultural impact assessment is a technical device which identifies the effect of a proposed investment activity on cultural values and identifies methods by means of which adverse effects can be avoided, remedied or mitigated.⁴⁷¹ Cultural impact assessments can be a component of environmental impact assessments (EIAs). A dispute may also occur when new cultural regulations are promulgated or existing regulations are amended. This may raise concern on the part of an investor who met the cultural requirements before the commencement of their projects about the stability of the investment project or negative impacts on business (for example increased business costs). Such disputes over measures (laws, regulations, procedural requirement or practices) adopted by the host State can serve to illustrate conflicts between public and private interests as tensions rise between the host state's public interest in protecting its own cultural heritage and the investors' private property rights over cultural properties.⁴⁷²

3.5.1 Suspension or termination of foreign investment projects

Foreign companies are legally permitted to mine or do construction activities under regulatory frameworks; however, they could be frustrated in their attempts to exercise those rights.⁴⁷³ After foreign investors are granted the rights to set up a company and the investment projects have already commenced, and before their licences expire, the host State could decide to suspend or cancel the project in

⁴⁷¹ Vadi, When the cultures collide: foreign direct investment, natural resources and indigenous heritage in international investment law, note 58, 783; Vadi, Cultural diversity disputes and the judicial function in investment law, note 64, 126.

⁴⁷² Lenzerini, note 58, 541.

⁴⁷³ Litton, note 136, 221.

question. For instance, in *Crystallex International Corporation v. Bolivarian Republic of Venezuela*,⁴⁷⁴ a Canadian based mining company obtained the right to develop Las Cristinas in Venezuela through a contract with the Corporacion Venezolana de Guayana (the ‘CVG’), a state-owned Venezuelan corporation. The mining site is one of the largest undeveloped gold deposits in the world. After Crystallex spent over \$500 million on developing Las Cristinas, the CVG sent Crystallex a letter to ‘unilaterally rescind’ the contract for reasons of ‘expediency and convenience’ in February 2011.⁴⁷⁵

The *Pyramids* case indicated that an international investment project may be cancelled by the host state where cultural heritage concerns played a role. The Egyptian Ministry of Tourism entered into negotiations with a Hong Kong company, Southern Pacific Properties Ltd. (SPP) to establish a joint venture for the development of tourist projects in Egypt. Three months later a more detailed agreement was concluded between SPP and the Egyptian General Company for Tourism and Hotels. Construction work was undertaken pursuant to the agreement. In 1977, concerns regarding the environmental impact of the project on the Pyramids and possible destruction of antiquities led to popular opposition and resistance from the People’s Assembly against the project.⁴⁷⁶ The government took a series of measures during May/June 1978, and adopted two Presidential Decrees, which resulted in the cancellation of the project.⁴⁷⁷ The investment was stopped in 1978 when the Pyramids Plateau was declared to be state public property.⁴⁷⁸

The arguments used by Egypt for cancelling the project may be similar to those used by other host States. For example, a domestic dispute has arisen in Vietnam about a project to build a hydroelectricity mill upon the Dong Nai River. In July 2013, the governmental offices at the provincial level applied to the National Assembly and the Government to postpone the project on the ground that the

⁴⁷⁴ *Crystallex International Corporation v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB(AF)/11/2). For more information about the case see <https://www.italaw.com/cases/1530> (accessed on 15/03/2019).

⁴⁷⁵ Ontario Court of Appeal Judgment regarding approval of arbitration funding agreement. The text is available at https://www.italaw.com/sites/default/files/case-documents/italaw1090_0.pdf (accessed on 15/03/2019).

⁴⁷⁶ Award on the merits, para 62.

⁴⁷⁷ *Ibid*, paras 63-64.

⁴⁷⁸ *Ibid*, para 65.

project is built in the Cat Tien National Park, which is subject to an application to be added as a the World Cultural Heritage Site. The final result from the State Body has not been issued yet.⁴⁷⁹

The decision to terminate an investment project could be based on supervening changes in domestic rules, as the *Parkerings* case demonstrates. In January 2004, the Municipality of Vilnius decided to terminate the Agreement between the Municipality of the City of Vilnius and the Egapris Consortium.⁴⁸⁰ This decision was taken after the Law on Self-Government was amended in 2000. The amended state legislation had restricted the right of municipal authorities to conclude Agreements on Joint Activity to other public counterparties only.⁴⁸¹

An important issue which arises from the *Pyramids* case is the lawfulness of the measures taken by the host state to cancel or suspend the project. Initially, the Claimants contended that even if antiquities exists, nothing in the 1972 World Heritage Convention required the cancellation of the project. They also argued that Egypt did not rely on the Convention when it cancelled the project and that the host state only invoked the Convention as post hoc rationalisation for an act of expropriation.⁴⁸² The Tribunal decided that the Respondent was entitled to cancel a project situated in its own territory for a public purpose, namely the preservation and protection of antiquities. After that, the Claimants did not challenge the Respondent's decision to cancel the project. Instead, they claimed that the cancellation amounted to an expropriation and claimed for compensation under both Egyptian and international law.⁴⁸³

⁴⁷⁹ See *Projects on hydroelectricity mill upon the Dong Nai River number 6 and 6A: More harm than benefits* (September 2013), available in Vietnamese only at <https://tuoitre.vn/thuy-dien-dong-nai-6-va-6a-hai-nhieu-hon-loi-568357.htm> (accessed on 15/03/2019)

⁴⁸⁰ Parkerings was established in 1996, with a view to participating in the Vilnius Tender, Parkerings incorporated Baltijos Parkingas UAB ('BP'), its wholly-owned Lithuanian subsidiary. Egapris and BP thereafter formed the Egapris Consortium.

⁴⁸¹ Award on the merits, paras 133-134.

⁴⁸² *Ibid*, para 154.

⁴⁸³ *Ibid*, para 158.

3.5.2 Cultural impact assessment

Clayton/Bilcon v. Government of Canada concerns a dispute over the actions of Canada and its sub-national governments in connection to environmental preservation. This case highlighted environmental impact assessments that recommended refusal or cancellation of a project because of the considerable adverse effects it will have on the mining sites. Practical dimensions of the case could feature in potential Investor-State disputes which are associated with the protection of cultural heritage.

Canada and the Province of Nova Scotia required that proponents of specific industrial projects undergo environmental assessments before they can begin constructing and operating the projects. The Nova Scotia Minister of Environment and Labour rejected the investor's application in November 2007. A month later Canada took steps tantamount to a rejection of the investment proposals. The investors served upon Canada with a Notice of Intent to submit a claim to Arbitration in 2008. The investors did not dispute the fact that a federal or provincial environmental assessment was required in this case. Their claim arose out of specific governmental measures that related to the administration and implementation of the environmental assessment of the Investments. In its Statement of Defence, Canada pointed out that Digby Neck, the place where the project would be developed, is an integral part of a UNESCO biosphere reserve.⁴⁸⁴ While the investors argued that the treatment they received at every stage of the environmental assessment was unfair and discriminatory, the Respondent maintained that the relevant authorities dealt with the proposal fairly and professionally.⁴⁸⁵ The issue arising from this case was whether the investors' application was assessed in a manner that complied with the laws that Canada and Nova Scotia had adopted.

The *Bilcon* case flags up potential implications for foreign investors. Cultural impact assessment may conceivably contain recommendations to turn down or

⁴⁸⁴ Statement of Defence of the Government of Canada, para 10, available at <http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/diff-clayton-04.pdf> (accessed on 15/03/2019).

⁴⁸⁵ Award on Jurisdiction and Liability, para 5.

cancel a project because of the considerable effect it will have on cultural sites or cultural landscapes. It could also be the case that the investors have not challenged the fact that a federal or provincial cultural assessment is required or some measures are needed to be taken in accordance with cultural heritage protection rules. In this case, American investors made claims focusing on the way that such procedures or measures are carried out, and they invoked the argument that the host states violated treaty obligations such as fair and equitable treatment and non-discrimination.

3.5.3 Counter claims brought by foreign investors based on the violation of treaty rights

Treaty rights established and defined in international investment law in practice have formed the basis of claims by investors against the host State. Investment treaties usually contain articles identifying several different standards of treatment such as National Treatment, a fair and equitable standard of treatment, and full protection and security.⁴⁸⁶ The right to compensation for expropriation is also one crucial right for foreign investors.

As mentioned in chapter 1, the thesis only examines the protection of cultural heritage in international projects after the investment is admitted into the host State. The post-establishment phase is often the focus in international investment agreements and the question as to whether the host state violates treaty rights should be put in this context. In *Philip Morris v. Uruguay*, when raising jurisdictional objections, Uruguay argued that public health measures were excluded from the scope of the Switzerland-Uruguay BIT on the basis of Art 2(1) as it states that the contracting parties recognize each other's right not to allow economic activities for reasons of public health.⁴⁸⁷ However, the Tribunal rejected Uruguay's arguments because the BIT only addresses the pre-establishment stage as Article 2 provides

⁴⁸⁶ There would be references to the most-favoured-nation standard of treatment, but the operation of this standard is not internal to the treaty as it depends on the identification of standards of treatment in other treaties so that the best standard offered could be determined. For an overview of the evolution and general standards of treatment of foreign investment, see e.g. T. J. Grierson-Weiler and I. A. Laird, *Standards of treatment in Muchlinski*, note 65, 201-205; Horn, note 65, 64-66; Salacuse, note 240, 131-134; McLachlan, note 65, 212-221.

⁴⁸⁷ The text is available at <https://investmentpolicyhub.unctad.org/Download/TreatyFile/3121> (last accessed on 31/03/2019)

that each contracting party shall in its territory promote as far as possible investments by investors of the other Contracting Party. In its Decision on Jurisdiction, the Tribunal noted that the BIT does not prevent Uruguay, in the exercise of its sovereign powers, from regulating harmful products in order to protect public health after investments in the field have been admitted.⁴⁸⁸

The host State can undertake specific legislative and administrative measures with a view to preserving cultural heritage as it is entitled to utilise cultural protection grounds in accordance with international and national regulations. In such situations, the question arises as to whether the investor could present a counter-claim against the host State concerning the violation of treaty rights.

3.5.3.1 The violation of national treatment obligations

The National Treatment principle protects foreign investors from special requirements that would result in a competitive disadvantage in comparison with national investors. The basis of National Treatment is non-discrimination between foreign investors and local investors conducting similar business. In fact, the violation of the national treatment standard is emerging as a significant cause of action arising from investment treaties.⁴⁸⁹

National treatment is often emphasised at both the pre-entry and the post-entry phases of international investment activities. At the pre-entry stage, national treatment creates a right of entering into the host state and a right to establish a business. Post-entry national treatment entitles the foreign investor to be treated equally with national entrepreneurs. The use of a negative list of sectors is a common practice in investment treaty law – it means that there are sectors that are exempted from the obligation of national treatment. Thus, for example, Article 18

⁴⁸⁸ Decision on Jurisdiction, 2 July 2013, para 174. The text is available at <https://www.italaw.com/sites/default/files/case-documents/italaw1531.pdf> (last accessed on 15/03/2019).

⁴⁸⁹ For a topic of the violation of national treatment standards, see e.g. Subedi, note 65, 94-98; Sornarajah, note 65, 335-345; Dolzer & Schreuer, note 65, 198-206; Salacuse, note 240, 245-251; McLachlan, note 65, 251-254; Collins, note 58, chapter 4: Guarantees against discrimination: National treatment and most favoured nation.

(2) of the 2013 Canada-Benin BIT⁴⁹⁰ states that National Treatment does not apply to a measure that a Contracting Party adopts or maintains with respect to sectors, subsectors or activities, as set out in its Schedule to Annex II. Predictably, the two countries have different lists of sectors and matters. However, interestingly, cultural aspects have been mentioned in the case of Benin, a stable democratic country in Africa. Benin reserves its right to adopt or maintain any measure relating to the investments concerning national heritage objects having artistic, historical or archaeological value, where the measure does not conform to the obligations imposed by National Treatment.

The *Bilcon* case was a dispute related to the national treatment principles. The Investors contended that their projects seeking regulatory approval under Canada's environmental assessment scheme are in like circumstances with the Investors and the Whites Point project. The American Investors further argued that some Canadian investors received better treatment in other environmental assessments. In particular, they suggested that Canadian-owned projects and Canadian investors received better treatment in various aspects including the assessment of cumulative effects and the scoping and level of environmental assessments. The Investors maintained that, as a result of the Respondent's failure to meet its national treatment obligation as stated in Article 1102 of NAFTA, their investments have been harmed.⁴⁹¹ Bilcon emphasised that the issue is not whether the outcome of the assessment review was different, but rather whether Canada provided less favorable treatment concerning the mode of review and the evaluative standard.⁴⁹²

There are a significant number of cases which have been instituted on the basis of a violation of national treatment, principally between the United States and Canada⁴⁹³ under the NAFTA mechanism.⁴⁹⁴ The Investors in the *Bilcon* case further argued

⁴⁹⁰ The text of the treaty is available at <http://investmentpolicyhub.unctad.org/Download/TreatyFile/438> (accessed on 15/03/2019).

⁴⁹¹ Award on Jurisdiction and Liability, para 614.

⁴⁹² *Ibid*, para 687.

⁴⁹³ For instance, *United Parcel Service of America Inc v. Government of Canada*, UNCITRAL Arbitration Proceedings (NAFTA), ICSID Case No. UNCT/02/1. The information about the case is available at <https://www.italaw.com/cases/1138> (accessed on 15/03/2019).

⁴⁹⁴ NAFTA Article 1102 reads:

1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment,

that Article 1102 is not attached to any justification clause, such as Article XX of the GATT⁴⁹⁵ which permits an exception to its norms in cases where a state has adopted reasonable measures to pursuing certain domestic policy objectives.⁴⁹⁶ The Tribunal concluded that the approach taken by the Joint Review Panel and adopted by Canada amounted to unequal and unfavorable treatment of Bilcon, resulting in a breach of the NAFTA's Article 1102.⁴⁹⁷

3.5.3.2 The violation of standards of 'fair and equitable treatment' and 'full protection and security'

The part in international investment treaties dealing with principles of the protection of investment often contains a provision that investments of investors of either Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Party.⁴⁹⁸ The new generation of BITs concluded by Canada after 2000 likely includes a clause called 'Minimum Standard of Treatment.'⁴⁹⁹ For example, Article 7 of the 2013 Benin-Canada BIT provides that each Contracting Party must agree to a covered investment treatment in accordance with the customary international law minimum standard of treatment

acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

2. Each Party shall accord to investments of investors of another Party treatment no less favorable than that it accords, in like circumstances, to investments of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

3. The treatment accorded by a Party under paragraphs 1 and 2 means, with respect to a state or province, treatment no less favorable than the most favorable treatment accorded, in like circumstances, by that state or province to investors, and to investments of investors, of the Party of which it forms a part.

⁴⁹⁵ Article XX reads in part:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures...

(b) necessary to protect human, animal or plant life or health.

⁴⁹⁶ *Ibid*, para 721.

⁴⁹⁷ *Ibid*, para 731.

⁴⁹⁸ For example, Article 2 (2) of the 1998 Czech Republic-South Africa BIT, Article 2 (3) of the 1995 Korea-South Africa BIT, Article 10 (2) of the 1998 Mauritius-South African BIT. For more about these standards see e.g. Subedi, note 65, 90-91; Sornarajah, note 65, 359-360; Dolzer & Schreuer, note 65, 160-166; Salacuse, note 240, 207-218; McLachlan, note 65, 247-251; Collins, note 58, chapter 5: Fair and equitable treatment, full protection and security and umbrella clauses;

⁴⁹⁹ For instance, Article 5 of the 2009 Jordan-Canada BIT, Article 6 of the 2011 Kuwait-Canada BIT.

of aliens, including fair and equitable treatment and full protection and security.⁵⁰⁰ This provision also stresses that the concepts of ‘fair and equitable treatment’ and ‘full protection and security’ do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.⁵⁰¹ Significantly, at the regional level, under the NAFTA scheme, Article 1105 ‘Minimum Standard Treatment’ has by now been used in cases as the legal basis for ‘fair and equitable treatment’ and ‘full protection and security.’⁵⁰² Article 1105 (1) provides that each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.⁵⁰³

As a matter of substance, these two standards are distinguishable. The fair and equitable treatment standard consists mainly of an obligation on the host State’s part to desist from any behaviours which are unfair and inequitable. By contrast, the host State is under the obligation of full protection and security to provide a legal framework that grants security and to take measures necessary to protect the international investment against adverse actions by private actors and State organs.⁵⁰⁴ However, specific contents of these standards are open to different interpretations and have become a focal point of discussion in Investor-State arbitration at present.⁵⁰⁵ Unsurprisingly, almost all disputes between foreign investors and host governments are potentially subject to the applicable investment

⁵⁰⁰ The text of the treaty is available at <http://investmentpolicyhub.unctad.org/Download/TreatyFile/438> (accessed on 15/03/2019).

⁵⁰¹ Art. 7, section 2.

⁵⁰² Article 1105 has been the subject of an official interpretation by the NAFTA Free Trade Commission (FTC) by virtue of which the Article is regarded as reflecting the customary international law minimum standard. See FTC Note of Interpretation of 31 July 2011, available at http://www.iisd.org/pdf/2001/trade_nafta_aug2001.pdf (accessed on 15/03/2019).

⁵⁰³ See further P. Dumberry, The protection of investors’ legitimate expectations and the fair and equitable treatment standard under NAFTA Article 1105 in *Journal of International Arbitration*, 2014 Vol. 31.1, 47–74.

⁵⁰⁴ C. Schreuer, Full protection and security in *Journal of International Dispute Settlement* (2010) 1-17, 14.

⁵⁰⁵ Cremades & Cairns, note 408, 341. On the difficult question of the meaning of fair and equitable treatment standard, see Dolzer and Steven, *Bilateral investment treaties* (The Hague, 1995) 58-60; UNCTAD, *Series on issues in international investment treaties: Fair and equitable treatment* (1999) available at http://unctad.org/en/Docs/unctaddiaecia2011d5_en.pdf (accessed on 15/03/2019), 22.

treaty relating to ‘fair and equitable treatment’⁵⁰⁶ and ‘full protection and security’⁵⁰⁷ under the BIT mechanism. Particularly in NAFTA litigation, claimants have often placed emphasis on whether there has been any violation in connection to the minimum standard treatment.⁵⁰⁸

*Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. The Republic of Estonia*⁵⁰⁹ is an interesting case which may have some levels of connection to disputes with cultural factors and termination of business license. The allegation was that the revocation of a banking license violated the fair and equitable standard in the United States-Estonia investment treaty, which is similar to Chapter 11 of NAFTA. Referring to the content of the fair and equitable standard, the tribunal said that while the exact content of this standard is not clear, the Tribunal understands it to require an ‘international minimum standard’ that is separate from domestic law, but that is, indeed, a minimum standard.’⁵¹⁰ The Tribunal accepted Respondent’s explanation that it took the decision to annul Estonian Innovation Bank’s license in the course of exercising its statutory obligations to regulate the Estonian banking sector and that such regulation by a state reflects a clear and legitimate public

⁵⁰⁶ For further discussion on fair and equitable, see e.g. K. Chovancova, The fair and equitable treatment and its current status in international investment law, TDM 5 (2018); R. Klager, *Fair and equitable treatment in international investment law* (Cambridge University Press, 2011); I. Tudor, *The fair and equitable treatment standard in international foreign investment law* (Oxford University Press, 2008); C. Schreuer, Fair and equitable treatment in arbitral practice in *Journal World Investment & Trade* (2005) vol. 6, 357-386; R. Dolzer, Fair and equitable treatment: A key standard in investment treaties in *International Lawyer*, 2005 Vol. 39, 87-106; Schokkaert & Heckscher, note 57, chapter XI: Fair and equitable treatment; Dolzer & Schreuer, note 65, 130-160; Subedi, note 65, 86-90; Sornarajah, note 65, 349-359; Salacuse, note 240, 218-245; McLachlan, note 65, 226-247; Schefer, note 65, section 5.5: Fair and equitable treatment; UNCTAD, Series on issues in international investment treaties Fair and equitable treatment, note 461; A. H. Ali, K. Tallent, The effect of BITs on the international body of investment law: the significant of fair and equitable treatment provisions in Rogers & Alford (eds), note 65; J. R. Picherack, The expanding scope of the fair and equitable treatment standard: Have recent tribunals gone too far? in *Journal of World Investment & Trade*, 2008 Vol. 9.4, 255–291; J. Stone, Arbitrariness, the fair and equitable treatment standard, and the international law of investment in *Leiden Journal of International Law*, 2012, Vol. 25.1, 77–107; K. J. Vandevelde, A unified theory of fair and equitable treatment in *NYU Journal of International Law and Politics*, 2010 Vol. 43.1, 43–106; S. Vasciannie, The fair and equitable treatment standard in international investment law and practice in *British Yearbook of International Law*, 2000 Vol.70, 99–164.

⁵⁰⁷ For further discussion on full protection and security, see e.g. Schefer, note 65, chapter 5, section 5.4: Full protection and security; C. Schreuer, note 503.

⁵⁰⁸ For a discussion of international minimum standard, see e.g. Subedi, note 65, 23-27; Sornarajah, note 65, 345-349.

⁵⁰⁹ *Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. The Republic of Estonia*, ICSID Case No. ARB/99/2, Award on 25 June 2001, available at <http://www.italaw.com/sites/default/files/case-documents/ita0359.pdf> (accessed on 15/03/2019).

⁵¹⁰ Award on Jurisdiction and Liability, para 367.

purpose. The Tribunal further accepted Respondent's explanation that the circumstances of political and economic transition prevailing in Estonia at the time justified heightened scrutiny of the banking sector.⁵¹¹ In conclusion, the Tribunal found that the Claimants failed to show that the Bank of Estonia's conduct in cancelling Estonian Innovation Bank's license rose to the level of a violation of the BIT or of the international law principles.⁵¹²

In a recent ICSID case law - *Philip Morris v. Uruguay*, the Claimants challenged two key aspects of Uruguay's tobacco control laws on the basis of the violation of the fair and equitable treatment obligations. All members of the Tribunal agreed that Uruguay had not breached this obligation in the way it imposed tobacco control measures. The majority considered that Uruguay – as 'a country with limited technical and economic resources' was justified in accordance with the World Health Organization Framework Convention on Tobacco Control and its Article 11 Guidelines.⁵¹³ In finding no breach of the fair and equitable standard, the majority noted that the host state attempted to address a real public health concern. Additionally, in the Tribunal's view, the challenged measures were both adopted in good faith and were non-discriminatory.⁵¹⁴

The Tribunal relied on the World Health Organization (WHO) Framework Convention on Tobacco Control (FCTC)⁵¹⁵ and the guidelines adopted by the Conference of the Parties for the implementation of Article 11 of the FCTC on 'Packaging and labelling of Tobacco Products.'⁵¹⁶ Moreover, in the Tribunal's view, 'there was no requirement for Uruguay to perform additional studies or to gather further evidence in support of the challenged measures and such support was

⁵¹¹ *Ibid*, para 370.

⁵¹² *Ibid*, para 373.

⁵¹³ *Ibid*, paras 393-396.

⁵¹⁴ *Ibid*, para 402.

⁵¹⁵ WHO Framework Convention on Tobacco Control. 2302 UNTS 166 (adopted 21 May 2003, entered into force 27 February 2005). The text is available at <https://apps.who.int/iris/bitstream/handle/10665/42811/9241591013.pdf;jsessionid=B8E462C85557F46B7B12620629C2806F?sequence=1> (accessed on 15/03/2019).

⁵¹⁶ WHO Guidelines for Implementation of Article 11 of the WHO Framework Convention on Tobacco Control on "Packaging and labelling of Tobacco Products" (decision FCTC/COP3(10)). The text is available at https://www.who.int/fctc/guidelines/article_11.pdf (accessed on 15/03/2019).

amply offered by the evidence-based FCTC provisions and guidelines adopted.’⁵¹⁷ The award therefore has given indications for cultural heritage protections cases in the way that the host State or the Tribunal can use both the 1972 World Heritage Convention and its guidelines to justify the reasonableness of the state’s measures in international investment activities.

In the NAFTA arbitration case – the *Bilcon* case, the claimants contended that the manner in which the Environmental Impact Assessment had been undertaken violated not only national treatment but also the fair and equitable treatment standard. The host state relied on the protection of environment but investors won their NAFTA claim against Canada for unfair treatment because of the approach to the environmental assessment taken by the Joint Review Panel. In this case, the Investors claimed that the Respondent had breached its NAFTA obligations set out in Articles 1105 (Minimum Standard of Treatment). The Investors submitted that the fair and equitable treatment standard stipulated in Article 1105(1) is guided by the principle of ‘good faith’ and requires Respondent to:

- a) act in accordance with basic fairness and fundamental justice;
- b) act in a non-arbitrary and non-discriminatory manner;
- c) respect foreign investors’ legitimate expectations;
- d) deal with foreign investors according to basic principles of openness and transparency;
- e) ensure that it not abuse its rights in regulating foreign investors; and
- f) provide foreign investors with a basic level of security of the legal and business environment.

In the Investors’ view, the violation of the fair and equitable treatment does not require a breach of every element stated above and a breach of any one of the elements suffices. Referring to the decisions of the tribunals in *Thunderbird*⁵¹⁸ and

⁵¹⁷ *Ibid*, para 396.

⁵¹⁸ *International Thunderbird Gaming Corporation v. United Mexican States*, UNCITRAL Arbitration Rules, Arbitral Award, 26 January 2006. The case is available at <https://www.italaw.com/cases/571> (accessed on 15/03/2019).

Waste Management,⁵¹⁹ the Investors maintained that fair and equitable treatment requires the Respondent not only to act in a non-arbitrary and non-discriminatory manner, but also to act reasonably.⁵²⁰ They referred to numerous acts of the Respondent which demonstrated a lack of due process, natural justice, fairness and reasonableness, falling short of the international standard for treatment of foreign investments. The Investors also contended that the ministerial decisions following the Joint Review Panel (JRP) Report adopted the JRP's legal flaws as their own without giving the Investors an opportunity to make submissions.⁵²¹ Moreover, the Investors argued that the Respondent acted in an unfair and unreasonable manner toward them by imposing 'biased, needless and unfair procedures and obligations' on the Investors.⁵²² They claimed that the Respondent treated them in a discriminatory manner by allowing political motivations to 'pervert the environmental assessment process.'⁵²³ Finally, the investors argued that it had been clear to officials that the federal minister intended to delay the regulatory process as long as possible.⁵²⁴

The Respondent in return addressed the Investors' arguments regarding lack of transparency, abuse of process, arbitrariness and discrimination, and delay. The Respondent said that it did not breach any transparency obligation by not notifying the Investors about the referral of the Whites Point project to a JRP, or because it led them to believe otherwise; and that Article 1105(1) does not include a transparency obligation. Secondly, the Respondent argued that the Investors should have anticipated that Whites Point project could be referred to a JRP given that government regulators consistently noted the possibility.⁵²⁵

Legitimate expectations play a key role in the interpretation of the fair and equitable treatment standard. Tribunals have also relied on the legitimate expectations of

⁵¹⁹ *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB (AF) 00/3, Arbitral Award, 30 April 2004. In this case, the tribunal held that the standard is infringed when the conduct of the state 'involves a lack of due process leading to an outcome which offends judicial propriety.' The text is available at <https://www.italaw.com/cases/571> (accessed on 15/03/2019).

⁵²⁰ *Ibid*, paras 357-359.

⁵²¹ *Ibid*, para 361.

⁵²² *Ibid*, para 362.

⁵²³ *Ibid*, para 363.

⁵²⁴ *Ibid*, para 391.

⁵²⁵ *Ibid*, para 407.

investors in a number of cases relating to indirect expropriation. Regarding legitimate expectations under Article 1105, the Investors also argued that ‘the fair and equitable treatment obligation includes the obligation to protect legitimate expectations’ but ‘their legitimate and reasonable expectations that they would be dealt with transparently and honestly were not met.’⁵²⁶ In the Respondent’s view, Article 1105(1) does not include a stand-alone obligation protecting legitimate expectations and a breach of legitimate expectations can only be a relevant factor in considering whether a measure violated Article 1105(1).⁵²⁷

In its decision, the Tribunal noted that viewing the actions of Canada as a whole, it was unjust for officials to encourage coastal mining projects in general and specifically encourage the pursuit of the project at the Whites Point site, and then, after a massive expenditure of effort and resources by Bilcon on that basis, had other officials effectively determine that the area was a ‘no go’ zone for this kind of development rather than carrying out the lawfully prescribed evaluation of its individual environmental merits.⁵²⁸ Records from the Tribunal confirmed that the Canada-Nova Scotia Joint Review Panel failed to apply Canada’s high level of environmental standards in evaluating the project. The Tribunal determined that there was a failure of international law because the Joint Review Panel considered factors outside Canada’s environmental law that were not disclosed to the investors during the review process. The NAFTA Tribunal determined that the Joint Review Panel ignored scientific and environmental evidence and instead imposed arbitrary requirements unrelated to the actual conditions at the quarry. This unfairness violated NAFTA’s fair and equitable treatment requirements. The Tribunal concluded that the approach to the environmental assessment taken by the JRP and adopted by Canada resulted in a breach of Article 1105.⁵²⁹

⁵²⁶ *Ibid*, para 385. The test for a NAFTA Article 1105 breach of the Investors’ legitimate expectations was established in the *Mobil* award - *Mobil Investments Canada Inc. & Murphy Oil Corporation v. Canada*, ICSID Case No. ARB(AF)/07/4, Decision on Liability and on Principles of Quantum, 22 May 2012. The text is available at <https://www.italaw.com/cases/1225> (accessed on 15/03/2019).

⁵²⁷ *Ibid*, para 424.

⁵²⁸ *Ibid*, para 592.

⁵²⁹ *Ibid*, para 604.

Foreign investors in disputes with cultural heritage factors should pay attention to Investor-States cases which were brought to arbitral tribunal on the basis the violation of the standard of fair and equitable treatment and full protection and security. As the *Bilcon* case illustrated, investors may rely on the issue of breach of the investors' legitimate expectations, absence of due process, lack of transparency and absence of good faith in exercising administrative functions associated particularly with licenses involved in foreign investment.⁵³⁰ As mentioned previously, there is no actual a case in which the host state argued that its measures can be justified on cultural grounds and the investor in turn insisted that such measures have led to the violation of treaty rights. However, there have been instances where that the host state relied on the need for cultural heritage protection under both international and national law, and where investors were able to claim compensation for expropriation based on a finding from the arbitral tribunal that the host state violated treaty rights. This issue will be discussed in detail in the next section of this chapter.⁵³¹

3.5.4 The possibility of bringing both contract-based and treaty-based claims by foreign investors

In *Parkerings-Compagniet AS v. Republic of Lithuania*, the Norwegian investor filed an ICSID proceeding and asserted that its claims arose from the action that the Republic of Lithuania undertook in violation of the BIT. The Respondent argued that Lithuania as host State is not responsible on an international level for acts of its agencies. This case illustrated the issue that whether foreign investors can bring claims against the host State when there is a contract concluded between investors and provincial authorities. A similar question is as to whether an investor can pursue treaty claims and contract claims simultaneously before the arbitral tribunal. The distinction between contract-based and treaty-based claims and case laws can show how to deal with such potential issues. This part will analyse *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic* (the

⁵³⁰ For a detailed analysis of these issues in general Investor-State disputes, see e.g. Dolzer & Schreuer, note 65, 130-160; Sornarajah, note 65, 349-359.

⁵³¹ Section 3.6.

Vivendi case) with its implications for Investor-State arbitration in the context of protecting cultural heritage sites.

In the *Vivendi* case, the investor was a French company and its Argentine affiliate who entered into a concession agreement with the Province of Tucumán to provide water and sewage services.⁵³² The claimants had not alleged that any action of the Argentine Republic directly or indirectly interfered with their performance of the Concession Contract. The *Vivendi* case concerns termination of the contract by the Province of Tucumán in Argentina, whereupon French investors commenced ICSID arbitration on the basis that Argentina was in breach of its obligations under Articles 3 and 5 of the 1991 Argentine-France BIT.

According to the investor, the Tucumán authorities – the legislature, the governor and the province’s regulatory authorities – exercised governmental authority in abrogating the rights of Claimants under the Concession. This was not problematic from the perspective of state responsibility because in a Federal State all of the actions of a Federal unit area, as a matter of public international law, attributed to the State itself.⁵³³ Argentina submitted that the Tribunal had no jurisdiction in the light of contractual jurisdiction clause.

When the *Vivendi* affair started, the Tribunal denied the claim on the merits. The Tribunal concluded that because of the crucial connection between the terms of the Concession Contract and these alleged violations of the BIT, the host state cannot be held liable unless and until investors have, as Article 16.4 of the Concession Contract requires,⁵³⁴ asserted their rights in proceedings before domestic courts and have been denied their rights, either procedurally or substantively.⁵³⁵ Since Claimants failed to seek relief from the Tucumán administrative courts and there was no evidence before the Tribunal that these courts would have denied Claimants

⁵³² Award, section 1.1.1.

⁵³³ J. Crawford, *The international law commission’s articles on state responsibility: Introduction, text and commentaries* (Cambridge University Press, 2002), 97-98.

⁵³⁴ Article 16.4 of the Concession Agreement provides that for purposes of interpretation and application of this Contract, the parties submit themselves to the exclusive jurisdiction of the Contentious Administrative Tribunals of Tucumán.

⁵³⁵ *Ibid*, section 2.1.4.

procedural or substantive justice, there was no basis to hold the Argentine Republic liable under the Argentina – France BIT.⁵³⁶

However, according to commentators, the arbitral tribunal fell into error in this reasoning by confusing claims before it under the BIT, and possible claims under the concession contract. There were no contractual claims, but treaty claims before the arbitral tribunal and therefore the effect of referring these issues to the Contentious Administrative Tribunal was to fail to decide these treaty claims.⁵³⁷

When the award was challenged by the claimant pursuant to the annulment procedure in Article 52 of the ICSID Convention, the Annulment Committee annulled the Arbitral Tribunal's decision on the merits. It differentiated between contractual and treaty-based claims in the following terms:

‘...in the case of a claim based on a treaty, international law rules of attribution apply, with the result that the state of Argentina is internationally responsible for the acts of its provincial authorities. By contrast, the state of Argentina is not liable for the performance of contracts entered into by Tucumán, which possesses separate legal personality under its own law and is responsible for the performance of its own contracts.’⁵³⁸

The Tribunal held that it had jurisdiction as Article 16(4) of the Concession Contract does not, and indeed could not, exclude the jurisdiction of the Tribunal under the BIT. This approach used the Annulment Committee in the *Vivendi* case has indicated that if a claim to breach of the treaty is separate and distinct to a claim of breach of contract, an investor might utilize them both since their causes of action before the investment tribunal is entirely different.⁵³⁹

In the *Parkerings* case, the Claimant underlined that it pleaded breaches of Lithuania's obligations under the Treaty and not breaches of the Agreement. The Claimant argued that Article IX of the Treaty, which governs the dispute between a contracting party and an investor, grants the Tribunal jurisdiction over any and all

⁵³⁶ *Ibid*, section 2.1.3.

⁵³⁷ Cremades & Cairns, note 408, 336.

⁵³⁸ Decision on annulment, para 96.

⁵³⁹ McLachlan, note 408, 391.

disputes in connection with an investment, including disputes arising out of breaches of contract or violation of domestic law.⁵⁴⁰ The Respondent, however, distinguished between disputes arising out of contract breaches and disputes under the BIT. In particular, the Respondent stated that Investor-State arbitration is only available to adjudicate rights contained in the Treaty. The Respondent then argued that the Tribunal has no jurisdiction under the BIT ground because BP and the Municipality agreed to submit all disputes arising under the Agreement to the Lithuanian courts and ICSID tribunals do not have jurisdiction over purely contractual claims which do not amount to claims for treaty violations.

The Claimant contended that the Republic of Lithuania itself, and not the City of Vilnius, violated its obligations under the BIT by virtue of the attribution to the State of the acts of the Municipality. The Claimant alleged exclusively violations of the BIT and particularly failure to afford its investment equitable and reasonable treatment and a breach of its obligation not to expropriate without compensation.⁵⁴¹

The different causes of actions were illustrated by *Genin v. Estonia* in which the respondent State had challenged ICSID jurisdiction on the grounds that under the 1994 United States-Estonia BIT,⁵⁴² such jurisdiction was precluded if the investor had previously submitted the dispute to the Estonia court.⁵⁴³ In this case, the local bank had taken proceedings in Estonia to seek to overturn the decision of the Bank of Estonia to revoke its banking licence. The tribunal held that this could not disqualify Genin from its ICSIS claim and one of the reasons is that the cause of action was different. The Tribunal considered that the claim for restoration of the

⁵⁴⁰ *Ibid*, paras 238-242.

⁵⁴¹ *Ibid*, para 264.

⁵⁴² The text is available at <http://investmentpolicyhub.unctad.org/Download/TreatyFile/1161> (accessed on 15/03/2019).

⁵⁴³ Article VI states as follows:

2. In the event of an investment dispute, the parties to the dispute should initially seek a resolution through consultation and negotiation. If the dispute cannot be settled amicably, the national or company concerned may choose to submit the dispute for resolution:

(a) to the courts or administrative tribunals of the Party that is a party to the dispute; or
(b) in accordance with any applicable, previously agreed dispute-settlement procedures; or
(c) in accordance with the terms of paragraph 3.

3. (a) Provided that the national or company concerned has not submitted the dispute for resolution under paragraph 2 (a) or (b) and that six months have elapsed from the date on which the dispute arose, the national or company concerned may choose to consent in writing to the submission of the dispute for settlement by binding arbitration...

banking license had to be pursued in Estonian courts. The ICSID claim was, however, concerned only with whether the losses suffered by Genin were attributed to breaches of the BIT.⁵⁴⁴

From the perspective of investors, the *Genin* case should be taken into consideration in case there is concern about the termination of the business licence and the demand for compensation for expropriation. The *Genin* case indicates that investors can take legal action in a domestic court to overturn the decision on the license withdrawal or revocation. In the meantime, investors may bring their treaty-based claim to an arbitral tribunal for compensation for expropriation or any breaches of the relevant international investment agreements' obligations.

In the *Parkerings* case, the Tribunal referred to the *Vivendi* case and ruled that state responsibility for actions of municipalities which are contrary to international law is undisputed at the international level, but that States are not liable internationally for acts of their agencies that are wrongful under domestic law.⁵⁴⁵ According to the Tribunal, it was uncontroversial that this dispute is between Parkerings and the Republic of Lithuania whilst the Agreement was entered into by two different entities, namely BP and the City of Vilnius, both of which are not parties to this arbitration. Moreover, the conduct of the Republic of Lithuania through its subdivision constituent (the Municipality of the City of Vilnius) had an impact on the investment of the Claimant. The claims were therefore in connection with the investment and fell under the Treaty; consequently, whether the Claimant should have submitted the dispute before the Lithuanian courts was not relevant at the stage of examination of the jurisdiction. The Arbitral Tribunal concluded that it has jurisdiction under Article IX of the Treaty.⁵⁴⁶

Canada conceded the relevance of the *Vivendi* ruling in the *Bilcon* case despite there being no contract between foreign investors and local authorities or governmental bodies. The Respondent agreed that it is responsible as a matter of international law for the acts of the Minister of Fisheries and Oceans, the Minister of the

⁵⁴⁴ Award, para 331.

⁵⁴⁵ *Ibid*, para 258.

⁵⁴⁶ *Ibid*, paras 265-266.

Environment or the Nova Scotia Minister of Environment and Labour when they act in their Ministerial capacities. It was also accepted that Canada is responsible for the acts of Nova Scotia as one of its constituent political subdivisions.⁵⁴⁷

To sum up, the *Vivendi* case, the *Parkerings* case and the *Bilcon* case gave indications for both parties concerned in the context of Investor-State disputes in relation to the preservation of cultural heritage. When a provincial authority of a host state terminates an international investment project or withdraws the business licence with cultural heritage grounds, an investor is still in a position to file treaty-based claims to an arbitral tribunal even if the contract contained an exclusive jurisdiction clause in favour of the host State courts. In response, the host State can file a jurisdictional objection of the tribunal, arguing that the essential basis of the claims was a breach of contract. The investor may succeed with an argument that the actions by the province/city are attributed to the host State as a matter of international law, and that those actions themselves constitute a breach of a specific bilateral investment treaty. Nonetheless, although the Annulment Committee ruled in favour for French investors in the *Vivendi* affair, investors still need to consider the risk of confusion between treaty and contract claims, and the complexities of the relationship between them.⁵⁴⁸ The determination of treaty claims requires an assessment of the conduct of the parties to the concession contract.

3.6 Disputes over expropriation and compensation for expropriation

When a host State intervenes in international investment projects such as cancel an investment project or adopts measures that delay or otherwise have an adverse impact on the cost of an investment project, the investor may claim that expropriation has taken place. Claims will usually take the form of compensation payable in such circumstances, and the questions frequently arise as to whether the amount of compensation for the loss suffered by the investor is sufficient and calculated in accordance with national and international law.⁵⁴⁹ For instance, in *Crystallex International Corporation v. Bolivarian Republic of Venezuela*,

⁵⁴⁷ Award on jurisdiction and liability, para 283.

⁵⁴⁸ Cremades & Cairns, note 408, 331.

⁵⁴⁹ Vadi, note 24, 123.

Crystallex filed a Request for Arbitration pursuant to the Canada-Venezuela Bilateral Investment Treaty, claiming \$3.4 billion plus interest for the loss of its investment in Las Cristina in relation to the cancellation of the contract.

Diplomatic protection was used in the past in expropriation claims⁵⁵⁰ when an investor's home country rendered assistance to obtain a satisfactory settlement from the host government. Arbitration now is a preferred way of dealing with compensation claims as it is given the priority in investment treaties. For instance, according to the 1992 China-Vietnam BIT,⁵⁵¹ litigation is a preferred method if an Investor-State dispute cannot be settled amicably through negotiations. Article 8 provides that either party to the dispute shall be entitled to submit the dispute to the competent court of the Contracting State accepting the investment. However, the treaty also states that 'arbitration can be used only when the dispute involving the amount of compensation for expropriation.'

This thesis will focus on investment arbitration cases relating to expropriation and compensation for expropriation in the context that the host State employs cultural heritage protection grounds to justify its intervention in investment projects.⁵⁵² The main issues in the Investor-State disputes over compensation likely are (1) whether a host state's actions constituted a lawful expropriation of the foreign investment for public purpose (preservation and protection of the antiquities in the area); (2) whether the host state was, therefore, liable to pay compensation for the value of the expropriated investment and (3) if the answer to the second question is yes, what is the quantum of compensation to be paid to the foreign investors.

⁵⁵⁰ For a discussion of diplomatic protection, see e.g. P. Muchlinski, *The diplomatic protection of foreign investors* in Binder, note 65, chapter II: Diplomatic protection for international investments and investors, 342-363; Dolzer & Schreuer, note 65, 232-234; A. Reinisch & L. Malintoppi, *Methods of dispute resolution* in Muchlinski, note 65, 712-714; S. P. Subedi, note 65, 27-29.

⁵⁵¹ The text is available at <http://investmentpolicyhub.unctad.org/Download/TreatyFile/795> (accessed on 15/03/2019).

⁵⁵² There are studies on expropriation and compensation of expropriation in international investment in general such as McLachlan, note 65, chapter 8: Expropriation and chapter 9: Compensation, Schokkaert & Heckscher, note 57, chapter XIII: Expropriation and nationalisation; Sornarajah, note 65, chapter 10: The taking of foreign property and chapter 11: Compensation for nationalisation of foreign investments, Collins, note 58, chapter 6: Guarantees against expropriation and chapter 7: Compensation; Salacuse, note 240, chapter 12: Protection against expropriation, nationalization and dispossession; Schefer, note 65, Chapter 4: Expropriation; A. Reinisch, *Expropriation* in Muchlinski, note 65; T. W. Walde and B. Sabahi, *Compensation, damages and valuation* in Muchlinski, note 65; B. Sabahi, *Compensation and restitution in Investor-State arbitration: Principles and practice* (Oxford University Press, 2011).

3.6.1 Acts amounting to compensable expropriation

3.6.1.1 Revocation or termination of government permits or licenses

Governmental permits are particularly important for business operation in mining and construction. One of the most common reasons for Investor-State disputes is the revocation of investment licenses as indicated in the previous section. Precedents exist where the arbitral tribunal ruled that revocation or non-renewal of permits by the host state government amounts to an indirect expropriation even where the investor retains full ownership and control of business assets.⁵⁵³ In *Goetz v. Burundi*,⁵⁵⁴ an ICSID tribunal had to rule on the revocation of the Minister for Industry and Commerce of the free zone certificate. Although there had been no formal taking of property, the Tribunal found that the government's actions constituted a measure having effect similar to expropriation.⁵⁵⁵ The ICSID Award in *Middle East Cement Shipping v. Egypt*⁵⁵⁶ also concerned the revocation of a free-zone license through the prohibition of the import of cement into Egyptian territory. The Tribunal concluded that the import prohibition resulted in an indirect taking of the claimant's investment.⁵⁵⁷

In the *Pyramids* case, the Respondent cancelled a tourist development project situated on its own territory for the public purpose of protecting antiquities. The Claimants did not challenge the Respondent's right to cancel the project as they agreed that the decision to cancel the project constituted a lawful exercise of the right of the host state. They contended that the cancellation amounted to expropriation of their investment for which they are entitled to compensation under both Egyptian law and international law.⁵⁵⁸ The investors maintained that they are entitled to compensation for the repudiation and taking of their contractual rights

⁵⁵³ For a discussion of this topic, see Salacuse, note 240, 305-307; Sornarajah, note 65, 400-402; K. Talus, Revocation and cancellation of concessions, operating licences, and other beneficial administrative acts in Schill, note 65, 49.

⁵⁵⁴ *Antoine Goetz et consorts v. République du Burundi*, ICSID Case No. ARB/95/3, Award, 10 February 1999, available at <http://www.italaw.com/cases/508> (accessed on 15/03/2019).

⁵⁵⁵ *Ibid*, para 124.

⁵⁵⁶ *Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/99/6, Award, 12 April 2002, available at <http://www.italaw.com/cases/699> (accessed on 15/03/2019).

⁵⁵⁷ *Ibid*, para 107.

⁵⁵⁸ Award on the merits, para 158.

and therefore sought compensation for a lawful expropriation. They characterized their claims as follows:

The claim here by SPP (ME) is not against the ARE for damages for breach of contract. It is for compensation on account of the losses occasioned to it by the ARE's exercise of its sovereign powers, which destroyed its property rights (including its contract rights).⁵⁵⁹

The Respondent argued that there was no compensable taking of the Claimants' property and based their arguments on various grounds. The Respondent contended that the cancellation of the project was neither 'nationalisation' nor 'confiscation' prohibited by Law No.43 of 1974.⁵⁶⁰ There was no transfer of the Claimants' rights or of the project to the State, and nor was there total deprivation of SPP's rights accompanied by an absence of compensation.

The Tribunal did not accept the Respondent's contentions, and decided that 'expropriation, the legitimacy of which is not being contested, if not accompanied by fair compensation, amounts to a confiscation, which is prohibited by Law No 43.'⁵⁶¹ The Tribunal determined that the cancellation of the project was compensable⁵⁶² and in the Tribunal's opinion, the Claimants are entitled to fair compensation.⁵⁶³ The *Pyramids* cases thus have shown that foreign investors may claim for compensation for expropriation if their business licenses have been withdrawn or cancelled by the host state or its governmental bodies with grounds of preserving cultural heritage sites in the mining or constructions places.

3.6.1.2 Legislative measures taken by the host state

Even though there is no direct interference with investors' physical property, changes in government regulations or the enactment of new domestic laws aimed at protecting cultural heritage can be tantamount to an indirect expropriation or a measure having the same effect as expropriation. However, the legislative measures in question are always contentious because they bring up the issue to draw the line

⁵⁵⁹ *Ibid*, paras 182-183.

⁵⁶⁰ *Ibid*, para 160.

⁵⁶¹ *Ibid*, para 163.

⁵⁶² *Ibid*, para 179.

⁵⁶³ *Ibid*, para 198.

between non-compensable regulatory measures and other governmental measures amounting to indirect, compensable expropriation. Not every change in the host State's legal system affecting foreign property will constitute an informal and compensable taking. If such change remains within the boundaries of normal adjustments which are accepted in other countries and customary in the host state, the common view is that no violation will occur.⁵⁶⁴ Sornarajah suggests that non-discriminatory measures related to anti-trust, consumer protection, securities, environmental protection, land planning are non-compensable takings since they are regarded as essential to the efficient functioning of the state.⁵⁶⁵

A host state may classify a measure as pertaining to the exercise of functions that are basically considered part of a government's powers or police powers⁵⁶⁶ to regulate the general welfare.⁵⁶⁷ When general regulations adopted by the host state are for public purposes, not discriminatory and commonly accepted as within the State's power, the Tribunal may decide that the issuance of such regulations do not constitute an expropriation. For example, the Tribunal in *SD Myers v. Canada* said that 'the general body of precedent usually does not treat regulatory action as amounting to expropriation. Regulatory conduct by public authorities is unlikely to be the subject of legitimate complaint under Article 1110 of the NAFTA, although the Tribunal does not rule out that possibility.'⁵⁶⁸ Similarly, in *Saluka v. Czech Republic*,⁵⁶⁹ the tribunal recorded the scope, conditions and effects of the police powers doctrine, stating:

It is now established in international law that States are not liable to pay compensation to a foreign investor when, in the normal exercise of their regulatory

⁵⁶⁴ Dolzer & Schreuer, note 65, 115. For an analysis of protection against expropriation in customary international law and the standards of compensations in customary international law, see Subedi, note 65, 98-105.

⁵⁶⁵ Sornarajah, note 63, 283.

⁵⁶⁶ The term 'police power' is used in the US Restatement of Foreign Relations Law and some investment tribunals have relied on this term. See OECD (2004), 'Indirect expropriation' and the 'right to regulate' in international investment law, *OECD Working Papers on International Investment*, 2004/04, 18-19.

⁵⁶⁷ Dolzer & Schreuer, note 65, 120.

⁵⁶⁸ *SD Myers v. Canada*, First Partial Award, 13 November 2000, para 281. The text is available at <http://www.italaw.com/documents/SDMeyers-1stPartialAward.pdf> (accessed on 15/03/2019).

⁵⁶⁹ *Saluka Investments B.V. v. The Czech Republic*, Partial Award, 17 March 2006. The text is available at <http://www.italaw.com/cases/documents/963> (accessed on 15/03/2019).

powers, they adopt in a non-discriminatory manner *bona fide* regulations that are aimed to the general welfare.⁵⁷⁰

In the opinion of the Tribunal, the principle that a State does not commit an expropriation and is thus not liable to pay compensation to a foreign investor when it adopts general regulations that are “commonly accepted as within the police power of States” forms part of customary international law today.⁵⁷¹

What about regulations imposed by a host State that are not for general public purposes but to protect specific fields such as environment, security, public health and cultural heritage? The case *Compañía del Desarrollo de Santa Elena v. Costa Rica*,⁵⁷² which concerned a direct expropriation, not an indirect taking, has attracted attention because the ICSID Tribunal found that the measures that were taken by the host state for the purpose of environmental protection did not affect their nature as an expropriation:

*Expropriatory environmental measures - no matter how laudable and beneficial to society as a whole-are, in this respect, similar to any other expropriatory measures that a state may take in order to implement its policies: where property is expropriated, even for environmental purposes, whether domestic or international, the state's obligation to pay compensation remains.*⁵⁷³ (Emphasis added)

The *Bilcon* case was also associated with the environmental safeguard. The Arbitral Tribunal approached the question as to whether a regulation imposed by a host state with a view to conserving cultural heritage or environment converts the state action to an expropriatory measure. However, this issue was not addressed in the Award on Jurisdiction and Liability (17 March 2015).

In the Tribunal's view in *Philip Morris v. Uruguay*, the adoption of the challenged measures by the host state was a valid exercise of the State's police powers, with the consequence of defeating the claim for expropriation under Article 5(1) of the

⁵⁷⁰ *Ibid*, para 255.

⁵⁷¹ *Ibid*, para 262.

⁵⁷² *Santa Elena v. Costa Rica*, Award, 17 February 2000, http://www.italaw.com/documents/santaelena_award.pdf (accessed on 15/03/2019).

⁵⁷³ *Ibid*, para 72. The Tribunal quoted this passage in *Azurix Corp v. The Argentina Republic*, Award, 14 July 2006, para 309. The text is available at <https://www.italaw.com/sites/default/files/case-documents/ita0061.pdf> (accessed on 15/03/2019).

BIT.⁵⁷⁴ The Tribunal decided that these measures were taken by Uruguay with a view to protect public health in fulfilment of its national and international obligations including the Uruguayan constitution.⁵⁷⁵

The Award of the Tribunal in *Philip Morris v. Uruguay* in July 2016 has significant implications in the way that the Tribunal has dealt with expropriation claims as they referred not only to recent international trade and investment treaties but also case laws. The police powers doctrine has been applied in several cases to reject claims challenging regulatory measures designed specifically to protect public interest including public health and environment. For instance, in *Chemtura v. Canada*,⁵⁷⁶ a U.S. manufacturer of lindane, an agricultural insecticide said to be harmful to human health and the environment, claimed a breach of the NAFTA by Canada's prohibition of its sale. The tribunal rejected the claim, stating:

Irrespective of the existence of a contractual deprivation, the Tribunal considers in any event that the measures challenged by the Claimant constituted a valid exercise of the Respondent's police powers. As discussed in detail in connection with Article 1105 of NAFTA, the PMRA took measures within its mandate, in a non-discriminatory manner, motivated by the increasing awareness of the dangers presented by lindane for *human health and the environment*. A measure adopted under such circumstances is *a valid exercise of the State's police powers* and, as a result, *does not constitute an expropriation*.⁵⁷⁷ (Emphasis added)

In summary, recent cases relating to the preservation of the environment and public health have not indicated a direct and definite answer to the question as to whether legislative measures taken by the host State (including amendments and enactments) result in an indirect and compensable expropriation. The above cases demonstrated that drawing the line between the concept of indirect expropriation

⁵⁷⁴ *Ibid*, para 287.

⁵⁷⁵ *Ibid*, para 306.

⁵⁷⁶ *Chemtura Corporation v. Government of Canada*, UNCITRAL, Award, August 2010. The text is available at https://www.italaw.com/sites/default/files/case-documents/ita0149_0.pdf (accessed on 15/03/2019).

⁵⁷⁷ *Ibid*, para 266.

and governmental regulatory measures not requiring compensation is not an easy task and it depends on the facts and circumstances of the case.⁵⁷⁸

3.6.2 Compensation for expropriation

The host state and foreign investors in practice are likely to have different views with respect to calculating compensation specifically the valuation approach by which to determine the compensation and also the amount of compensation. The *Pyramids* case and *Bilcon* case illustrates these two points. The part to follow focuses on disputes over the calculation method for compensation and amount of compensation for expropriation.

With regards to methods for the measure of compensation, the Claimants in the *Pyramids* case relied primarily on the discounted cash flow (DCF) method.⁵⁷⁹ The Respondent contested the applicability of the DCF method on the grounds that it leads to speculative results and takes no account of the real value of the expropriated assets.⁵⁸⁰ In the Tribunal's view, this method was not appropriated for determining the fair compensation in this case because the project was not in existence for a sufficient period of time to generate data necessary for a meaningful DCF calculation.⁵⁸¹ The DCF has often been used by arbitral tribunals in resolving Investor-State disputes. The implication of the *Pyramids* case is that the tribunal can refuse to award DCF-based compensation to enterprises lacking a proven record of profitability. Such an award does not represent any dissatisfaction with DCF methodology as a whole and is consistent with the World Bank Guidelines.⁵⁸²

Concerning the amount of compensation for expropriation, the Claimants in the *Pyramids* case had put three alternative claims for compensation. Types of claims included the value of the investment; development costs; the amount of the loan; post-cancellation cost; legal, audit and arbitration cost; interest and additional

⁵⁷⁸ For an analysis of this point, see OECD (2004), 'Indirect expropriation' and the 'right to regulate' in international investment law in *OECD Working Papers on International Investment*, 2004/04, (OECD Publishing) 3-5.

⁵⁷⁹ Award on the merits, para 184.

⁵⁸⁰ *Ibid*, para 186.

⁵⁸¹ *Ibid*, para 188.

⁵⁸² World Bank, Report to the development committee and guidelines on the treatment of foreign direct investment (1992) vol. 31 I.L.M 1366.

amounts as shall be fixed by the Tribunal to compensate for the loss of the chance or opportunity of making a commercial success of the project.⁵⁸³

In the *Bilcon* case, the Claimants claimed damages arising from the delays, suppression of evidence, and non-production of documents by Canada; and an award for all costs, disbursements and expenses incurred in the merits phase of the arbitration for legal representation and assistance, plus interest, and costs of the Tribunal.⁵⁸⁴ The Tribunal accepted Canada's position that this proceeding should be divided into a merits phase and a damages phase. The Tribunal found that the host state had established breaches of Article 1102 and 1105 of NAFTA.⁵⁸⁵ The Tribunal also extended to both Parties the opportunity, if they do not resolve the matter through a settlement, to submit evidence and argument concerning the quantum of a compensation award for loss or damage and concerning the allocation of the costs of this arbitration.⁵⁸⁶ According to the Investor's Damages Memorial dated 10 March 2017,⁵⁸⁷ the Investors reserved the right to submit additional information regarding their related costs and expenses, including all legal fees and disbursement; all other professional fees, including the fees and disbursement of expert; administrative and overhead costs, including the cost of management time; the fees and expenses of the Tribunal; and the cost of the Permanent Court of Arbitration (PCA).⁵⁸⁸ NAFTA Article 1135(1) and Article 38 to 40 of the UNITRAL Arbitration Rules grant the Tribunal broad discretion to award costs.

These two cases have shown that categories of costs claimed for compensation for expropriation likely include the value of the investment, development costs, the amount of loan, the value of opportunity lost by foreign investors, legal and arbitration costs. The issue of moral damages which has gained considerable

⁵⁸³ *Ibid*, paras 179-181.

⁵⁸⁴ Award on Jurisdiction and Liability 17 March 2015, para 109 (d), (e).

⁵⁸⁵ *Ibid*, paras 446-453 and 731.

⁵⁸⁶ *Ibid*, para 732.

⁵⁸⁷ Investor's Damages Memorial, 10 March 2017, available at <https://www.italaw.com/sites/default/files/case-documents/italaw8770.pdf> (accessed on 15/03/2019).

⁵⁸⁸ *Ibid*, para 254.

attention in international investment disputes in recent years was not mentioned by the investors of these cases.⁵⁸⁹

With reference to the *Pyramids* case, there are factors to be taken into account when determining the amount of compensation. First, some types of costs claimed may not be disputed such as the amounts of the capital contribution, the number of loans and development costs.⁵⁹⁰ The Tribunal award could exclude costs which are not adequately documented.⁵⁹¹ Secondly, even if the Claimants attempt to seek the legal costs resulting from the previous arbitration and related courts, the Tribunal will not award costs which are relevant or useful to the previous adjudicatory proceedings (including both arbitration and litigation).⁵⁹² It will be likely that the costs to be reimbursed for legal work must be relevant to the present arbitral proceedings.⁵⁹³ Thirdly, in respect of loss of commercial opportunity, significantly the Tribunal finally awarded the value of what the Claimants called ‘opportunity of making a commercial success of the project’ at the time the project was cancelled (May of 1978). The amount of such controversial costs will depend much on case-by-case situations. In the *Pyramids* case, this was the difference between the portion of the sales revenues and the Claimants’ non-reimbursable out-of-pocket expenses (which includes the value of capital contribution and development cost awarded).⁵⁹⁴ Fourthly, national law could play an important role in respect of the determination of the rate of interest. The Tribunal in the *Pyramids* case reached the conclusion that Article 42 (1) of the Washington Convention requires that interest is determined according to Egyptian law⁵⁹⁵ because there is no rule of international law that would fix the rate of interest or prescribe the limitations imposed by Egyptian law.⁵⁹⁶ The

⁵⁸⁹ For a topic of moral damages in international investment disputes, see e.g. L. Markert, E. Freiburg, Moral damages in international investment disputes – on the search for a legal basis and guiding principles in *Journal of World Investment and Trade*, 2013 Vol. 12, 1-43.

⁵⁹⁰ *Ibid*, para 257.

⁵⁹¹ *Ibid*, para 203.

⁵⁹² *Ibid*, para 208.

⁵⁹³ *Ibid*, para 211.

⁵⁹⁴ *Ibid*, para 218.

⁵⁹⁵ In this case, it is Article 226 of the Civil Code of Egypt.

⁵⁹⁶ *Ibid*, para 222.

provisions of Egyptian law which prohibit compound interest and require that the interest not exceed the principle were accepted by the Tribunal.⁵⁹⁷

Most importantly, the Tribunal's decision on the date on which interest began to run has implications for Investor-State disputes with cultural elements. The Tribunal decided to employ the principle which is usually applied in cases of expropriation and also supported by the international tribunals and national laws, namely, that the *dies a quo* is the date on which the dispossession effectively took place – in this case, May 28, 1978.⁵⁹⁸ As mentioned in the previous chapter, commentators have criticised the Tribunal's view on when the obligations of a host State to protect its cultural heritage in accordance to the 1972 World Heritage Convention become legally binding. They argued that the obligations of the Convention apply even before the formation of public identification which took place in February 1979 in the *Pyramids* case. It is worth to recall that the Head of Agreement was concluded in December of 1975⁵⁹⁹ and construction work began at the Pyramids site in July of 1977.⁶⁰⁰ Since the World Heritage Convention entered into force on the 17th December 1975,⁶⁰¹ Egypt could find itself in breach of its duty under the Convention more quickly than the 28th May 1978.⁶⁰² And if this is the case, the Tribunal could award more amount of compensation for expropriation when they decide that the date on which interest began to run was much before the date that the General Investment Authority withdrew its approval of the Pyramids Oasis Project by Resolution No. 1/51-78.

The final Award of the *Bilcon* case was made in 2019 – nearly three decades after the *Pyramids* case and it has shown the most recent approach of the Tribunal in dealing with expropriation and determining compensation for expropriation. The Tribunal determined that the Investors are entitled to compensation equivalent to the value of the opportunity to have the environmental impact of the Whites Point Project assessed in a fair and non-arbitrary manner. In doing so, they addressed the

⁵⁹⁷ *Ibid*, para 224.

⁵⁹⁸ *Ibid*, para 234.

⁵⁹⁹ *Ibid*, para 57.

⁶⁰⁰ *Ibid*, para 61.

⁶⁰¹ *Ibid*, para 153.

⁶⁰² O'Keefe, note 151, 265.

various causation and mitigation scenarios.⁶⁰³ The Tribunal also considered several indicators of value in the evidence on the record⁶⁰⁴ including amounts expended by the investors and past transactions regarding the Quarry site. The value of the opportunity lost by the Investors in respect of the Whites Point Project was decided to be US\$ 7 million. It should be noted that the investors requested an order that Canada pay the investors full reparation damages of more than US\$ 443 million, exclusive of legal fees and the arbitration costs.⁶⁰⁵ However, the Tribunal unanimously decided that only US\$ 7 million shall be paid by the Respondent as compensation for the Respondent's breaches of NAFTA established in the Tribunal's Award and that all other claims are dismissed.⁶⁰⁶

3.7 Investment arbitration - a preferred method of resolving Investor-State disputes associated with the protection of cultural heritage sites?

With the involvement of cultural heritage factors, investment arbitration mechanism appears to be the preferred method to resolve Investor-State disputes as it can bring benefits to the disputing parties as investment arbitration in general cases offer. In comparison to litigation and amicable methods of Investor-State disputes, arbitration has certain advantages. Arbitral award is final and binding upon disputing parties. In contrast to litigation, arbitration offers the parties the opportunity to select arbitrators who have the necessary expertise in the field. Foreign investors have a wide range choice of arbitration rules.⁶⁰⁷

⁶⁰³ Award on damages, January 2019, para 221. The text is available at https://www.italaw.com/sites/default/files/case-documents/italaw10377_0.pdf (accessed on 15/03/2019).

⁶⁰⁴ *Ibid*, para 280.

⁶⁰⁵ Investor's Damages Memorial, para 255.

⁶⁰⁶ *Ibid*, para 400.

⁶⁰⁷ Chapter 11 of NAFTA offers a choice to the investor of arbitration under either ICSID or the UNCITRAL Arbitration Rules (Article 1120). Another regional investment treaty, the 2009 ASEAN Comprehensive Investment Agreement states that the parties may mutually agree to arbitration under (a) ICSID; (b) UNCITRAL Arbitration Rules; (c) the Regional Centre for Arbitration at Kuala Lumpur; or (d) any other regional centre for arbitration in ASEAN (Article 33). In relation to bilateral investment treaties, for instance Article XIII (4) of the 1997 Thailand-Canada BIT provides that the dispute may, at the election of the investor concerned, be submitted to arbitration under: (a) The International Centre for the Settlement of Investment Disputes (ICSID) ..., provided that both the disputing Contracting Party and the Contracting Party of the investor are

One can argue that there appears to be a growing sense of challenges to the future of investment arbitration. Certain states have withdrawn from the ICSID.⁶⁰⁸ Bolivia, for example, has withdrawn from the ICSID Convention⁶⁰⁹ and Ecuador has followed suit, announcing its withdrawal from ICSID, denouncing the ICSID Additional Facility as well as withdrawing from a number of bilateral investment treaties (BITs).⁶¹⁰ There are also concerns about transparency, fairness, and the enforcement of arbitral awards.⁶¹¹ Investment arbitration has been criticised about conflicting decisions. For example, in respect to compensation, the question of whether an expropriation has occurred is to be determined on a case-by-case basis. Two different arbitral tribunals, after reviewing the same set of facts (albeit under two different BITs), came to opposite decisions on the expropriation claims.⁶¹²

Statistics could be a good indicator to answer to the question as to whether investment arbitration is the most appropriate means for settling Investor-State disputes in general and in the context of safeguarding cultural heritage sites in particular. With 70 investment cases initiated by investors in 2015, the number of new treaty-based Investor-State arbitration cases set a new annual high.⁶¹³ In 2016 and 2017, investors initiated at least 62 and 65 disputes with the host state pursuant to international investment agreements respectively.⁶¹⁴ By the end of 2017, the total

parties to the ICSID Convention; or (b) the Additional Facility Rules of ICSID, provided that only one of the Contracting Parties is a party to the ICSID Convention; or (c) an international arbitrator or *ad hoc* arbitration tribunal established under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL).

⁶⁰⁸ Y. Banifatemi, Mapping the future of investment arbitration as a system of law – Remarks in *American Society of International Law* – Proceedings of the 103rd Annual ASIL Meeting (2009), 323-330; R. W. Rosendahl, Political, economic and cultural obstacles to effective arbitration of foreign investment disputes in Horn, note 65; G. Kahale, Rethinking IDSD, TDM 5 (2018).

⁶⁰⁹ See e.g., Emmanuel Gaillard, ‘Bolivia’s withdrawal from ICSID’ in *Transnational Dispute Management*, September, 2007, Issue 4(5).

⁶¹⁰ See *Investment Treaty News* available at www.investmenttreatynews.org/cms/news/archive/2009/08/28/ecuador-prepares-for-life-after-icsid-while-debate-continues-over-effect-of-its-exit-from-the-centre.aspx (accessed on 15/03/2019).

⁶¹¹ See e.g., Sauvants, note 341, part III: Promoting consistency and coherence; J. Delaney; D. B. Magraw, Procedural transparency in Muchlinski, note 65; A. Kotera, Regulatory transparency in Muchlinski, note 65; A. S. Alexandroff and I. A. Laird, Compliance and enforcement in Muchlinski, note 65; C. S. Zoellner, Transparency: An analysis of an evolving fundamental principle in international economic law in *Michigan Journal of International Law* 2006 Vol. 27.2, 579–628.

⁶¹² See further McLachlan, note 65, chapter 8: Expropriation, para 8.90 and 8.119.

⁶¹³ UNCTAD, World Investment Report 2016, 118.

⁶¹⁴ UNCTAD, World Investment Report 2017, 114 and UNCTAD, World Investment Report 2018, xiii. UNCTAD’s statistics do not cover Investor–State cases that are based exclusively on

number of publicly known Investor-State claims which have been brought to an arbitral tribunal had 855 and investors had won about 60 per cent of all cases that were decided on the merits.⁶¹⁵ These facts have confirmed that foreign investors are increasingly resorting to Investor-State arbitration. There have been only a few cases relating to the preservation of cultural heritage sites as analysed in this chapter. It is worth to recall that all these disputes between foreign investors and a host state have been submitted to arbitral tribunal. The *Pyramids* case was initially brought to arbitration with the ICC in Paris and the ICSID six years later. While foreign investors in the *Parkerings* case filed a claim against Lithuania before an ICSID Arbitral Tribunal, the *Bilcon* case was brought to the Permanent Court of Arbitration with UNCITRAL Rules. Last but not least, as arbitrations can be kept confidential under certain circumstances the actual number of disputes filed for arbitration is likely to be higher than the recorded statistics.

3.8 Conclusion

Whereas Chapter 2 concerns the host state's interests in the way that it identifies the most effective type of regulations that the host state can rely on in order to protect cultural heritage, this chapter deals with interests of both a host state and foreign investors. This work identifies and evaluates the counter-arguments which investors can employ when they bring counter-claims against a host state; and which arguments can assist host states to strengthen better its positions of protecting cultural heritage.

This chapter has examined how Investor-State disputes concerning the preservation of cultural sites, mixed sites, and cultural landscapes can be resolved best by arbitration. Types of potential Investor-State disputes have been identified. The existing cases indicated that both measures taken by the host state (such as the suspension or termination of business license; changes in domestic rules after the conclusion of investment agreement and the results of assessments or reviews on

investment contracts (State contracts) or national investment laws, or cases in which a party has signalled its intention to submit a claim to ISDS but has not commenced the arbitration.

⁶¹⁵ UNCTAD, World Investment Report 2018: Investment and new industrial policies, xiii. The text is available at https://unctad.org/en/PublicationsLibrary/wir2018_en.pdf (accessed on 15/03/2018).

the impact of projects on cultural heritage) and compensation for expropriation are two central themes of Investor-State disputes. Disputes may extend to jurisdictional matters and applicable laws.

The approaches of the arbitral tribunal and the disputing parties have also been identified in this chapter. When arbitrators deal with investors' claims against a host state, it has to decide whether the host state's counter-arguments relating to the legal basis of cultural heritage preservation could be justifiable. With regard to the nature of Investor-State disputes, investors have to identify the legal grounds for their claim, either contract or treaty-based as they need to choose between treaty rights and contract rights. This issue is very crucial not only to settle the merits of disputes but also to determine whether an arbitral tribunal has jurisdiction over the case.

This chapter has also identified and evaluated the counter-arguments which investors can employ when they bring other claims against a host state. While a host state often justifies its interfere with international investment projects with rules on cultural heritage protection, foreign investors should be aware of international investment principles when challenging the host state's actions. They can lodge counter-claims based on the violation of treaty rights from the host state (e.g. national treatment or fair and equitable treatment standards), and request for compensation for expropriation. It could also be the case that foreign investors have not disputed the fact that a federal or provincial cultural assessment is required or some measures are needed to be taken in accordance with cultural heritage protection rules. The *Bilcon* case is worth to consider as foreign investors made claims focusing on the way that such procedures or measures are carried out, and they invoked the argument that the host states violated treaty obligations such as fair and equitable treatment and non-discrimination.

4. Chapter 4: Dealing with other claims relating to cultural heritage protection in the mining and construction sectors

4.1 Introduction

This chapter deals with the third research question as to how best to deal with other claims relating to the protection of cultural heritage in general and cultural sites, mixed sites, cultural landscapes and movable cultural objects in particular in the mining and constructions sectors. This chapter aims at evaluating the second hypothesis that amicable methods are believed to be appropriate in dealing with claims about cultural heritage protection, but that the cultural factors pose a challenge in regard to the use of these methods.

The first section of the chapter concentrates on claims relating to movable cultural items discovered in the course of investment projects on mining and construction and how to deal with such claims on the basis of international instruments. This section also identifies advantages and challenges in employing peaceful settlement approaches in dealing with cultural object related claims. Analysis of other claims which are about cultural heritage protection and raised by parties other than a host State will be undertaken next. Relevant cases will be examined with facts and developments. Other cases which are linked to the protection of public interest are also considered to the extent that they assist in predicting the difficulties that may arise in dealing with claims when public interest is concerned. The second section will answer the main question as to whether amicable methods are capable of managing claims initiated by parties other than the host State such as the local cultural community, non-governmental organisations and so on. Finally, the chapter examines dilemmas which each party may have to cope with in the course of decision-making. The focus will be the issue of conflicting interests of parties concerned the way that parties can balance such conflicting interests so that conflicts can be avoided escalating into serious legal disputes.

4.2 Dealing with claims relating to movable cultural objects discovered in the course of investment projects on mining and construction

International instruments on cultural properties may contain certain provisions on dispute settlement. Arbitration is mentioned by the 1995 UNIDROIT Convention as its Article 8 section 2 provide that the parties may agree to submit the dispute relating to stolen and illegal exported cultural objects to any court or other competent authority or to arbitration. Nevertheless, it appears that arbitration plays a modest role in restitution claims in practice.⁶¹⁶ In the context of international disputes, the traditional options for non-litigious dispute resolution or alternative dispute resolution (ADR) mechanisms include arbitration, negotiation,⁶¹⁷ mediation, conciliation and good offices, and inquiry.⁶¹⁸ However, in the field of cultural property related disputes, only mediation and conciliation are encouraged by the Intergovernmental Committee for Promoting the Return of Cultural Property to Its Countries of Origin or Its Restitution in Case of Illicit Appropriation.⁶¹⁹ In respect of the restitution or return of movable cultural properties, mediation indicates a procedure in which an outside party intervenes to bring them together and to assist them in reaching an amicable solution of their dispute⁶²⁰ whereas conciliation means a procedure in which a given dispute is submitted to a constituted organ for investigation and for efforts to effect an amicable settlement of it.⁶²¹

⁶¹⁶ E. Campfens, Alternative dispute resolution in restitution claims and the binding expert opinion procedure of the Dutch restitutions committee in V. Vadi, H. E. G. S. Schneider (eds), *Art, cultural heritage and the market* (Springer Link, 2014), 79.

⁶¹⁷ Negotiation as a means of resolving disputes has been addressed by international instruments such as the United Nations Charter, the Manila Declaration on the Peaceful Settlement of International Disputes, the United Nation Convention on Law of the Sea and the Dispute Settlement Understanding of the World Trade Organization (WTO).

⁶¹⁸ On methods of settlement of international disputes in general, see e.g. Collier & Vaughan, note 30, chapter 2: Methods of settlements of disputes: the basic framework; J. G. Merrills, *International Dispute Settlement* (6th edition, Cambridge University Press, 2017).

⁶¹⁹ Rules of procedure for mediation and conciliation in accordance with Article 4, Paragraph 1, of the Statutes of the Intergovernmental Committee for Promoting the Return of Cultural Property to Its Countries of Origin or Its Restitution in Case of Illicit Appropriation (UNESCO Procedures) was adopted by the UNESCO Committee in 2010. The text is available at <http://unesdoc.unesco.org/images/0019/001925/192534E.pdf> (accessed on 15/03/2019). For a detailed analysis, see S. Urbinati, Alternative dispute resolutions mechanisms in cultural property related disputes: UNESCO mediation and conciliation procedures in Vadi and Schneider, note 616, 93-116.

⁶²⁰ UNESCO Procedures, Art. 2, para. 1.

⁶²¹ UNESCO Procedures, Art. 2, para. 3.

As explained in chapter 1, in the context of international investment activities in mining and construction, claims relating the protection of movable cultural items mainly include claims relating to location, claims for restitution, and claims relating to damage to cultural objects. International conventions on preserving cultural properties have limited roles in dealing with these three types of claims. In respect of disputes relating to location, they do not cover the issue of location unless it is a consequence of illegal export. Therefore, resolution mechanisms for the foremost category of disputes relating to cultural items or artefacts discovered and removed in the course of mining and construction are omitted from international cultural instruments. In this situation, the host State may make a formal request of returning the objects to their original sites with a view to sorting out the problem quickly by employing amicable approaches. The foreign investor may decide to relocate these cultural objects voluntarily, and the dispute is to be resolved at an early stage. But if it is not the case, this is particularly problematic for a host state or indigenous groups, whose claims tend to be for repatriation rather than restitution. A host state and the local community can use neither arbitration nor litigation as international cultural instruments do not provide a legal basis for adjudicative processes. In addition, claims initiated by the local communities or indigenous groups are not covered well international conventions in respect of parties to the disputes and resolutions to the disputes because the 1970 UNESCO Convention and the 1995 UNIDROIT Convention only deals with claims brought by states or cultural properties' owners.⁶²²

Scholars have argued that alternative dispute resolution mechanisms are to be preferred to normal litigation in cultural property claims.⁶²³ Amicable approaches such as negotiation, mediation and conciliation seem to be appropriate methods in dealing with disputes relating to the protection of movable cultural items in mining

⁶²² For the topic of indigenous peoples and cultural property claims, see e.g. K. Kuprecht, *Indigenous peoples' cultural property claims: repatriation and beyond* (Springer, 2014).

⁶²³ See e.g. N. Palmer, Litigation, the best remedy? in *Resolution of cultural property disputes: papers emanating from the seventh PCH international law seminar*, note 120, 265–291; J. C. Wichard, W. B. Wendland, Mediation as an option for resolving disputes between indigenous/traditional communities and industry concerning traditional knowledge in Hoffman, note 1, 465–474; I. Barker, Thoughts of an alternative dispute resolution practitioner on an international ADR regime for repatriation of cultural property and works of art in Hoffman, note 1, 483; M. Cornu, M-A. Renold, New developments in the restitution of cultural property: Alternative means of dispute resolution in *International Journal Cultural Property*, 2010 Vol. 17, 1–31.

and construction projects.⁶²⁴ The parties concerned need to bear in mind the voluntary nature of amicable methods as they do not result in a decision that is legally binding on the parties. Negotiation as a means of dispute resolution is not specifically referred to either in international instruments on cultural heritage or in international investment treaties in terms of its nature and procedure. However, negotiation can facilitate discussions amongst different parties with a view to achieving common understanding or agreement.⁶²⁵ The definitions and nature of mediation and conciliation in the context of cultural property related disputes are in the same line with traditional understandings of these two peaceful settlement methods in international disputes.⁶²⁶

Negotiation may provide a solution to claims relating to cultural items or artefacts discovered and removed – the common type of disputes in the course of mining and construction. The case of the Venus of Cyrene is worth to mention although it did not take place in the context of international investment. This case illustrated that the reconciliation was paramount and that negotiation and cooperation between two disputing parties can facilitate ending the dispute about the restitution to Libya of archaeological objects and manuscripts.⁶²⁷ In this case, the Roman sculpture was discovered in 1913 and subsequently transported and exhibited in Rome, at the beginning of the Italian colonisation of Libya. After that Libya gained independence. The Archaeological Site of Cyrene was inscribed on the World Heritage List in 1982, and two years later Libya formally requested the restitution of the Venus of Cyrene. In 2000, both states signed the agreement on the return of the artwork, and two years later, the Italian Ministry of Cultural Heritage decided

⁶²⁴ For an analysis of methods for general cultural property disputes mainly between states, see e.g. Gazzini, note 62, chapter 2: Resolution - Methods for cultural property disputes: Existing mechanisms, 39-64.

⁶²⁵ For a general discussion of negotiation, see K. Hakapaa, *Negotiation* in Max Planck Encyclopedia of Public International Law [MPEPIL] (Oxford University Press, 2013); R. P. Barnidge, The international law of negotiation as a means of dispute settlement in *Fordham International Law Journal*, (2013) Vol.36.3, 545–574.

⁶²⁶ For a general discussion about mediation, see F. O. Vicuna, *Mediation* in Max Planck Encyclopedia of Public International Law [MPEPIL] (Oxford University Press, 2013); Rovine, note 61; J. G. Merrills, note 618, Chapter 2: Mediation, 26-42; J. Bercovitch (ed), *Resolving international conflicts: The theory and practice of mediation* (Rienner Boulder, 1996); M Kleiboer, Understanding success and failure of international mediation in *Journal of Conflict Resolution*, (1996) vol. 40, 360–389.

⁶²⁷ A. Jakubowski, World Heritage, cultural conflicts and political reconciliation in Durbach and Lixinski, note 15, 251-273, at 269.

on the de-accession of the item from public collections and authorised its transfer to Libya. Finally, in August 2008, the statue was handed over to Libya's leader. The act of return accompanied the conclusion of the Treaty on Friendship, Partnership and Cooperation.⁶²⁸

At the time of writing, disputes concerning artefacts or movable cultural items in mining and construction projects have not been reported. Given that, peaceful settlement methods are recommended by scholars, and mediation and conciliation mechanisms have been set up recently by the international organisation including the UNESCO,⁶²⁹ amicable approaches will likely be more appropriate than traditional court litigation in dealing with disputes relating to cultural objects. If amicable bilateral negotiation fails, then other alternative dispute resolution methods such as mediation and conciliation are options to achieve a settlement.

4.3 Dealing with claims raised by parties other than the host state about cultural heritage protection in international projects on mining and construction

Disputes associated with the protection of cultural heritage in the field of mining and construction can be initiated by foreign investors as analysed in the previous chapter. Besides Investor-State disputes, there are also oppositions from and claims raised by non-state actors such as local communities, indigenous groups, cultural organisations, archaeologists, activists or nongovernmental entities within the host state. While the previous section focuses on claims relating to movable cultural items, this section will discuss claims relating to the protection of cultural heritage sites. As discussed earlier, resolution mechanisms for disputes relating to movable

⁶²⁸ The case note is available at <https://plone.unige.ch/art-adp/cases-affaires/venus-of-cyrene-2013-italy-and-libya/case-note-2013-venus-of-cyrene-2013-italy-and-libya/view> (accessed on 15/03/2019). See further A. Chechi, The return of cultural objects removed in times of colonial domination and international law: The case of the Venus of Cyrene in *The Italian Yearbook of International Law*, 2008, Vol.18. The text is available at https://www.academia.edu/3426620/The_Return_of_Cultural_Objects_Removed_in_Times_of_Colonial_Domination_and_International_Law_The_Case_of_the_Venus_of_Cyrene (accessed on 15/03/2019).

⁶²⁹ For more on the role of the UNESCO in dealing with cultural property related disputes, see e.g. M. Vicien-Milburn, A. García Márquez and A. F. Papaefstratiou, UNESCO's Role in the Resolution of Disputes on the Recovery of Cultural Property in *Transnational Dispute Management* (2013) Vol.10 (5).

cultural items or those in which disputing parties are states or foreign investors could be subject to international conventions on culture or international investment agreements respectively. However, claims which have been brought by parties other than the host state and are associated with cultural heritage sites preservation do not fall within the ambit of international instruments.

While disputes between international investors and a host State can be settled before national courts or arbitral tribunals, claims or conflicts raised by local communities and other non-state actors are not likely best resolved by adjudication. Such claims are in opposition to governmental entities' decisions, or they aim to enlist the host State to take action to protect the public interest or cultural community interest. The part to follow will examine whether amicable methods such as negotiation, conciliation and mediation can be employed to deal with claims raised not by the host state itself.

4.3.1 Case analysis

There is no official central source for Investor-State disputes or concerns raised by parties other than a host State in relation to the preservation of cultural heritage. This work relies on information obtained from secondary resources, such as internet websites and online databases such as ArThemis.⁶³⁰ Due to the complication of the nature of cases and perhaps the complication of different parties involved, their relevant information has not been reported to the public. The chapter will address how concerns relating to the protection of cultural heritage sites are developed and dealt with by parties concerned.

4.3.1.1 The Parkerings case

Parkerings-Compagniet AS v. Republic of Lithuania was about an Investor-State dispute that raised the concerns of nongovernmental organisations about cultural heritage protection. In this case, from October 2000 various administrative Departments and Commissions in Lithuania (including the State Monument

⁶³⁰ ArThemis is a database containing case notes about disputes over cultural property. For more information, see <https://plone.unige.ch/art-adr> (accessed on 15/03/2019).

Protection Commission of the Republic of Lithuania, the Environmental Protection Department of Vilnius Region and Vilnius Territorial Division) were opposed to the multi-storey car parks ('MSCP') as planned by BP due to both environmental and cultural impacts of the project. Despite all the oppositions from these entities, the Municipality decided in January 2001 to permit BP to design an underground parking lot on the Gedimino Avenue section. Gedimino is one of two locations for the construction of MSCP, and the other place is Pergales MSCP. The Mayor of Vilnius City then approved the construction and confirmed that the Municipality would provide the required assistance to realize this project.⁶³¹

The State Monument Protection Commission of the Republic of Lithuania still continued to oppose the project, and in March 2001 it issued unfavourable opinions and stressed that in case the construction of underground garages in the old city of Vilnius was to be embarked upon, 'all legal acts concerning regulation of territorial planning, land relationship, heritage protection, environment protection and construction would be infringed.'⁶³²

Parkerings-Compagniet AS v. Republic of Lithuania is an interesting case for a number of reasons. It illustrated that parties other than the host State could raise concern for cultural heritage protection. The Municipality of Vilnius was faced with numerous and solid oppositions from various bodies that relied on archaeological and environmental concerns. The case also demonstrates the role which cultural and environmental protection departments or other administrative divisions could play in raising awareness of the state about preserving cultural heritage. The opposition raised against the BP projected MSCP was important and contributed to the Municipality's decision to refuse this construction project.⁶³³ Moreover, the host State can justify its decision by invoking various concerns initiated by such entities in terms of historical and archaeological preservation and environmental protection. The *Parkerings* case evidenced good practice when the host state paid due and prompt attention to the oppositions, thereby avoiding negative social impacts. The Municipality subsequently changed its mind and decided in the same month to

⁶³¹ Award on merits, para 146.

⁶³² *Ibid*, para 388.

⁶³³ *Ibid*, para 392.

develop the Pergales MSCP exclusively and abandon the project of MSCP on Gedimino Avenue. The Municipality then used the grounds of cultural heritage concerns and public opposition to instruct BP to relinquish the Gedimino MSCP in April 2001.⁶³⁴

One may argue that it is unfair for the City of Vilnius to reject the project proposed by BP because the project was situated in the Old Town whilst the Municipality authorized another company (Pinus Proprius) to build an MSCP on the same site. In this case, the Claimant did allege that the Respondent violated Article IV of the Agreement between the Government of the Republic of Lithuania and the Government of the Kingdom of Norway on the Promotion and Mutual Protection of Investments dated 16 June 1992.⁶³⁵ The Arbitral Tribunal had to decide whether this alleged discriminatory measure amounted to the Municipality wrongfully granting PP and denying BP authorisation to build an MSCP under Gedimino Avenue.⁶³⁶ The Tribunal noted that the Pinus Proprius project was also situated in the Old Town and should have likely met the same administrative requirements as BP's. The project had to be approved by, among others, the State Monument Protection Commission of the Republic of Lithuania, the Urban Development Department of the Vilnius Municipality and the Vilnius Territorial Division.⁶³⁷ Finally, in the absence of convincing evidence that Pinus Proprius benefited from a more favourable treatment in terms of administrative requirement, the Arbitral Tribunal found that the Claimant failed to demonstrate discrimination concerning the Gedimino car park.⁶³⁸

4.3.1.2 The Mapungubwe case

This case related to a legal battle to protect the Mapungubwe Cultural Landscape and its surrounding area against a plan to build a largely open-cast coal mine. The significance of the area has been recognised by South Africa, Zimbabwe and Botswana and in 2006, the three countries entered into an agreement to establish

⁶³⁴ *Ibid*, para 281.

⁶³⁵ *Ibid*, para 363.

⁶³⁶ *Ibid*, para 376.

⁶³⁷ *Ibid*, para 394.

⁶³⁸ *Ibid*, para 396.

and develop the Greater Mapungubwe Transfrontier Conservation with the Mapungubwe National Park at its core.⁶³⁹

A coalition of organisations concerned about the granting of a mining right to Limpopo Coal (Pty) Ltd by the Department of Mineral Resource. Limpopo Coal is a subsidiary of the Australian mining company Coal of Africa (CoAL), so the mining project has an international element. These civil society entities included the Association of Southern African Professional Archaeologists and environmental groupings such as the Mapungubwe Action Group, the Endangered Wildlife Trust, Peace Parks Foundation, World Wide Fund for Nature South Africa, BirdLife South Africa and the Wilderness Foundation South Africa. They were represented by the Centre for Applied Legal Studies when raising their concerns about the protection and maintenance of the environmental integrity of the area in and around Mapungubwe for current and future generations as it relates to the natural habitat, ecosystems, cultural heritage and related aspects of the environment.⁶⁴⁰

Civil organisations lodged internal appeals against both the decision to grant the mining right and the decision to approve the Environmental Management Programme. These appeals were still pending, and the applicants had not received any answers. The applicants, therefore, launched an application for an interdict in an attempt to prevent further destruction of the area while the legal disputes are pending. In August 2010 the Department of Environmental Affairs confirmed that its Environmental Management Inspectorate issued a Compliance Notice to CoAL to cease with activities that are in contravention of the National Environmental Management Act (NEMA). The Notice is related to CoAL's non-compliance with the provisions of the NEMA in having commenced with activities listed in the Environmental Impact Assessment (EIA) Regulations promulgated in terms of the NEMA without the required prior environmental authorisation.⁶⁴¹ The compliance notice instructed the company to cease all construction related activities on the

⁶³⁹ Peace Park Foundation, Mining in the Mapungubwe area cease – for now (2010), available at <http://www.peaceparks.org/news.php?pid=1097&mid=843&lid=1003> (accessed on 20/05/2018).

⁶⁴⁰ Mapungubwe: The legal battle rages on (August, 2011), available at <https://cer.org.za/news/mapungubwe-the-legal-battle-rages-on> (accessed on 15/03/2019).

⁶⁴¹ C. Sievers, Mining in the Mapungubwe area to go ahead (September, 2011), available at <http://www.archaeologysa.co.za/news/2011/September/mining-mapungubwe-area-go-ahead> (accessed on 15/03/2019).

access roads and roads falling within, and outside the legal mining right area. The mine was also not permitted to increase the current development footprint. CoAL has ceased much of its activity on the Vele site although Coal of Africa is free to object to the compliance notice and request a suspension from the Minister of Water and Environmental Affairs in relation to all or some of the instructions set out in the notice. Construction activities on the Vele site appear to have stopped.⁶⁴²

The theme of the *Mapungubwe* case was about environmental preservation; the protection of cultural heritage is just an aspect of the main concerns of the applicants. The *Mapungubwe* case illustrates the important role of environmental groups and other civic organisations in protecting cultural heritage sites. This environment-related case also represents good practice in as far as the governmental entity (the Department of Environmental Affairs) finally reconsidered the oppositions from groups which have knowledge about the safeguarding and maintenance of the environmental integrity and cultural heritage. In this case, concern about the environment and cultural heritage has been dealt with at an early stage, and there was no serious legal dispute afterwards.

4.3.1.3 The Mes Aynak case

There have been campaigns launched by Afghans, environmentalists, Buddhists, archaeologists and other supporters aiming to oppose a mining project in Mes Aynak and stop the destruction of the mining areas. Campaigns also asked the UNESCO to add the mining site to the list of World Heritage In Danger. Petition signatures were also given to former Afghan president, but the petition was ignored.⁶⁴³ Mes Aynak holds historical, cultural, environmental and spiritual significance to both rural and urban Afghans and to Buddhists across the globe.⁶⁴⁴ The *Mes Aynak* case raises a practical issue of how to balance different targets including the protection of cultural heritage, the safeguard of the environment, the

⁶⁴² Peace Park Foundation, Mining in the Mapungubwe area cease – for now, note 639.

⁶⁴³ Sacred Land Film Project, Mes Aynak (September, 2017), available at <http://sacredland.org/mes-aynak-afghanistan/> (accessed on 15/03/2019).

⁶⁴⁴ For background about the heritage site Mes Aynak and the mining project, see the White Paper published by Alliance for the restoration of cultural heritage (ARCH), December 2011. The text is available at <https://www.scribd.com/document/93786816/White-Paper-Mes-Aynak> (accessed on 15/03/2019).

safety of public health; and the economic benefits for both the host state and local people at the mid and long terms.

In November 2007, Metallurgical Corporation of China (MCC), a Chinese state-owned company concluded a 30-year lease for a \$3 billion contract with Afghanistan's Ministry of Mines and Petroleum (MMP) to develop copper and iron-ore deposits. In 2008, Afghanistan's first major mining agreement gave exploitation rights of Mes Aynak to not only MCC but also Jiangxi Copper Company Limited (known collectively as MJAM).⁶⁴⁵ An estimated \$40 billion worth of copper can be mined from this project.⁶⁴⁶ MCC forecasted that the mine could eventually produce up to 343,000 tonnes of copper a year and create tens of thousands of jobs indirectly.⁶⁴⁷ The mining project has huge potentials but also huge risks to the environment, ecology and cultural heritage. None of the involved parties has studied and assessed the environmental and cultural impacts of proposed operations in Mes Aynak.⁶⁴⁸

Archaeological work has been carried out in this cultural heritage site by the Ministry of Mine and Petroleum and progress reports have been issued up to August 2015.⁶⁴⁹ Archaeologists have had the support of the French Archaeological Mission in Afghanistan (Delegation Archeologique Francaise en Afghanistan - DAFA) for conducting 'salvage archaeology' or 'rescue archaeology' as they struggled to document the sacred site.⁶⁵⁰ Although the World Bank did not provide financial

⁶⁴⁵ M. Amin, The story behind China's long-stalled mine in Afghanistan (January, 2017), available at <https://thediplomat.com/2017/01/the-story-behind-chinas-long-stalled-mine-in-afghanistan/> (accessed on 15/03/2019).

⁶⁴⁶ Plesch, note 8.

⁶⁴⁷ F. J. Daniel, M. Harooni, Chinese demands, rebels and Buddhist ruins stall Afghan copper dreams (April, 2015), available at <https://www.reuters.com/article/us-afghanistan-china-copper/chinese-demands-rebels-and-buddhist-ruins-stall-afghan-copper-dream-idUSKBN0N304320150412> (accessed on 15/03/2019).

⁶⁴⁸ C. Benard, E. Sugarman, H. Rehm, Cultural heritage vs. Mining on the new silk road? Finding technical solutions for Mes Aynak and beyond, 13. The text is available at http://www.archinternational.org/wp-content/uploads/2016/10/ARCH-Conference-Report_Website-Version.pdf (accessed on 15/03/2019).

⁶⁴⁹ For the progress reports of archaeological rescue excavation, see <http://mom.gov.af/en/page/mes-aynak-project/mes-aynak-archaeology> (accessed on 15/03/2019).

⁶⁵⁰ <http://sacredland.org/mes-aynak-afghanistan/> (accessed on 15/03/2019). DAFA has published a two part mini-survey 'Mes Aynak, Archaeological Assessment Report, Transitory Document', DAFA Assessment 15/XI/2010, available at http://mom.gov.af/Content/files/Aynak_Archeological_Assessment-Final.pdf (accessed on 15/03/2019).

support to the Chinese investors, it was still involved in this case as it has provided technical and policy guidance, capacity building, advisory services and a combined \$92 million in grants to promote sustainable development of the minerals sectors. Significantly, the World Bank has funded a nationwide assessment of the intersection of mining and cultural antiquities in areas in which the Ministry of Information and Culture has awarded licences.⁶⁵¹ It issued a document of more than two hundred pages called ‘Report and Recommendation Afghanistan: Sustainable Development of Natural Resources Project Additional Financing and Sustainable Development of Natural Resources Project II’⁶⁵² in April 2013. Archaeologists have claimed that they have not had the chance to fully explore and analyse and repeatedly rushed to finish excavations that would otherwise take at least 30 years to complete.⁶⁵³

The case also received much attention from non-governmental bodies as a conference called ‘Cultural heritage vs. Mining on the new Silk Road? Finding technical solutions for Mes Aynak and beyond’ organized by the Alliance for the Restoration of Cultural Heritage and the Central Asia-Caucasus Institute took place in June 2012. Experienced experts in the fields of geology, mining engineering, archaeology, history and economic development as well as academic credentials, historians, development economists and political scientists gathered in the conference to find our solutions for preserving not only Afghanistan’s cultural heritage but also economic and social development.⁶⁵⁴

The Chinese companies have spent nearly \$200 million on payments to the Afghan government and on preliminary work on the site. Before the archaeological work is completed, the mining project is still at a standstill, and copper has yet to be mined from the area. Opponents to the mining activity argued that it would take an

⁶⁵¹ For more on the World Bank’s involvement in mining in Afghanistan, see <http://www.worldbank.org/en/news/feature/2013/04/02/qa-aynak-mining-afghanistan> (accessed on 15/03/2019).

⁶⁵² The text is available at <http://documents.worldbank.org/curated/en/859311467993737697/pdf/768520IPR0P1160IPN0REQUEST0RQ013001.pdf> (accessed on 15/03/2019).

⁶⁵³ B. Huffman, *The fate of Mes Aynak* (Spring, 2013), available at <https://tricycle.org/magazine/fate-mes-aynak/> (accessed on 15/03/2019)

⁶⁵⁴ Benard, note 648,13.

estimated dozen of years to excavate the entire site, and the government would not likely allow a long time for professional excavations.⁶⁵⁵

The *Mes Aynak* case gave rise to concerns relating to not only archaeological aspects but also environmental effects and the security situation. There is a real concern that mining activities could contaminate the environment including water, air and so on. Looting of Buddhist statues and multiple attacks occurred. Since the spring of 2012, in response to increased security incidents, almost all Chinese employees have been evacuated.⁶⁵⁶ Security concerns have delayed work on the project since 2007.

Since 2014, the Chinese companies attempted to renegotiate contract terms due to security concerns and the complexity and controversy of the project. Renegotiation has continued in private, and mining has been suspended for the time being pending better security and results of contract renegotiation.⁶⁵⁷ The *Mes Aynak* case has not been fully reported and resolved at the time of writing. The last updated on the media was about news from the Internet that the project is to be stopped due to corruption charges since April 2017.⁶⁵⁸

4.3.1.4 Other claims relating to the protection of public interest

Cases in which grounds of protecting environmental or human rights or public interest to interfere investment activities need to be taken into consideration. The way in which human rights or environmental preservation featured in permanent cases with the conduct of environmental impact assessment foreshadows the possibility that reliance may, in future, be placed on the protection of cultural heritage. Importantly, these cases can identify relevant issues such as potential adverse social effects when claims relating cultural heritage preservation are not dealt with promptly and adequately.

⁶⁵⁵ Plesch, note 8.

⁶⁵⁶ Benard, note 648, 18.

⁶⁵⁷ Daniel, note 647.

⁶⁵⁸ M. Amini, China's plan to mine for copper beneath an ancient city get thrown off by corruption charges (April, 2017), available at <https://www.cnbc.com/2017/04/06/mes-aynak-chinese-copper-mine-disrupted-by-corruption-charge.html> (accessed on 15/03/2019). For the issue of corruption, see section 4.4.2 of this chapter.

The *Wild Coast* conflict in South Africa constitutes an example where the environmental safeguarding and the protection of the Umgungundlovu community were concerned.⁶⁵⁹ The Australian company Mineral Commodities (MRC) requested permission to work on nearly 3,000 hectares of land. Nevertheless, anti-mining villagers and activists claimed that MRC is an exploitative international mining company set upon uprooting the community and destroying the environment. The local residents on the Wild Coast fiercely resisted mining on their land.⁶⁶⁰ The foreign-invested company argued that only a third of the area concerned would be disturbed and only about one-tenth actually mined. Government officials appeared to support the project, arguing that it is necessary for the nation's development to allow investors to exploit a key resource in order to assist South Africa and develop an impoverished region.⁶⁶¹ MRC has an obligation to undertake an environmental impact assessment (EIA) and submit an EIA report inclusive of specialist reports and an Environmental Management Plan (EMP) to the Department of Mineral Resource. Anti-mining activists have invoked "Section 24 – Environment" of the 1996 South Africa Constitution⁶⁶² about the right to a safe environment and sustainable economic development. Their lawyers averred that the MRC had not fulfilled legal requirements to obtain the consent of the community in and around Xolobeni. In March 2016 the company applied for a new permit to mine all five blocks. However, the mining right application was frozen for 18 months in June 2017 in order for the parties to reach an agreement.⁶⁶³ The Amadiba Crisis Committee had launched a court battle against the Department of Mineral

⁶⁵⁹ S. Guyot, J. Dellier (eds), *Rethinking the Wild Coast, South Africa: Eco-frontiers vs livelihoods in Pondoland*, 2009, available at <https://hal-unilim.archives-ouvertes.fr/hal-00420064/document> (accessed on 15/03/2019).

⁶⁶⁰ T. Ntongana, *Battle over mining rights in remote Eastern Cape villages* (February, 2018), available at <https://www.news24.com/SouthAfrica/News/battle-over-mining-rights-in-remote-eastern-cape-villages-20180220> (accessed on 15/03/2019).

⁶⁶¹ J. Burke, *The coastal village, the mining giant and the battle for South Africa's soul* (June, 2016), available at <https://www.theguardian.com/world/2016/jun/12/south-africa-titanium-mining-giant-xolobeni> (accessed on 15/03/2019).

⁶⁶² The text is available at <https://www.ru.ac.za/media/rhodesuniversity/content/humanresources/documents/employmentequity/Constitution%20of%20the%20Republic%20of%20South%20Africa%201.pdf> (accessed on 15/03/2019).

⁶⁶³ A. Secombe, *Wild Coast mining case crystallises need to listen to communities* (April, 2018), available at <https://www.businesslive.co.za/bd/companies/mining/2018-04-25-wild-coast-mining-case-crystallises-need-to-listen-to-communities/> (accessed on 15/03/2019).

Resources and the Australian company over mining rights in the High Court in Pretoria in April 2018.⁶⁶⁴

The possibility of lodging criminal proceedings by the local community has also been shown by a conflict concerning environmental protection in a mining project of South Africa. The Platreef mine in Limpopo was expected to bring prospect to the local economy and create direct and indirect jobs through the construction and production phases.⁶⁶⁵ Ndebele Vaaltyn Tribe alleged that Ivanplats, a Canadian company is involved in illegal mining operations and violates rules on environmental safeguarding. The residents then brought criminal charges against Ivanplants in 2014.⁶⁶⁶

The *South America Silver* case was about an internal conflict concerning the termination of a mining project in Bolivia on the human rights basis. In this case, the Bolivian government initially supported the Malku Khota Mining project.⁶⁶⁷ However, indigenous people marched to express their opposition to the project. The uncontrollable conflict resulted in a declaration by the United Nations Higher Commissioner for Human Rights in Bolivia. The Bolivian Government did not have any other option but to declare the reversion to re-establish the public order.⁶⁶⁸

Another conflict relating to mining activities of the Harwar Colliery Project in South Africa needs to be highlighted through it was an internal conflict.⁶⁶⁹ From

⁶⁶⁴ J. Chabalala, Court hears Xolobeni community is in dark about Australian mining company's plans (April, 2018), available at <https://www.news24.com/SouthAfrica/News/court-hears-xolobeni-community-is-in-dark-about-australian-mining-companys-plans-20180423> (accessed on 15/03/2019).

⁶⁶⁵ For more on the Platreef Project, see <https://www.ivanhoemines.com/projects/platreef-project/> (accessed on 15/03/2019).

⁶⁶⁶ S. Liedtke, AfriForum's prosecution unit considers possible legal action against Ivanplants (May, 2018), available at http://www.miningweekly.com/article/afriforums-prosecution-unit-considers-possible-legal-action-against-ivanplats-2018-05-08/rep_id:3650 (accessed on 15/03/2019).

⁶⁶⁷ The Claimant's Statement of Claim and Memorial, paras 51-53, available at <http://www.italaw.com/sites/default/files/case-documents/italaw4041.pdf> (accessed on 15/03/2019).

⁶⁶⁸ The Respondent's Counter-Memorial, para 84, available at http://www.italaw.com/sites/default/files/case-documents/italaw4262_0.pdf (accessed on 15/03/2019).

⁶⁶⁹ F. Flus, Complete and utter chaos at Chrissiesmeer, South Africa (April, 2013), available at <http://www.ejolt.org/2013/04/complete-and-utter-chaos-at-chrissiesmeer-south-africa> (accessed on 15/03/2019).

March 2013, Msobo Coal proceeded with plans to build a new coal mine in the environmentally fragile Chrissiesmeer area - a site of significant beauty and biodiversity. The planned Harwar Colliery is an opencast mine which can produce 1Mt of coal per year for 15 to 20 years.⁶⁷⁰ Local farmers, businessmen and various NGOs and represented government departments have lodged strong objections to the planned mine. Msobo Coal commissioned Digby Wells Environmental to conduct environmental and social studies in support of a mining right application in accordance with the 2002 Mineral and Petroleum Resources Development Act. An Environmental Impact Assessment (EIA) and Environmental Management Plan (EMP) must be compiled and submitted to the Department of Mineral Resources. The Heritage Impact Assessment Report which is a component of the EIA was publicised on 28 June 2013.⁶⁷¹ However, the Environmental Impact Assessment and Environmental Management Plan have not been reported to the public yet. New progress of this project has not updated in the media since December 2013 either.⁶⁷²

The *Kakadu* case serves as another example of internal conflict which was related to the opposition to a domestic mining project and the protection of both environment and cultural heritage.⁶⁷³ The explosion of three uranium enclaves inside the Kakadu National Park was approved at the beginning of the 1970s. The first mining activity was undertaken in 1981 by an Australian company with the consent of the local indigenous community – the Mirrar people. The Aboriginal landowners after that did not agree on any project in the Jabiluka area to proceed at all. However, in October 1997, the Australian Government had approved the Jabiluka uranium mining project No.2 in the Northern Territory. The two decades following witnessed a controversy concerning the effects of the exploitation of the said uranium enclaves on Aboriginal sacred sites. The investor, the Australian government, UNESCO, local Aboriginal people, and a number of international

⁶⁷⁰ Mining upset in the lake district (October, 2013), available at <https://www.pressreader.com/south-africa/financial-mail/20131011/281565173479973> (accessed on 15/03/2019).

⁶⁷¹ Heritage impact assessment for the proposed Harwar Colliery, available at <http://www.sahra.org.za/sahris/heritage-reports/heritage-impact-assessment-proposed-harwar-colliery> (accessed on 15/03/2019).

⁶⁷² C. Matthew, New coal mine for Chrissiesmeer (November, 2013), available at <http://thegreentimes.co.za/new-coal-mine-for-chrissiesmeer/> (accessed on 20/05/2018).

⁶⁷³ For more information about Jabiluka Uranium Mining Project (Northern Territory, Australia), see <http://www.wise-uranium.org/upjab.html> (accessed on 15/03/2019).

nongovernmental organizations (NGOs) got involved.⁶⁷⁴ Indigenous groups organized a blockade against the Jabiluka project from March to October 1998. In May 1998, construction of the mining project had been put on hold. A Federal Court judge had ordered the Territory's Minister for Mines and Energy not to approve the project as he found the Minister did not have enough information before making his decision to approve its construction. A month later, the Northern Territory Government had given final approval for the construction of a uranium mine and the mining activity started then though a decision on the mill location and an environmental assessment of the Jabiluka Mill Alternative are pending still. It should be noted that the proposal to add Kakadu National Park to the World Heritage In Danger List was strongly objected to by Australia, which engaged in a significant lobbying campaign to prevent the listing.⁶⁷⁵ The United Nations' World Heritage Bureau has set up an inspection team to visit Jabiluka. A report has concluded that the mine should not go ahead as the Jabiluka uranium mine has been threatening the cultural and environmental values of Kakadu National Park.⁶⁷⁶ The UN World Heritage Committee called for a halt to construction work at the Jabiluka mine site.⁶⁷⁷ However, mine constructions had continued with the support of the Australian government.⁶⁷⁸ Finally, in August 2003, mining companies agreed not to mine in the World Heritage cultural site because any development cannot proceed without the consent of the Northern Land Council and the area's traditional owners.⁶⁷⁹ The *Kakadu* case demonstrates the situation in which the host state-supported investment activities while the local community and indigenous people opposed and the World Heritage Committee advised that all mine construction must stop immediately.

⁶⁷⁴ Lenzerini, note 58, 547.

⁶⁷⁵ G. Aplin, *Kakadu National Park World Heritage site: Deconstructing the debate, 1997-2003*, in *Australia Geographical Studies*, Vol 42 (2004), 160-170 cited by Litton, note 136, 220.

⁶⁷⁶ See *Report on the mission to Kakadu National Park, Australia, 26 October to 1 November 1998* UNESCO Doc WHC-98/CONF.203/ INF.18 of 29 November 1998, available at <http://www.wise-uranium.org/upjabw1.html> (accessed on 15/03/2019).

⁶⁷⁷ The role of the World Heritage Committee has been discussed earlier in Chapter 2, section 2.2.1.1.3.

⁶⁷⁸ *Kakadu – World Heritage in danger* (updated July 2015), available at <https://www.wilderness.org.au/articles/kakadu-world-heritage-danger> (accessed on 01/05/2018).

⁶⁷⁹ *Jabiluka Uranium Mining Project (Northern Territory, Australia)* (March, 2012), available at <http://www.wise-uranium.org/upjab.html> (accessed on 15/03/2019).

In case of construction work in Gaza, disputes between archaeologists and housing planners are common after Israeli bombing and artillery fire left tens of thousands homeless in 2014. Nevertheless, it was Gaza's citizens who raised the alarm about the destruction of the site. The local community posted on social media in order to draw the attention of the Gaza archaeology authority. After a lot of effort by archaeologists, academics and those concerned with Gaza's heritage, the authorities behind the housing program agreed to halt the construction.⁶⁸⁰

In short, concerns about cultural heritage preservation might be raised by anti-mining groups, archaeologists, activists, the local communities, indigenous people, administrative entities of the host state and nongovernmental organizations. The authorities such as the council, the Cultural Heritage Commission or the Environmental Division may ignore these concerns and not employ the grounds of safeguarding cultural heritage or the environment or human rights in order to have any interference in international investment activities.

4.3.2 Amicable approaches – an ideal way of dealing with claims raised by parties other than the host state about cultural heritage protection?

Concerns and claims about the preservation of cultural heritage need to be dealt with promptly and accurately in order to avoid adverse social outcomes and prevent such claims from escalating into serious legal disputes. Claims raised by the local community, archaeologists, activists and other non-state actors may impact the decision of the host State to allow the continuation of international investment activities in its territory.

While international investment agreements only focus on how to settle disputes brought by foreign investors against a host State, international conventions on a cultural property only cover resolution mechanisms in specific situations for disputes relating to movable cultural items. Methods of settling claims which are initiated by non-state actors and not related to movable cultural objects are omitted from international instruments. Peaceful dispute settlement methods including

⁶⁸⁰ French Press Agency, note 18.

negotiation and mediation might be appropriate choices for parties concerned in the context of claims raised by parties other than the host state with a view to preventing conflicts or disagreements from escalating into serious legal disputes.⁶⁸¹ The disputants can start to sort out their conflicts with negotiation – negotiation could facilitate parties concerned in explaining and discussing their positions to settle issues of common interests. Mere negotiation may not bind parties to any particular result but may produce results that the parties are willing to implement with binding legal effect. Mediation with the participation of a third party (‘the mediator’) can help the disputants reach an agreement to a solution. In case of claims relating to cultural heritage preservation, relevant cultural entities such as the World Heritage Committee and an association of archaeologists may take a role as mediators.

Amicable means can offer certain advantages in the context of resolving claims raised by parties other than the host State as they do in the context of Investor-State disputes or international disputes. Peaceful settlement methods are based on the negotiation of mutually acceptable solutions by the parties themselves. Agreements secured by negotiation can be self-executing, and enforcement problems do not arise, however, this point has still much controversy because of the non-binding nature of amicable settlement methods. Moreover, successful amicable approaches such as negotiation or mediation can lead to win-win settlements where none of the parties to the dispute ends up being a loser. Last but not least, one of the most apparent advantages of amicable means over litigation or arbitration is that they could be time-saving and money-saving for the parties concerned.⁶⁸² With the diplomatic nature of amicable methods, peaceful settlement methods have drawbacks. The agreements reached by the disputing parties in negotiation and the suggestions and proposals of the mediator are not binding on the parties. However, these proposals can have considerable influence on the position of the parties and facilitate compromise solutions acceptable to all. Amicable methods will not always attain a thriving settlement and might drag on for a long time. For instance, in the

⁶⁸¹ There are studies on the use of alternative dispute resolution including negotiation, mediation and conciliation for cultural property disputes which do not have neither foreign investment elements nor the involvement of non-state actors. See e.g. Gazzini, note 62, 59-64.

⁶⁸² Echanti, note 30, 276-277.

Wild Coast case, the application for mining permission by investors was put on hold for one and a half years so that parties can carry out negotiation and finally no agreement has been reached. Nevertheless, it is still worth to use negotiation or mediation a view to dealing with any disagreements before the disputants can resort to other dispute settlement methods.

Recent cases associated with the protection of cultural heritage sites or the safeguard of the local community's rights have indicated that amicable methods especially negotiation have been used in different stages. For instance, in the *Mes Aynak* case, negotiations in relation to the mining contract terms are still ongoing since 2014. Such negotiation took place in private, and the mining activities have been suspended.

4.4 Difficulties in dealing with claims about cultural heritage protection

Cases have indicated that dealing with the issue of balancing competing interests of various involved parties is the key to manage cultural heritage concerns. Consequently, amicable methods such as negotiation or mediation seem uneasy to be applied in practice. The part that follows will illustrate difficulties in managing claims raised by parties other than the host state about the protection of cultural heritage.

4.4.1 The issue of balancing conflicting interests of parties concerned

An appropriate approach to resolving claims initiated by parties other than a host State is to rely on the reconciliation of the different interests of the parties involved in the conflict, what is known as 'interest-based resolution'.⁶⁸³ Host States, foreign investors, cultural communities, archaeologists, scholars, activists and nongovernmental organizations all have an interest in the outcome of international

⁶⁸³ According to the approach used by the parties in attempting to resolve their disputes, dispute resolution theory classifies three broad categories. The parties involved may attempt to settle their disagreement by (i) determining who is more powerful - 'power-based resolution;' (ii) determining who is right - 'right-based resolution;' (iii) reconciling their interests - 'interest-based resolution.' See further W. Ury, J. Brett and S. Goldberg, *Getting disputes resolved: designing system to cut the costs of conflict*, The Program on Negotiation at Harvard Law School (Cambridge, MA: Harvard, 1993); S. Smith and J. Martinze, *An analytic framework for dispute systems design in Harvard Negotiation Law Review* 14 (2009), 123-169; Echandi, note 30, 273-275.

investment projects, the way that cultural heritage is preserved and the manner that conflicts are managed. While the interests of the home state, the host state, and foreign multinational corporations have been analysed and much is known about how they may clash in practice,⁶⁸⁴ the interests of other parties concerned in international investment projects such as the local community have not been studied much.⁶⁸⁵ Parties concerned can cite concern over different aspects such as legal compliance, investment promotion, economic benefits, and the cultural and social effects of investment projects. In the event that any potential threats to cultural heritage have not been raised by a host state; local cultural communities, archaeology associations, and nongovernmental organizations can make a claim to express their concern. The motivation for their actions likely comes from cultural benefits and social impacts. Their interest is to ensure that the cultural heritage in question should be protected in accordance with the law.

This part will address the possible dilemmas which each party has to cope with in the course of decision-making to ensure that concern associated with cultural heritage protection are managed in the best interest of all parties concerned.

4.4.1.1 Host states and the need to strike a balance amongst legal compliance, economic benefits and social impacts

Measures taken by a host State such as the termination of a business license can be carried out if the host State agrees with the opposition to an international investment project expressed by local communities or NGOs. The host State should consider first tensions between the protection of cultural heritage as compulsory by law and economic benefits from foreign investment⁶⁸⁶ to decide whether it should take such measures. The preamble of the UNESCO Recommendation concerning the Preservation of Cultural Property Endangered by Public or Private works⁶⁸⁷ states

⁶⁸⁴ For example, M. Sornarajah, note 63, 17-18.

⁶⁸⁵ The issue of balancing disputing parties' interest in Investor-State disputes have been discussed recently, see P. Bernardini, Reforming Investor-State disputes settlement: The need to balance both parties' interests in *ICSID Review - Foreign Investment Law Journal*, 2017 Vol. 32, Issue 1, 38-57.

⁶⁸⁶ For an analysis of conflicting economic theories on foreign investment, see M. Sornarajah, note 65, 47-59.

⁶⁸⁷ Recommendation concerning the Preservation of Cultural Property Endangered by Public or Private works, 19 November 1968, available at http://portal.unesco.org/en/ev.php-URL_ID=13085&URL_DO=DO_TOPIC&URL_SECTION=201.html (accessed on 15/03/2019).

that it is the duty of governments to ensure the protection and the preservation of the cultural heritage of mankind as much as to promote economic development.

Mining and construction projects are usually high in value and therefore can bring a significant amount of capital to a host State. For example, a US\$3 billion contract for a copper mine in Mes Aynak was the first major mining deal for Afghanistan and the most substantial foreign investment in the country at the time. There are high hopes that the project will soon become a major source of revenue for the Government of Afghanistan.⁶⁸⁸ However, economic benefits from international investment activities should be considered both in the short and the long term to determine whether the site concerned requires protection or professional excavation. Mining may appear to be a long-term endeavour, but, in fact, it is an activity with a limited lifespan. When the minerals have been removed from the ground, the mine might close even after a brief period of time. Income from mining may last for several decades, but this cannot make up for the permanent loss of invaluable cultural heritage. Cultural sites will have no economic value and destruction, and the impact of the loss of cultural riches lasts forever.⁶⁸⁹ Mine sites that have served their purpose will be of no economic value afterwards.

Is it more important to grow an economy or should the preservation of cultural heritage and the availability of healthy ecosystems take priority? The conference on the situation of Mes Aynak in 2012 was conducted with a view to developing strategies to ensure real economic benefits to the Afghan people, safeguard their environment and health, consider livelihoods during and after the mining and preserve the cultural treasures. Gruber argues that state development priorities have meant that heritage is perceived and justified as an economic resource benefitting the state, rather than a right vested in communities and a facilitator of social cohesion in developing countries.⁶⁹⁰ Considerations between economic benefits and legal compliance will determine whether a host State will use its right to intervene in an investment project that poses a danger to cultural heritage.

⁶⁸⁸ Benard, note 648, 11.

⁶⁸⁹ L. O'Donnel, China digging into Afghanistan's treasure trove (March, 2013), available at <http://www.scmp.com/news/world/article/1190941/china-digging-afghanistans-treasure-trove> (accessed on 15/03/2019)

⁶⁹⁰ A. Durbach and L. Lixinski, Introduction in Durbach and Lixinski, note 15, 1-8 at 5.

The issue of balancing economic benefits and social impacts also draws much attention when concerns about preserving cultural heritage have been raised in the context of international investment. The host state may wish to prevent a conflict from escalating into a legal dispute or from taking a turn for the worse by mitigating any risk of violence to local inhabitants. This part to follow will analyse several conflicts brewing at present which pose social challenges for developing countries and how negative social impacts could happen in relation to concerns about cultural heritage protection.

Internal conflicts or concerns raised by parties other than the host State have also demonstrated how negative social impacts can occur in mining projects such as violence or a fearful atmosphere for the local communities. In the case of the *Harwar Colliery Project*, Msobo Coal held a public meeting in March 2013 to discuss their intention to mine inside the Chrissiesmeer site. Local residents in the Chrissiesmeer area gained entry to the meeting and disrupted it with shouting and chants. They complained that the meeting was reserved for white people and that the local community is not considered. Threats of litigation and criminal proceedings were made to discourage Msobo from proceeding with the mining.⁶⁹¹ In the *Wild Coast* conflict, there were repeated violence and intimidation in the village of Mdatya in late December 2015. Armed men parked their car away from the village, turned off the lights, and came looking for Cynthia Balen who was acting as the mouthpiece for anti-mining resolutions of five coastal villages most affected by the Xolobeni Mineral Sands Project. Three villagers were ambushed by men wielding knobkerries and bush knives some days later. The victims were allegedly leading anti-mining activists, and two of them suffered serious injuries. Then an armed group went from house to house banging on doors, calling for named individuals and firing guns. Anti-mining activists claimed that two of the most prominent local mining advocates appeared at the police station an hour after the arrests in a bid to bail out the suspects.⁶⁹² Four men are facing trial for a violent assault on a woman who had criticized the mining project. Two journalists were recently attacked and one beaten when they tried to report on an anti-mine

⁶⁹¹ Flus, note 669.

⁶⁹² T. Washinyira, *Wild Coast battle to save land from mining* (February, 2016), available at <https://www.groundup.org.za/article/imbizo-xolobeni/> (accessed on 15/03/2019).

demonstration.⁶⁹³ In the *South America Silver* case, by early June 2012, more than 4000 indigenous people marched towards La Paz to express their opposition to the project. They tried to overtake the Vice-presidency office and warned they would not leave until the Mining Concessions were revoked. There were many indigenous people wounded, and a resident from the Mallku Khota community died.⁶⁹⁴

Disputes in which local residents oppose foreign investment on grounds other than the preservation of cultural heritage such as environmental protection or human rights have shown a picture of negative impacts on society. For instance, the *Wild Coast* conflict has been dragged on for at least ten years. The ups and downs of the permit process have seen not only outbreaks of violence but also deaths.⁶⁹⁵

The issue of preserving cultural heritage has been raised not only in developing countries that often depend on certain building projects and lack alternative solutions but also in developed countries if economic interests or other interests stand in direct competition with the preservation of heritage sites. The situation in the Cathedral of Cologne in Germany which was inscribed on the World Heritage List in 1996 on the basis of cultural criteria illustrated this point. The World Heritage Committee considered the Cathedral of Cologne an ‘exceptional work of human creative genius’ and a ‘powerful testimony to the strength and persistence of Christian belief in medieval and modern Europe.’⁶⁹⁶ The Committee suggested ‘that protective legislation should be set up which would ensure that new constructions around the property would be in conformity with the architectural significance of the Cathedral.’⁶⁹⁷ Despite this suggestion, the City of Cologne decided to pass new building plans that included high-rise building projects on the bank of the Rhine River opposite the Cathedral. This would have had a significant impact on the visual integrity of the Cathedral as a landmark. After the German authorities failed

⁶⁹³ M. A. Gontsana, Court case exposes violence in Wild Coast mining dispute (January, 2016), available at <https://thisisafrica.me/court-case-exposes-violence-wild-coast-mining-dispute/> (accessed on 15/03/2019).

⁶⁹⁴ The Respondent’s Counter-Memorial, para 84.

⁶⁹⁵ T. Washinyira, We will die for our land, say angry Xoxobeni villagers as dune mining looms (February, 2016), available at <https://mg.co.za/article/2016-02-12-we-will-die-for-our-land-say-angry-xolobeni-villagers-as-dune-mining-looms-1> (accessed on 15/03/2019).

⁶⁹⁶ <https://whc.unesco.org/en/list/292> (accessed on 15/03/2019).

⁶⁹⁷ Cologne Cathedral, UNESCO World Heritage Centre, available at <https://whc.unesco.org/uploads/nominations/292bis.pdf> (accessed on 15/03/2019).

to provide sufficient information regarding the building projects in question, the World Heritage Committee decided to inscribe the Cathedral of Cologne on the World Heritage in Danger List in 2004. While it was removed from this list in 2006, it is nevertheless alarming to see how the City of Cologne struggled with preserving the visual integrity of its World Heritage Site during the course of this conflict.⁶⁹⁸

Last but not least, all involved parties have a stake in choosing the best manner to deal with cultural concerns raised by non-state actors. Legal disputes can be avoided if conflicts are managed at an early stage. However, when the issue of conflicting interests is not dealt with thoroughly, such conflicts could be sorted temporally, and they would arise again in the future, possibly with the higher level of tenseness. In case of ancient heritage in Gaza, archaeologists and preservation activists in the Gaza Strip have managed to halt the destruction of a Bronze Age site for now, but the future of what remains may still be in jeopardy. The activists are unsure how long the reprieve will last in a strip of land that has already seen its archaeological riches devastated by three wars with Israel, Palestinian infighting, overcrowding and indifference.⁶⁹⁹

4.4.1.2 Foreign investors and the need to strike a balance between legal compliance and economic benefits

Foreign investors might encounter the tension between compliance with the law on cultural heritage protection and their own economic interest. Since mining or construction projects are likely invested with a large amount of capital, foreign investors might suffer huge economic losses if their projects are cancelled, even in cases where they could successfully claim compensation for expropriation. Foreign investors have economic concerns over the cost of the termination of the projects and how much they can get paid for compensation. Such economic considerations will affect how they react to claims about cultural heritage preservation initiated by parties other than the State.

⁶⁹⁸ Gruber, note 2, 265.

⁶⁹⁹ French Press Agency, note 18.

Foreign investors understand how much of profit can be made from investing in the mining and construction sectors, and they might be advised about the regulations on cultural heritage protection on the other hand. If they adhere strictly to regulations on cultural heritage, they might have to spend more time and money on carrying out a Cultural Impact Assessment or an archaeological report in order to identify whether such a project can have negative cultural impacts on a site. Moreover, when the local community opposes investment activities or a host state withdraws the business license, it becomes difficult to answer a question as to whether foreign investors will not challenge that decision because they have recognised the importance of the protection of cultural heritage and then voluntarily cease their investment projects.

4.4.2 Other difficulties

The difficulties in applying amicable methods to manage claims relating to cultural heritage protection raised by local communities or non-state actors also come from the private-public nature of such claims.⁷⁰⁰ Parties other than the host State in the recent cases obviously represent for private forces. Local communities, cultural organizations, archaeologists, activists and other nongovernmental organizations can initiate proceedings against foreign-invested companies or a governmental agency. However, such private parties in the above-mentioned cases did not bring their claims to be resolved by litigation or arbitration. The actions of these parties are deemed to send requests to the host State for taking effective measures in order to protect cultural heritage in its territory.

The fact that the State needs to be involved in managing claims raised by local communities or non-state actors generate certain difficulties. First, governments are complex organizations and authority is allocated among different agencies. It is not easy for governmental officials to undertake the risk and effort of negotiating a

⁷⁰⁰ M. Clodfelter, Why aren't more Investor-State treaty disputes settled amicably? in UNCTAD (2011), *Investor-State disputes: Prevention and alternatives to arbitration II, proceedings of the Washington and Lee University and UNCTAD joint symposium on international investment and alternative dispute resolution*, held on 29 March 2010 in Lexington, Virginia, USA (New York and Geneva: United Nations), United Nations, UNCTAD/WEB/DIAE/IA/2010/8 cited by Echandi, note 30, 282-283.

settlement that may be not respected or maybe later challenged by another governmental agency. For example, in the *Mapungubwe* case, the local authority of the area where the cultural landscape is situated may require Limpopo Coal to undertake cultural impact assessment before it can be granted a mining right. Nevertheless, it could be the scenario that the local authority's decision will be challenged by the Department of Mineral Resources as they can insist that cultural impact assessment is not required under the current domestic law of South Africa.

An additional difficulty in dealing with claims taken by parties other than a host State comes from concern over transparency and corruption. The *Mes Aynak* case illustrates the transparency issue. The final contract was not released publicly until 2015, seven years after the contract's conclusion, and the agreement has not been translated into Pashto or Dari - the language of the people in Aynak. Global Witness, a non-governmental organization, published an analysis of the mining contract between the two Chinese companies and the Afghan Ministry of Mines.⁷⁰¹ In this publication, many serious concerns have been raised in relation to 'the lack of transparency, vague contract structure, inadequate community reparations, flaws in economic provisions, danger to security forces, environmental hazards and the destruction of an invaluable cultural heritage site.'⁷⁰²

Corruption can be defined as 'the abuse of entrusted power for private gain.' Corruption includes not only the abuse of power of government officials but also other private misuses of power for illegitimate gain or benefits.⁷⁰³ International instruments differentiate between so-called 'hard corruption' to public officials⁷⁰⁴

⁷⁰¹ For further information about the Aynak contract, see Global Witness Report, *Copper bottomed? Bolstering the Aynak contract: Afghanistan's first major mining deal*, November 2012, available at www.globalwitness.org/copper_bottomed/index.html (accessed on 15/03/2019).

⁷⁰² <http://blog.sacredland.org/mes-aynak-site-afghanistan-faces-destruction-copper-mine> (accessed on 15/03/2019).

⁷⁰³ Transparency International UK (TI UK), 'Corruption in the UK: Overview and policy recommendation' (March 2012) 1, available at <http://www.transparency.org.uk/publications/corruption-in-the-uk-overview-policy-recommendations-2/> (accessed on 15/03/2019).

⁷⁰⁴ See Article 1.1 of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, November 21, 1997, available at <http://www.oecd.org/corruption/oecdantibriberyconvention.htm> (accessed on 15/03/2019).

and ‘influence peddling.’⁷⁰⁵ Corruption may occur in administrative decision-making in the context of international investment law⁷⁰⁶ and manifest in decisions that are justified exclusively with reference to economic benefits, ignoring concerns about the protection of cultural heritage. In the *Mes Aynak* case, there were allegations that one of the two Chinese investors - MCC paid huge kickbacks to a previous minister to secure the contract but they have not been verified.⁷⁰⁷ There was also an allegation about the corruption of Ministry of Mines.⁷⁰⁸ In the *Wild Coast* case, both sides accused the other of selling out. The activists accused prominent members of the community who support the mining project of accepting gifts and favours from MRC, while their opponents claimed that the anti-mine activists are ‘being paid to be opposition’ by NGOs.⁷⁰⁹

4.5 Conclusion

This chapter has addressed cultural object related disputes and concerns about cultural heritage protection brought by parties other than the host state such as local communities, cultural organizations, archaeologists, activists or nongovernmental entities within the host state. Such disputes and concerns undoubtedly have occurred in the context of international investment projects on mining and construction. They are needed to be managed in a proper manner with a view to avoiding adverse social outcomes. Amicable methods such as negotiation and mediation are believed to be effective in dealing with these two types of disputes claims cultural heritage protection. Nevertheless, the issue of conflicting interests amongst parties concerned poses difficulties in regard to the use of peaceful settlement methods. Negotiation or mediation at the end of the day maybe not ideal

⁷⁰⁵ See Article 12, Criminal Law Convention, Council of Europe, January 27, 1999, available at <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/173> (accessed on 15/03/2019). See further Horn, note 65, The notion of corruption, 471-473; Kulick, note 57, Chapter 8: Corruption and other irregularities.

⁷⁰⁶ See further A. Blundell-Wignall, C. Roulet, (2017), Foreign direct investment, corruption and the OECD Anti-Bribery Convention, OECD Working Papers on International Investment, No. 2017/01, OECD Publishing, Paris.

⁷⁰⁷ See e.g J. Partlow, Afgan minister accused of taking bribe (November, 2009), available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/11/17/AR2009111704198.html> (accessed on 01/05/2018); J. Partlow, Afgan minister denied he pocketed \$32m (November, 2009), available at <https://www.smh.com.au/world/afghan-minister-denies-he-pocketed-32m-20091118-imm0.html> (accessed on 15/03/2019); Huffman, note 653.

⁷⁰⁸ O’Donnel, note 689.

⁷⁰⁹ Burke, note 661.

in practice but parties should make a try with these means rather than using adjudicatory methods. There are certain dilemmas which each party has to cope with in the course of decision-making to ensure that claims associated with cultural heritage protection are managed in the best interest of all parties concerned.

5. Chapter 5: Conclusion

5.1 Key findings

The PhD thesis has examined two main issues (i) regulations on cultural heritage protection in the context of international investment projects on mining and construction, and (ii) how Investor-State disputes and other claims which are associated with the protection of cultural heritage can be resolved and dealt with best. The crucial questions are whether the current regulations are sufficient and what should be done in order improve the legal framework for the adequate protection of cultural heritage sites and movable cultural objects. Investor-State disputes and other claims were analysed in order to determine what the preferred dispute resolution mechanism is and to provide recommendations for parties concerned. This chapter summarises the analysis undertaken as a whole and sets out the key findings.

Regulations on preserving cultural heritage in international investment projects on mining and construction originate at an international and national level and are unsurprisingly fragmented. Parties who have an interest in the protection of cultural heritage sites, cultural landscapes and movable cultural items need to consider the regulations from various sources such as the laws on cultural heritage, investment law, human rights, regulations on archaeological excavation, and regulations on mining and construction.

Laws on cultural heritage at an international level seem to be inadequate insofar as they do not contain specific minimum measures to be taken for the protection of cultural heritage. The 1972 World Heritage Convention and its Operational Guidelines are unlikely an effective tool due to the lack of specific regulations on protecting cultural heritage sites. It is not clear how to determine what measures are required to be taken, or when a State Party has fulfilled its duty to protect cultural heritage. In the context of Investor- State disputes, the host state can argue that its measures taken would be mandatory under the 1972 World Heritage Convention as the Tribunal in the *Pyramids* case illustrated this view. Regarding claims raised by

parties other than the host state, non-state actors can assert that they have a duty to protect cultural heritage sites and raise their concerns if investment projects are backed by the government or its local authorities. The 1970 UNESCO Convention and the 1995 UNIDROIT Convention also provide a legal basis for a host State or original owners of cultural properties (e.g. indigenous people or local communities) to make a request for stolen and illegal excavated movable cultural objects to be returned to the state of origin or the owners. These two conventions are important to source countries that are vulnerable to looting and the illicit trade, but the effectiveness of these two conventions has been affected by the fact that there are limited state members to the conventions.

The implementation of international law is generally more or less left to the discretion of the respective State Parties. The effectiveness of protecting cultural heritage ultimately needs detailed and sufficient regulations of each nation. Municipal laws on heritage can regulate the protection of cultural heritage but different countries have varying levels of details and types of measures, and they are seldom compartmentalised and centralised. Domestic laws may govern important aspects of cultural heritage in the context of investment activities including, for instance, protected areas or designated areas, and specific measures may need to be carried out. National cultural heritage law (e.g. in Vietnam and South Africa) may impose a duty to protect cultural heritage sites and cultural objects on investors. Nevertheless, in those instances where such obligations have been placed on foreign investors, they are not sufficiently detailed to provide adequate protection of cultural heritage. National implementation differs in comprehensiveness and strictness, depending on the national perception of the protection and preservation of cultural heritage in the legal system in question.

The laws would be ideal in safeguarding cultural heritage from both tangible and intangible aspects if the protection regime could cover not only cultural heritage sites and cultural items but also indigenous people, inhabitants of cultural heritage sites, minority groups, local communities and other stakeholders who are historically and culturally connected to such heritage. The 1972 World Heritage Convention was expected to protect cultural heritage sites and also strengthen local

residents' rights in line with human rights instruments, for instance, the Universal Declaration of Human Rights 1948. However, the World Heritage Convention makes no reference to human rights and the rights of people who inhabit in cultural heritage sites.⁷¹⁰ Therefore, it is unlikely that the protection of cultural heritage sites and cultural objects through the lens of cultural heritage law itself would be sufficient. The law should make it mandatory to include the inhabitants of cultural heritage sites in any protection plan in order to respect their rights and maintain the integrity of the site.

The implementation of regulations on preserving cultural heritage is also still far from practical. Countries that ratify or accept the 1972 World Heritage Convention are obligated to establish appropriate protective mechanisms to conserve the integrity and value of the property, by virtue of Article 5 of the Convention. Although the Operational Guidelines for the Convention outline the nature of the protective mechanisms, how countries are to effect this obligation is not clear.

In respect of investment law, both laws at the international and national level have played a limited role. It is no doubt that BITs or international investment and trade treaties have indicated that a host state may intervene with public protection related measures when international projects have been carried out. Nevertheless, current international investment instruments have often referred aspects of legitimate public interest only to public health, safety, public security and order and the environment. Cultural heritage is still not directly mentioned from the list and the preservation of cultural heritage is unlikely addressed in detail in the same way that environmental safeguarding is. There are very few examples of treaties embodying a clause relating to cultural heritage. In international investment treaties, industries exempted clauses involve aspects of intangible cultural protection with the focus on intellectual property rights. The cultural exception clauses do not give a legal basis to protect immovable cultural sites and landscapes and movable cultural objects. So far, the 2009 ASEAN Comprehensive Investment Agreement can be seen as the best regional model as it enables a member state to impose measures for the protection of historical or archaeological value. At a domestic level, South Africa is

⁷¹⁰ Gillespie, note 15, 167.

an excellent example as it provides legal grounds for authorities to interfere foreign investors' activities for the purposes of protecting cultural heritage.

Significantly, the international investment law regime can fill the gap of cultural heritage law in providing more effective rules on preserving cultural heritage sites and movable cultural objects with the rules and policies of foreign investment financiers. The World Bank guidelines on preserving both physical cultural resources and cultural rights of indigenous people have become the point of reference for cultural protection policies. Foreign investors as the borrowers have to assess the project's potential impacts on cultural resources as an integral part of the Environmental Impact Assessment Process. Foreign investors ought to be thoroughly acquainted with these cultural standards of the World Bank and other global financial institutions (e.g. ADB). The criteria on cultural heritage protection can be adopted by the local bank of the financing agency. Given that state contracts in practice have not dealt with the protection of cultural heritage properly, the World Bank or other regional lending institutions would provide a good guideline for drafting contracts with a view to protecting physical cultural resources and cultural rights of indigenous people.

The study has shown that cultural heritage law and investment law can rely on and supplement each other in an interesting way. The World Bank Guidelines – one important source of international investment law – can fill the gap of cultural heritage law in order to provide more effective rules to protect cultural heritage. In turn, cultural heritage law can give indications on how to resolve Investor-State disputes which are related to cultural items with international instruments such as the 1970 UNESCO Convention, the 1995 UNIDROIT Convention and Rules of Procedure for Mediation and Conciliation issued by the UNESCO Committee.

Regulations on archaeological excavation and laws on mining and construction may provide for a certain level of protection for cultural sites and cultural objects. Developers may be required, for instance, to conduct archaeological surveys prior to the execution of construction projects. Guidelines for Conducting Historical Archaeological Surveys issued by Heritage Victoria of Australia illustrates a good

practice in which the issues of registering cultural heritage place, archaeological reports and environmental survey and heritage studies are addressed in detail. Law on mining and construction may contain requirements for environmental impact assessments for development proposals, but requirements for cultural heritage impact assessments are often omitted.

Disputes between foreign investors and a host state can be related to measures taken by the host state such as the suspension or termination of business permit and the conduct of cultural impact assessment. A host State can argue that its decision on terminating an international investment project or setting more requirements for the project's continuation is designed to preserve cultural sites or mixed sites or cultural landscapes which have been included on the World Heritage List or placed on the List of World Heritage in Danger. Investor-State disputes may also give rise to claims related to jurisdictional matters and applicable laws. The issue of expropriation and compensation for expropriation are often raised in the context of disputes between foreign investors and the host state. Investors may allege that an indirect expropriation has taken place and they require the host State to pay for compensation, or the two parties may not be able to agree on whether such an indirect expropriation is compensable and if so, what amount of compensation is payable to foreign investors. There have been Investor-State disputes in which the protection of cultural heritage did feature or can be considered as a component of legal grounds advanced by a host State to justify its interference in international investment projects on mining and construction.

Recent cases in the context of international investment projects have confirmed the trend that the protection of cultural heritage is associated with environmental issues or the respect for human rights of individuals and communities, particularly those of indigenous people and minority groups. Moreover, according to the most recent World Investment Report, foreign investors challenged state conduct in respect of the designation of national heritage sites, indigenous protected areas, national parks, and environmental conservation zones. Such concepts which are closely linked to cultural heritage can be employed by a host state for its intervention in foreign investors' activities.

The local communities, cultural organisations, archaeologists, activists or nongovernmental entities within the host state can raise a concern or initiate a conflict about the protection of cultural heritage. There are actual claims brought by parties other than the host State about cultural heritage preservation in the mining and construction sectors, and such cases can easily lead to adverse social outcomes. The *Parkerings-Compagniet AS v. Republic of Lithuania* has shown that concern about cultural heritage protection from nongovernmental organizations influenced the decision of the host State to stop the international investment activities in its territory. Cases in which investment activities are interfered with on the basis of grounds of protecting environmental or human rights or public interest highlights relevant social effects such as violence and social disorder when claims relating cultural heritage preservation are not dealt with promptly and adequately.

Cases have shown that arbitration is still a preferred adjudicatory method in resolving Investor-State disputes associated with cultural heritage preservation in the mining and construction sectors. Arbitration is an effective means with considerable advantages over litigation. However, both foreign investors and host States should bear in mind that using arbitration to settle their dispute remains challenging in practice. Difficulties in applying arbitration to resolve disputes with cultural factors also come from unique features of cultural heritage such as incomprehensive regulations on cultural heritage protection or the lack of arbitration cases directly linked to the safeguarding of cultural heritage. Moreover, settling restitution disputes at an international level seems to lead to a situation where resolutions depend on political, economic and societal motivations.

Amicable methods such as negotiation and mediation are useful in managing other investment claims before they escalate into legal disputes which can be brought to a national court or an arbitral tribunal. Negotiated methods, particularly mediation and conciliation, seem to be preferred in cultural property disputes for restitution claims with recent developments of UNESCO guidelines on mediation and conciliation procedures. There are specific benefits of using amicable means in the context of dealing with claims raised by parties other than the host State. Peaceful approaches offer a practical, flexible, and inexpensive way of dispute settlement and

conflict management. However, while open to all parties, they may produce results only for those voluntarily committing themselves to the outcome achieved. Peaceful settlement methods are far from sufficient in practice – the need to balance conflicting interests of parties concerned in perspective of economics, social and political points create challenges to be overcome. The experts believe that the interests of different parties (the Government of Afghanistan, Chinese companies, the World Bank, archaeologists and so on) involved in the *Mes Aynak* case can be reconciled⁷¹¹ but this case has not been fully resolved yet. Any approaches to deal with Investor-State disputes or other claims brought by parties other than the State could be successful only if they are interest-based dispute resolution methods which can promote constant and interactive communication among the parties concerned.

Last but not least, the protection of cultural heritage nowadays depends much on how parties concerned deal with competing interests amongst economic development and cultural heritage protection. The safety of the latter should be ensured. However, in practice, it is often the case that local governments appear to consider cultural objects of no apparent economic value as a ‘source of revenue, not as public goods to protect and preserve.’⁷¹² The situations in developing countries such as China and Afghanistan have demonstrated that economic and social developments appear to trump human rights and cultural heritage protection.⁷¹³

5.2 Recommendations for parties concerned

To improve the protection of cultural heritage protection in mining and construction projects, various actors need to take an active role. The World Heritage Committee can take actions to prevent adverse impacts on cultural heritage sites and cultural objects. For instance, the proposal to add Kakadu National Park to the World Heritage in Danger List received the support from the state where it is located. The World Heritage Committee sent an inspection team for carrying out a report then called for a halt to construction work at the Jabiluka mine site. All parties who have

⁷¹¹ Benard, note 648, 15.

⁷¹² R. J. Shepherd and L. Yu, *Heritage management, tourism, and governance in China* (New York, Springer, 2013) 64.

⁷¹³ S. Gruber, The tension between rights and cultural heritage protection in China, in Durbach and Lixinsk, note 15, 155.

an interest in the protection of cultural heritage including states, foreign investors, local community, indigenous groups, cultural organizations, archaeologists, activists or nongovernmental entities can contribute to the protection of cultural heritage. Next the following summarises recommendations for parties concerned with a view to making and implementing the regulations on cultural heritage protection more effectively and dealing with disputes and other claims property for both their best interests and the interest of cultural heritage itself.

5.2.1 The host state

Protecting cultural heritage in the host state is the obligation of the host state. The analysis of cases studies (both international and national) has shown that there is no clear answer to the question as to when the host State has an obligation to preserve cultural heritage under the 1972 World Heritage Convention. Different tribunals can have different approaches to this issue.

From the perspective of the host state, the more detailed the regulations in place, the more effective the implementation of protecting cultural heritage. Specific measures to protect cultural heritage are not usually set out in detail in either international or national instruments. In most treaties, cultural heritage exceptions have not been spelt out. This is understandable because various important aspects have to be solved on a national level and the effectiveness of protecting cultural heritage needs detailed regulations at the domestic law level. The 1972 World Convention or other international instruments should, therefore, be supplemented by further principles and guidelines at regional and national levels.

Field studies, research and surveys should be stipulated in domestic laws and conducted on cultural heritage sites periodically and adequately. Recent cases have shown that reports need to be carried out before and during the course of projects on mining and construction. Surveys or studies which directly refer to cultural aspects could be named Initial Cultural and Archaeological Survey, Archaeological Report, Cultural Impact Assessment, and Cultural Review. Cultural survey can be included as part an environmental assessment (such as Initial Environmental Impact Study) or heritage assessment (such as Heritage Impact Assessment) with a view to

preserving cultural heritage. Fieldwork plays an essential role as the effect of the mining or construction projects on potential cultural sites could be determined early.

In relation to expropriation and compensation for expropriation, the counter-arguments advanced by the Respondent in the *Pyramids* case deserve to be highlighted to the extent that they refer to cultural heritage protection. The factors invoked by Egypt to mitigate the amount of compensation were, first, that the reclassification of the land on the Pyramids Plateau was a lawful act and secondly, that the project was to take place in an area where the Claimants should have known there was a risk that antiquities would be discovered. Investors should take into account the facts from the *Pyramids* case that these factors had already been taken into consideration in the Tribunal's decision not to award compensation based on the profits that might have accrued to the Claimants after the Plateau area were registered with the World Heritage Committee.

5.2.2 Foreign investors

Generally, before making an investment especially in mining and construction, foreign investors should determine whether the host state has ratified the 1972 World Heritage Convention and whether the targeted investment area is near or may negatively impact a listed site or a site in the List of World Heritage in Danger. Investors should further consider whether the targeted investment area is near a possible site as the *Pyramids* case illustrated the fact that investors had invested in the host state before Egypt ratified the 1972 World Heritage Convention and the site in question was subscribed to the World Heritage list.⁷¹⁴

Foreign investors should be well aware of all relevant international and national laws on protecting cultural heritage and other relevant regulations that may affect their investments such as law on planning, environment, human rights as cultural heritage nowadays is closely tied up with other public interests. Those who need financial support from lending organizations should take into account rules and conditions set by foreign investment financiers. The World Bank has developed a

⁷¹⁴ Germiny, note 157, 5-6.

series of precise standards and guidelines relating to cultural resource preservation. The specific standards, guidelines, and checklists of the World Bank can serve as a reference point for public lending and funding communities in addressing cultural heritage issues in project finance agreements.

Significantly, the issues of compulsory registration and reporting of cultural heritage sites and cultural items are often emphasised in national laws. Foreign investors need to comply with any reporting duties because the host State can take legal action against investors if they fail to report cultural objects.

With regard to the nature of Investor-State disputes, investors have to identify the legal grounds for their claims. These may be contractual or treaty-based so that it will be necessary to make a choice between treaty-based rights and contractual rights. This issue is crucial for purposes of settling the merits of disputes and making a decision as to whether an arbitral tribunal has jurisdiction over the case. When a provincial authority of a host state terminates an investment project or withdraws the business licence of a foreign investor, the investor is still in a position to file treaty-based claims and take similar approaches used by the French company in the *Vivendi* affair. The investor may succeed with a claim that the actions by the province/city are attributed to the host State as a matter of international law and that those actions themselves constitute a breach of a specific bilateral investment treaty.

Investors should pay attention to how to respond when the host state asserts that specific measures are taken in order to follow regulations on cultural heritage protection. They should verify whether the applicable investment treaty contains an exception to state liability for the purposes of protecting cultural sites and cultural objects.⁷¹⁵ Foreign investors can contend that there are violations of national treatment or fair and equitable treatment standard. There have been instances where the host state relied on the need for cultural heritage protection under both international and national law, and where investors were able to claim

⁷¹⁵ Germiny, note 157, 10.

compensation for expropriation based on a finding from the arbitral tribunal that the host state violated treaty rights.

The *Bilcon* case highlights potential implications for foreign investors. Cultural impact assessments may conceivably contain recommendations to turn down or cancel a project because of the considerable effect it will have on cultural sites or cultural landscapes. It could also be the case that the investors have not disputed the fact that a federal or provincial cultural assessment is required or some measures are needed to be taken in accordance with cultural heritage protection rules.

Regarding the application of cultural heritage impact assessment, foreign investors should consider the *Bilcon* case where investors contended that the manner in which the Environmental Impact Assessment had been undertaken violated the national treatment and the fair and equitable treatment standard. The host state relied on the protection of the environment, but investors won their NAFTA claim against Canada. The Tribunal concluded that the approach to the environmental assessment taken by the Joint Review Panel and adopted by Canada resulted in a breach of Article 1102 and Article 1105 of the NAFTA.

Although the Award in *Philip Morris v. Uruguay* favoured the host state, it brought out uncertainty about the level of evidence and processes required to satisfy the fair and equitable standards⁷¹⁶ as the third arbitrator had a view that the host state violated the fair and equitable treatment obligation in accordance to Article 3(2) of the Switzerland – Uruguay BIT.⁷¹⁷

Concerning expropriation and compensation for expropriation, recent cases relating to the preservation of the environment and public health have not indicated a direct and definite answer to the question as to whether legislative measures taken by the host State constitute an indirect and compensable expropriation. Cases demonstrated that the line between the concept of indirect expropriation and

⁷¹⁶ T. Voon, *Philip Morris v. Uruguay*: Implications for public health, *Journal of World Investment & Trade* 18 (2017) 320-331, 330.

⁷¹⁷ The text is available at <https://www.italaw.com/sites/default/files/case-documents/italaw7428.pdf> (accessed on 15/03/2019).

governmental regulatory measures not requiring compensation is not always clear and it depends on the facts and circumstances of the case.

5.2.3 Arbitral tribunal

Arbitrators have to consider the impact of other forms of dispute resolution including litigation or other arbitral tribunals upon their jurisdiction as a primary matter. In case that an investment treaty gives investors the right to select arbitration for dispute settlement, the first question is whether an arbitral tribunal has jurisdiction over a particular claim even if the concession contract refers contractual disputes to the municipal courts of the host State. The second one is whether and to what extent a breach of contractual claim can be brought before a treaty-based arbitration or must be brought exclusively before the local forum. It is crucial to distinguish between contract claims and treaty claims arising out of the same facts for the purposes of not only determining arbitration jurisdiction but also resolving the merits of the dispute.

In relation to a question as to whether rules or principles of international law are to be applied even where the parties have not expressly agreed to apply them in their choice-of-law provision in a concession agreement. The ICSID tribunal in the *Pyramids* case decided that the choice of national law did not prevent arbitrators from having recourse to international law if national laws contained a lacuna.

The most direct and least controversial way in which an investment tribunal might take into account the protection of cultural heritage would be if investment treaty itself provided a textual basis for doing so. However, express references in investment treaties to cultural heritage remain quite rare. A few states have incorporated language into their investment and free trade treaties that addresses only some aspects of potential overlap between investment and public interest protection (including environment, security and public health). The recent ICSID case law - *Philip Morris v. Uruguay* confirmed the potential for public measures

specifically public health to withstand legal challenge in relation to compensation claims, the fair and equitable treatment obligations.⁷¹⁸

No actual Investor-State disputes associated with preserving cultural sites, cultural landscapes or movable cultural objects have been brought to arbitration yet. Relevant cases about environmental protection and public health have demonstrated the variety of scenarios in which the question of indirect expropriation may arise. Different aspects of both law and economics have been mentioned in arbitration cases and should be taken into account such as the effect and duration of the measures in question, the issue of legitimate expectations, the relationship between control and expropriation, and especially the issue of distinguishing indirect expropriation from legitimate regulations. According to the majority of the Tribunal in *Philip Morris v. Uruguay*, ‘the responsibility for public health measures rests with the government and investment tribunals should pay great deference to governmental judgments of national needs in matters such as the protection of public health.’⁷¹⁹ The protection of public interest including environment, human rights and public health therefore should be taken into consideration by the arbitral tribunal in dealing with challenged state measures.

With regard to the issue of expropriation, the tribunal has to first determine the existence of an expropriation and secondly whether such expropriation is compensable. The termination of investment licences or governmental actions amounting to legislative measures for the protection of cultural heritage could give rise to both expropriation and compensation claims from foreign investors. In a hypothetical situation, a host state amends its domestic rules – for example, the cultural impact assessment becomes compulsory before the business license is granted while the investment project is being carried out. The state can argue that such a change is accepted under international law and should have been foreseeable for investors. Accordingly, it would be lawful to expropriate the foreign investors’ property on the basis of cultural heritage protection. From the host state’s view, this can be considered an expropriation but not compensable while investors might

⁷¹⁸ Voon, note 716, 320.

⁷¹⁹ Award, para 399.

claim that an informal taking has occurred and compensation for expropriation is a legitimate request. The answer to the question as to whether governmental regulatory measures are required to be compensable when the state pursued legitimate goals of protecting cultural heritage is still open judging from the Pyramids award as the site in question was not on the World Heritage List at the time of expropriation.

5.2.4 Local communities and other parties

Protecting cultural heritage in the host state is also an obligation for the citizens, non-state entities and NGOs. The local communities or residents to cultural heritage sites are entitled to have their cultural rights protected under both the laws on human rights and cultural heritage. Cultural organizations, archaeologists, activists or nongovernmental entities within the host state can raise a concern or launch a campaign about the protection of cultural heritage. The *Mapungubwe* case is an excellent example of where construction activities on the Vele site appear to have stopped after continuously active actions from archaeologists and environmental groupings. Enhanced public participation and consultation are therefore important aspects in obtaining better cultural heritage protection.

5.3 Proposals for further research

To date, there have been disputes between foreign investors and the host State in the context of projects on mining and construction. However, these disputes are not directly related to the issue of cultural heritage protection but linked to the safeguard of the environment or human rights. An official source for disputes and claims in the mining and construction projects in relation to the preservation of cultural heritage has not been made available. Some cases may have separate documents available online for public purposes only. Accordingly, there were not many case studies to draw on for purposes of the thesis. However, the thesis has attempted to analyse relevant examples with environment or human rights elements in order to identify types of Investor-State disputes and other concerns associated with cultural heritage protection and to illustrate situations relating to using

arbitration to resolve disputes or employing amicable ways to deal with conflicts. Several recommendations for future research can be identified.

Further research could fruitfully explore how local communities or indigenous people can protect cultural sites that they have been residing at and cultural objects associated with their land and how to deal with disputes in relation to the protection of their cultural rights in the context of international investment projects. The interaction of international investment and cultural heritage has not been subject of great attention to date and the interaction of international investment law with the rights of indigenous peoples has been explored in very little in publications too.⁷²⁰ Therefore the topic of protecting indigenous peoples and their cultural rights and other cultural sites and objects associated with them would have definitely practical meanings. Although there are not many reported cases of Investor-State arbitrations where cultural heritage issues have arisen, the few examples that do exist demonstrate that the issues can arise via different players and means. Foreign investors might complain about or challenge measures taken by the host state that were put in place for purposes of protecting the rights of indigenous people.

Further study can also be conducted to examine how cultural heritage law, investment law and human rights law can help local communities and individuals to safeguard their cultural heritage. An interesting issue then would be which rules or tactics cultural heritage law can borrow from human rights law to improve rules to protect cultural heritage from both tangible and intangible aspects. Potential disputes raised by local communities about the protection of the cultural heritage sites where they are residing should not be ignored. Local communities may employ environmental grounds to raise their concerns about the violation of public interest (safe environment and sustainable development), for instance the *Wild Coast* conflict in South Africa. Indigenous people marched to oppose the mining project in an internal conflict – the *South American Silver* case – and the local authority had to terminate the project after a declaration by the United Nations Higher

⁷²⁰ For example, J. Levine, The interaction of international investment arbitration and the rights of Indigenous peoples, TDM 1 (2017); M. Ng, Can human rights counterclaims succeed in investment treaty arbitration? TDM 5 (2018).

Commissioner for Human Rights in Bolivia. If the government acts in concert with foreign investors to initiate development projects mining or other economic development projects, it can lead to the displacement of local communities with a significant cultural link to the land and other serious social impacts. The fact that inhabitants to cultural sites use grounds of both human rights and cultural heritage protection laws are understandingly anticipated. The examination of the 2013 Optional Protocol to International Covenant on Economics, Social and Cultural Rights (ICESCR)⁷²¹ could result in better prospect of the reception and resolution of individual or groups' complaints and enquiries into alleged violations of economic, social and cultural rights.⁷²²

Recently, there have been calls for a reform of classic investment treaties. Given that cultural industries clauses in current international investment treaties have such a limited role in protecting cultural heritage, the topic of the inclusion of a cultural clause would bring practical benefits. At present, there are no sufficiently effective provisions for cultural heritage impact assessments similar to the environmental impact assessments in international instruments and national legislation. A cultural clause in an investment treaty can be a useful tool to deal with any disputes and conflicting interest between a host State and foreign investors in respect of cultural heritage protection. The task to draft a cultural clause in international investment treaties remains challenging, considering that every state faces different social, cultural and economic conditions. Another topic that would be interesting is the inclusion of a tailored a cultural clause in state contracts so that cultural heritage conservation is weighted properly.

Further study is also needed with regard to claims raised by non-state entities about cultural heritage protection and how to deal with such claims. It is hoped that more relevant information will be reported to the public in books and journals. At this

⁷²¹ The Optional Protocol was adopted by the UN General assembly on 10 December 2008 and opened for signature on 24 September 2009. As of December 2016, the Protocol has 22 State Parties and has been signed but not ratified by an additional 26 States. It entered into force on 5 May 2013. See more at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/OPCESCR.aspx> (accessed on 15/03/2019).

⁷²² This topic of the ICESCR as a mechanism for the implementation of cultural rights is addressed in F. Francioni, L. Lixinski, Opening the toolbox of international human rights law in the safeguarding of cultural heritage in Durbach&Lixinsk, note 15.

moment, reliable information about these claims is hard to find and is mainly obtained from internet websites.

Last but not least, the compliance with regulations on cultural heritage protection in international investment projects in mining and construction is always an interesting theme. The identification of more factors and more reliable information will help to facilitate a more in-depth analysis.

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