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Natural Resources and Indigenous Cultural Heritage in International Investment Law and Arbitration

Valentina Vadi*

*The life of the law is struggle ... The law is not mere theory but living force.*²
R. von Jhering

1. INTRODUCTION

The protection of indigenous cultural heritage constitutes one of the foundational pillars of the identity of indigenous peoples and contributes to the realisation of their human rights. Although the protection of indigenous rights and heritage has gained some momentum in international law since the adoption of the 2007 United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP),³ law and policy tend to favour macroeconomic notions of growth regardless of actual or potential infringement of indigenous human rights.⁴ Many of the estimated 370 million indigenous peoples around the world have lost, or are under imminent threat of losing, their ancestral lands because of the exploitation of natural resources.

This chapter explores the clash between economic development and indigenous peoples' rights through the perspective of international investment law, examining whether indigenous rights and the protection of cultural heritage can prevail over international economic governance. The protection of indigenous heritage has frequently intersected with international investment law, resulting in tension between the safeguarding of indigenous culture and the promotion of foreign direct investment. For example, when a state adopts cultural policies that interfere with foreign investments, they may be deemed to amount to indirect expropriation or a violation of other investment treaty provisions. Therefore, the question arises whether international investment law has embraced an international economic culture—a culture strictly focused on productivity and economic development—or whether it is open to integrating cultural concerns in its operation.

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² Rudolf von Jhering, *The Struggle for Law* (John J Lalor tr, 2nd edn, Callaghan & Company 1915).

³ United Nations Declaration on the Rights of Indigenous Peoples, A/RES/61/295 (2007).

⁴ Lila Barrera-Hernández, 'Indigenous Peoples, Human Rights and Natural Resource Development: Chile's Mapuche Peoples and the Right to Water' (2005) 11 *Annual Survey of International & Comparative Law* 1.

While international investment law has traditionally developed only limited tools for the protection of cultural heritage through dispute settlement,⁵ recent arbitral awards have shown a growing awareness of the need to conserve indigenous cultural heritage within investment disputes. The incidence of cases in which arbitrators have balanced the different values is increasing.⁶

This chapter proceeds as follows. The chapter opens with the question of whether the governance of indigenous heritage—which is inherently ‘local’ by definition—is purely local or whether it also pertains to international law, as indicated in part by the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) and relevant international law instruments. The international norms protecting indigenous cultural heritage are scrutinised within this chapter and particular reference is made to the UNDRIP. The international investment law regime is then briefly outlined, and relevant arbitrations are analysed and critically assessed. The chapter subsequently offers several legal options to better reconcile the different interests at stake. Finally, the conclusions are drawn. This chapter argues that although the UNDRIP significantly contributes to the current discourse on indigenous heritage, further steps must be taken. The collision between international investment law and indigenous entitlements makes the case for strengthening the current regime protecting indigenous heritage, in particular through the participation of indigenous peoples in the decisions which affect them and their heritage.

2. GLOBAL V. LOCAL: THE INTERNATIONAL PROTECTION OF INDIGENOUS HERITAGE

As indigenous heritage is inherently ‘local’ by definition, the question arises whether its governance should be purely local or should more broadly pertain to international law. Prior to the 1970s, indigenous peoples were not viewed as ‘legal unit[s] of international law’;⁷ rather, they were mostly regulated under domestic law.⁸ As Daes stated, ‘[i]nternational law knew no other legal subjects than the state ... and had no room for indigenous peoples.’⁹ However, due to the failures of national law to adequately address indigenous peoples’ rights, international law in the past four decades has increasingly regulated indigenous peoples’ matters, reaffirming their rights and entitlements. This has

⁵ See generally Valentina Vadi, ‘When Cultures Collide: Foreign Direct Investment, Natural Resources and Indigenous Heritage in International Investment Law’ (2011) 42 *Columbia Human Rights Law Review* 797–889.

⁶ Id.

⁷ *Cayuga Indians (Gr. Brit.) v. United States*, (1926) 6 *Review of International Arbitral Awards* 173, 176 (stating that an Indian tribe ‘is not a legal unit of international law.’)

⁸ Siegfried Wiessner, ‘Indigenous Self-Determination, Culture, and Land: A Reassessment in Light of the 2007 UN Declaration on the Rights of Indigenous Peoples’ in Elvira Pulitano (ed), *Indigenous Rights in the Age of the UN Declaration* (CUP 2012) 31–63 at 38.

⁹ Erica-Irene Daes, ‘Indigenous Peoples’ Rights to their Natural Resources’, in Aristotle Constantinides and Nikos Zaikos (eds), *The Diversity of International Law* (Martinus Nijhoff 2009).

signalled a paradigm shift in international law, through which indigenous peoples have been deemed as ‘legal subjects’ under its purview.¹⁰

While a number of international law instruments protect different aspects of indigenous heritage,¹¹ indigenous culture plays a central role in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).¹² The Declaration is the product of two decades of preparatory work and ‘a milestone of re-empowerment’ of indigenous peoples.¹³ It constitutes a significant achievement for indigenous peoples worldwide,¹⁴ bringing indigenous peoples’ rights to the cutting edge of international law with a cogency that was previously missing. While this landmark human rights instrument is currently not binding, this may change in the future to the extent that its provisions reflect customary international law and/or general principles of law.¹⁵ As Stavenhagen noted, ‘The Declaration provides an opportunity to link the global and local levels, in a process of *glocalization*’.¹⁶

Indigenous culture is a key theme of the Declaration.¹⁷ Many articles are devoted to different aspects of indigenous culture, and the word ‘culture’ appears no less than 30 times in its text.¹⁸ Not only does the UNDRIP recognise the dignity and diversity of indigenous peoples’ culture, but it also acknowledges its essential contribution to the ‘diversity and richness of civilization and cultures which constitute the common heritage of mankind’.¹⁹ Moreover, the Declaration recognises the right of indigenous peoples to practice their cultural traditions²⁰ and maintain their distinctive spiritual and material relationship with the land which they have traditionally owned, occupied or otherwise

¹⁰ For a seminal study, see RL Barsch, ‘Indigenous Peoples in the 1990s: From Object to Subject of International Law’ (1994) 7 *Harvard Human Rights Journal* 33. See also Jérémie Gilbert, *Indigenous Peoples’ Land Rights under International Law: From Victims to Actors* (Transnational Publishers 2006).

¹¹ For an overview, see eg Marina Hadjioannou, ‘The International Human Right to Culture: Reclamation of the Cultural Identities of Indigenous Peoples under International Law’ (2005) 8 *Chapman Law Review* 201.

¹² United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) G.A. Res. 61/295, U.N. Doc. A/RES/61/295, 13 September 2007. The Declaration was approved by 143 nations, but was opposed by United States, Canada, New Zealand and Australia. However, these four nations subsequently endorsed the Declaration.

¹³ Wiessner, ‘Indigenous Self-Determination, Culture, and Land’, at 31.

¹⁴ Elvira Pulitano, ‘Indigenous Rights and International Law: An Introduction’, in Elvira Pulitano (ed), *Indigenous Rights in the Age of the UN Declaration* (CUP 2012) 1–30 at 25.

¹⁵ On the legal status of the Declaration, see Mauro Barelli, ‘The Role of Soft Law in the International Legal System: The Case of the United Nations Declaration on the Rights of Indigenous Peoples’ (2009) 58 *ICLQ* 957 (arguing that ‘regardless of its non-binding nature, the Declaration has the potential effectively to promote and protect the rights of the world’s indigenous peoples’ and that ‘the relevance of a soft law instrument cannot be aprioristically dismissed.’ *Id.* at 983).

¹⁶ Rodolfo Stavenhagen, ‘Making the Declaration Work’, in Claire Charters and Rodolfo Stavenhagen (eds), *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples* (IWGIA 2009) 357.

¹⁷ See generally Siegfried Wiessner, ‘The Cultural Rights of Indigenous Peoples: Achievements and Continuing Challenges’ (2011) 22 *European Journal of International Law* 121 at 139.

¹⁸ See Yvonne Donders, ‘The UN Declaration on the Rights of Indigenous Peoples. A Victory for Cultural Autonomy?’, in Ineke Boerefijn and Jenny Goldschmidt (eds), *Changing Perceptions of Sovereignty and Human Rights* (Intersentia, 2008) 99.

¹⁹ UNDRIP, preamble.

²⁰ UNDRIP, Article 11.

used.²¹ For most, if not all, indigenous peoples, land is not only the basis of economic livelihood, but also the source of spiritual and cultural identity.²² They ‘see the land and the sea, all of the sites they contain, and the knowledge and the laws associated with those sites, as a single entity that must be protected as a whole...’²³ As indigenous peoples often adopt this holistic approach, a UN study insists that ‘all elements of heritage should be managed and protected as a single, interrelated and integrated whole’.²⁴

Among the various theoretical models addressing indigenous peoples’ rights, the cultural integrity approach ‘emphasizes the value of traditional cultures in and of themselves as well as for the rest of society’.²⁵ The cultural integrity approach places cultural entitlements at the centre of the human rights catalogue, and emphasises the importance of cultural considerations to protect indigenous peoples’ rights and their dynamic nexus with their lands. More importantly, as a Native American scholar contended, indigenous sovereignty relies on a continued cultural integrity: ‘to the degree that a nation loses its sense of cultural identity, to that degree it suffers a loss of sovereignty’.²⁶

Some scholars have criticised the cultural integrity approach, contending that emphasising the cultural entitlements of indigenous peoples *de facto* reduces their political rights and limits their claims to self-determination.²⁷ According to such authors, over-emphasising indigenous culture risks undermining indigenous self-determination. However, without protection of indigenous cultural identity, all additional claims of indigenous peoples lose strength. Cultural claims do not replace other claims; rather, they complement and strengthen them. For this reason, the UNDRIP endorses the cultural integrity model, adopting a holistic understanding of indigenous peoples’ rights. In fact, the protection of the cultural identity of indigenous peoples is its *raison d’être*,²⁸ and ‘one can find the cultural rights angle in each article of the Declaration’.²⁹ Moreover, if one understands the cultural integrity approach as complementary to other issues of importance to indigenous peoples, then it becomes clear that such an approach not only

²¹ See e.g. Declaration on the Rights of Indigenous Peoples, preamble, Articles 8, 11, 12.1 and 13.1.

²² Jérémie Gilbert, ‘Custodians of the Land – Indigenous Peoples, Human Rights and Cultural Integrity’, in Michele Langfield, William Logan and Mairead Craith (eds), *Cultural Diversity, Heritage and Human Rights* (Routledge 2010) 31–44 at 31.

²³ Ciaran O’Faircheallaigh, ‘Negotiating Cultural Heritage? Aboriginal Mining Company Agreements in Australia’ (2003) 39 *Development and Change* 25–51, at 27.

²⁴ Erica-Irene Daes, *Study on the Protection of the Cultural and Intellectual Property of Indigenous Peoples*, Sub-Commission on Prevention of Discrimination and Protection of Minorities, UN Doc. E/CN.4/Sub 2/1993/28.

²⁵ Laura Westra, *Environmental Justice and the Rights of Indigenous Peoples* (Earthscan, 2008) 10.

²⁶ Vine Deloria Jr., ‘Self-Determination and the Concept of Sovereignty’, in John R. Wunder (ed), *Native American Sovereignty* (Garland, 1996) 118.

²⁷ See generally Claire Cutler, ‘The Globalization of International Law, Indigenous Identity, and the “New Constitutionalism”’, in William D. Coleman (ed), *Property, Territory, Globalization: Struggles over Autonomy* (University of British Columbia Press, 2010).

²⁸ Francesco Francioni, ‘The Human Dimension of International Cultural Heritage Law: An Introduction’ (2011) 22 *European Journal of International Law* 9 at 15.

²⁹ Elsa Stamatopoulou, ‘Taking Cultural Rights Seriously: The Vision of the UN Declaration on the Rights of Indigenous Peoples’, in Stephen Allen and Alexandra Xanthaki (eds), *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Hart Publishing 2011) at 392.

adds to, but is of fundamental importance to understanding and better protecting the culture and human rights of indigenous peoples.

A particularly significant limitation of the current legal framework protecting indigenous cultural heritage is the absence—aside from the classical human rights mechanisms—of adjudicative mechanisms at the international level by which indigenous peoples can raise complaints regarding measures that affect them.³⁰ The UNDRIP does not address this gap. Therefore, notwithstanding the major political merits of the Declaration, the ‘UNDRIP does not definitively resolve, but at best temporarily mediates, multiple tensions.’³¹ In light of this limitation, the following section examines the international investment law regime and the adjudicative mechanisms it offers.

3. INTERNATIONAL INVESTMENT GOVERNANCE AND THE DIASPORA OF INDIGENOUS CULTURE-RELATED DISPUTES BEFORE INTERNATIONAL INVESTMENT TREATY TRIBUNALS

International investment law is a well-developed field of study within the broader international law framework and is characterised by sophisticated dispute settlement mechanisms. As there is no single comprehensive global treaty, investors’ rights are defined by an array of bilateral and regional investment treaties and by customary international law. International investment law provides extensive protection to investors’ rights in order to encourage foreign direct investment (FDI) and to foster economic development. At the substantive level, investment treaties provide *inter alia* for adequate compensation for expropriated property; protection against discrimination; fair and equitable treatment; full protection and security; and assurances that the host country will honor its commitments regarding the investment.

At the procedural level, while state-to-state arbitration has been rare,³² investor–state arbitration has become the most successful mechanism for settling investment-related disputes.³³ Investment treaties provide investors with direct access to an international arbitral tribunal. The use of the arbitration model is aimed at depoliticising disputes,

³⁰ Human rights may be claimed before national courts and regional human rights courts, as well as through particular complaint mechanisms at the UN level. Irene Watson and Sharon Venne, ‘Talking Up Indigenous Peoples’ Original Intent in a Space Dominated by State Interventions’, in Elvira Pulitano (ed.), *Indigenous Rights in the Age of the UN Declaration* (CUP 2012) 87–109 at 106.

³¹ See Karen Engle, ‘On Fragile Architecture: The UN Declaration on the Rights of Indigenous Peoples in the Context of Human Rights’ (2011) 22 *European Journal of International Law* 141–163 at 163 (contending that ‘If we are willing to examine it critically, the UNDRIP may have the potential to become an important site for the ongoing struggle over the meaning of human rights ...’).

³² On state-to-state investment treaty arbitration, see generally Anthea Roberts, ‘State-to-State Investment Treaty Arbitration: A Hybrid Theory of Interdependent Rights and Shared Interpretive Authority’, 55 *Harvard International Law Journal* (2014) 1–70; Michele Potestà, ‘Towards a Greater Role for State-to-State Arbitration in the Architecture of Investment Treaties?’, in Shaheez Lalani and Rodrigo Polanco Lazo (eds.) *The Role of the State in Investor–State Arbitration* (Brill 2015) 249, 250 (noting that ‘despite being incorporated in almost every BIT, State-to-State dispute settlement clauses have attracted very little attention ... due to [their] limited use in practice’).

³³ Susan Franck, ‘Development and Outcomes of Investor–State Arbitration’, (2009) 9 *Harvard Journal of International Law* 435–489.

avoiding potential national court bias and ensuring the advantages of confidentiality and effectiveness.³⁴ Once proceedings are initiated by an investor, arbitral tribunals review state acts in light of their investment treaties.

Given the structural imbalance between the vague and non-binding dispute settlement mechanisms provided by human rights treaties and the highly effective and sophisticated dispute settlement mechanisms available under international investment law, cultural disputes involving investors' and indigenous peoples' rights have been repeatedly brought before international investment treaty tribunals. This does not mean that international investment treaty tribunals are the only available fora for such disputes. Additional available tribunals include national courts, human rights courts, regional economic courts, traditional state-to-state courts, tribunals such as the International Court of Justice and even inter-state arbitration. Indeed, some of these dispute settlement mechanisms may be more suitable than investor-state arbitration to address cultural concerns. However, given the fact that indigenous rights-related disputes have been frequently brought before investment treaty arbitral tribunals, this chapter specifically aims to unveil and critically assess their jurisprudence.

It is first important to understand whether the adjudication of cultural disputes before international investment treaty tribunals results in institutional bias. Investment treaty standards are generally vague and their language encompasses a potentially wide variety of state regulation that may interfere with economic interests. When a state adopts regulatory measures that interfere with foreign investments, the regulation may be considered to violate substantive standards of treatment under investment treaties, and the foreign investor may claim compensation before arbitral tribunals. Furthermore, the architecture of the arbitral process raises significant concerns in the context of disputes involving indigenous heritage. While arbitration structurally constitutes a private model of adjudication, investment treaty arbitration can be substantively viewed as international public law adjudication.³⁵ Arbitral awards ultimately shape the relationship between the state and private individuals.³⁶ Moreover, arbitrators determine matters such as the legality of governmental activity, the degree to which individuals should be protected from regulation and the appropriate role of the state.³⁷ Therefore, disputes determined within this model can potentially have significant impacts on indigenous culture, heritage and rights.

Investor–state arbitration distinguishes between two types of non-state actors: 1) the investor engaged in foreign direct investment, and 2) the FDI-impacted non-state actors.³⁸ While indigenous peoples do have access to local courts and regional human rights courts and can eventually make complaints to the UN Committee on Economic, Social and Cultural Rights, if they have exhausted domestic remedies and believe a member state

³⁴ Ibrahim FI Shihata, 'Towards a Greater Depoliticization of Investment Disputes: The Role of ICSID and MIGA' (1986) 1 *ICSID Review Foreign Investment Law Journal* 1–25.

³⁵ Gus Van Harten, 'The Public–Private Distinction in the International Arbitration of Individual Claims against the State' (2007) 56 *International & Comparative Law Quarterly* 371–393 at 372.

³⁶ Gus Van Harten *Investment Treaty Arbitration and Public Law* (OUP 2007) 70.

³⁷ M. Sornarajah, 'The Clash of Globalizations and the International Law on Foreign Investment' (2003) 10 *Canadian Foreign Policy* 1.

³⁸ Noemi Gal-Or, 'The Investor and Civil Society as Twin Global Citizens: Proposing a New Interpretation in the Legitimacy Debate' (2008–2009) 32 *Suffolk Transnational Law Review* 271–301.

has failed to observe its obligations under the Covenant,³⁹ the resolution of disputes arising from the investment within the territory of the host state is often directed to international arbitration.⁴⁰ Furthermore, court decisions in the host state which uphold complaints brought by private parties against a foreign investor may be challenged by the investor before an arbitral tribunal on the grounds that they constitute wrongful interference with the investment.⁴¹

The increasing impact of FDI on the social sphere of the host state has raised the question of whether the principle of access to justice, as successfully developed to the benefit of investors through the provision of binding arbitration, should be matched by a corresponding right to a remedial process for individuals and groups adversely affected by the investment in the host state.⁴² While the recognition of multinational corporations (MNCs) as ‘international corporate citizens’ has progressed,⁴³ by comparison, the procedural rights of indigenous peoples have remained unchanged. The paradox is that the foreign company and indigenous peoples lie at the opposite ends of the same spectrum: the company is characterised by its foreignness; indigenous peoples are characterised by their indigeneity,⁴⁴ descending from those who inhabited the area before colonisation. At the same time, however, both parties have clearly defined rights under international law. The following section addresses the question of whether indigenous peoples’ cultural rights play any role in the context of international disputes before international investment treaty tribunals.

4. WHEN CULTURES COLLIDE

This section explores the clash of cultures between the promotion of foreign investment and the safeguarding of indigenous cultural heritage. While the international investment legal culture is characterised by efficiency, productivity and the pursuit of economic growth, indigenous cultural heritage is based on a holistic understanding of natural resources, cultural practices and human development.

The development of natural resources is increasingly occurring in, or very close to, traditional indigenous areas. While development analysts point to extractive projects as anti-poverty measures and advocate FDI as a major catalyst for development,⁴⁵ the peoples in the areas where the resources are located tend to bear a disproportionate share

³⁹ Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, GA Res 63/117, UNGAOR, 63d Sess, Supp No 49, UN Doc A/RES/63/117 (2008), adopted 10 December 2008, in force 5 May 2013.

⁴⁰ Francesco Francioni, ‘Access to Justice, Denial of Justice, and International Investment Law’, in Pierre-Marie Dupuy, Francesco Francioni and Ernst-Ulrich Petersmann (eds), *Human Rights in International Investment Law and Arbitration* (OUP 2009) 72.

⁴¹ *Id.* 72.

⁴² *Id.* 71.

⁴³ Peter Muchlinski, ‘Global Bukovina Examined: Viewing the Multinational Enterprise as a Transnational Law Making Community’, in Gunther Teubner (ed) *Global Law Without a State* (Dartmouth, 1997) 79.

⁴⁴ Michele Langfield, ‘Indigenous Peoples are Not Multicultural Minorities – Cultural Diversity, Heritage and Indigenous Human Rights in Australia’ in Michele Langfield, William Logan and Mairead Craith (eds), *Cultural Diversity, Heritage and Human Rights* (Routledge 2010) 135–152.

⁴⁵ OECD, *Foreign Direct Investment for Development* (OECD 2002) 3.

of the negative impacts of development, such as reduced access to resources and direct exposure to pollution and environmental degradation. Rising investment in the extractive industries can therefore have a devastating impact on the livelihood of indigenous peoples, their rights, and culture.⁴⁶

The linkage between economic globalisation and indigenous peoples' rights has been frequently discussed by administrative and constitutional courts at the national level⁴⁷ and by human rights bodies at the regional and international level.⁴⁸ The resulting jurisprudence and the relevant literature are extensive. However, there has been limited attention devoted to the emerging jurisprudence of investment treaty arbitral tribunals dealing with elements of indigenous cultural heritage.⁴⁹ Given the impact that arbitral awards can have on indigenous peoples' lives, culture and rights, scrutiny and critical assessment of this jurisprudence is particularly important. Investment disputes with indigenous cultural elements are characterised by the need to balance the safeguarding of indigenous cultural heritage by the host state and the protection of property rights of foreign investors.

To date, the crossover of international investment law and indigenous cultural heritage has arisen in four ways.⁵⁰ First, as investors, indigenous peoples have complained about measures adopted by their respective host states, alleging that the states failed to take into account their human rights. For example, in *Grand River v. United*

⁴⁶ Kyla Tienhaara, 'What You Don't Know Can Hurt You: Investor–State Disputes and The Protection of the Environment in Developing Countries' (2006) 6 *Global Environmental Politics* 73–100.

⁴⁷ At the national level, see e.g. *Hupacasath First Nation v. The Minister of Foreign Affairs Canada and The Attorney General of Canada*, Judgment of 9 January 2015, 2015 FCA 4 (CanLII) (the Canadian Federal Court dismissed an application by the Hupacasath First Nation, an aboriginal band in British Columbia, to stay the Canada–China investment treaty until First Nations have been consulted, holding that any potential adverse impacts are non-appreciable and speculative in nature); *Yanner v Eaton* (1999) 166 ALR 258, 301 (Austl.) (the High Court of Australia dismissed a charge against a member of an aboriginal tribe who had caught two young crocodiles in Queensland using a traditional harpoon. Although the appellant did not have a hunting permit, the Court concluded that he was exempted from the obligation of obtaining a permit, since his act was based on a traditional aboriginal custom which deems catching young crocodiles of high spiritual significance.)

⁴⁸ At the international level, see e.g. *Ivan Kitok v. Sweden* (Comm'n No. 197/1985), UN Human Rights Comm., para 4.2, UN Doc. CCPR/C/33/D/197/1985, 27 July 1988 (the Human Rights Committee stated that reindeer husbandry, as a traditional livelihood of the indigenous Saami people, is an activity protected under ICCPR Article 27.); *Jouni Lansman v. Finland* (Comm'n No. 671/1995), UN Human Rights Comm., para 10.2, UN Doc. CCPR/C/58/D/671/1995, 22 November 1996 (the Committee found that reindeer herding fits into the definition of cultural activities). At the regional level, see e.g. *Inuit Tapiriit Kanatami e.a. v. Parliament and Council*, Case T 18/10 R, Order of the General Court, 6 September 2011, available at [http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62010TO0018\(04\):EN:HTML](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62010TO0018(04):EN:HTML) (last visited 12 July 2016) (the Canadian Inuit filed a lawsuit before the European Court of Justice to overturn the EU ban on the import of seal products into the EU. While the regulation exempted the Inuit from the ban, the Inuit people did not export seal products themselves, but exported them via non-indigenous exporters. Therefore, they claimed that the exception in their favor would remain an 'empty box.' Although the Court rejected the claim as inadmissible, the case reveals the way in which the operation of aboriginal exemptions in practice may, in fact, be perceived to be inadequate to sustain cultural practices.)

⁴⁹ But see Valentina Vadi, *Cultural Heritage in International Investment Law and Arbitration* (CUP 2014).

⁵⁰ Here I follow the useful analytical framework elaborated by Judith Levine. See Judith Levine, 'The Interaction of International Investment Arbitration and the Rights of Indigenous Peoples', in Freya Baetens (ed.) *Investment Law Within International Law—Integrationist Perspectives* (CUP 2013).

States,⁵¹ a Canadian tobacco company composed of indigenous peoples contended that the Master Settlement Agreement—an agreement between tobacco companies and major tobacco producers in the United States—was being applied to their business without their input, allegedly violating customary law that requires consultation, if not consent, of indigenous peoples on regulatory matters potentially affecting them.⁵² The arbitral tribunal, however, did not find any violation of fair and equitable treatment,⁵³ albeit admitting, in passing, that indigenous peoples should be consulted on matters potentially affecting them.⁵⁴

Second, foreign investors have filed claims against the host state contending that regulatory measures protecting indigenous cultural rights or heritage were in breach of relevant investment treaty provisions. For example, in *Glamis Gold v. United States of America*,⁵⁵ a Canadian investor claimed, *inter alia*, that measures requiring the backfilling of previously extracted open-pit gold mines to preserve the skyline of ancient indigenous cultural sites amounted to an indirect expropriation of its investment and /or a violation of fair and equitable treatment.⁵⁶ The arbitral tribunal, however, dismissed the claims, holding that the investment remained profitable⁵⁷ and that none of the government actions breached the fair and equitable treatment standard.

In a less-known dispute, *John Andre v. Canada*, a U.S.-based investor lodged a Notice of Intent to Arbitrate alleging that legislative measures affecting his caribou-hunting outfitters in Northern Canada violated NAFTA.⁵⁸ The claimant had previously enjoyed the use of 360 caribou hunting licenses (caribou quota tags), and had specialised in the organisation of hunting camps for tourists and hunters into aboriginal lands in Canada's North West Territories (NWT).⁵⁹ In 2007, the government of the NWT brought in emergency hunting restrictions to conserve the Bathurst caribou population, resulting in the grant of only 75 caribou quota tags per outfitter.⁶⁰ The claimant alleged that the authorities cut the number of hunting licenses in a discriminatory manner⁶¹ designed to minimise the negative effect on local outfitters and maximise the negative effects on the investor.⁶² The justification was that the majority of locally-owned outfitters tended to

⁵¹ *Grand River Enterprises Six Nations, Ltd et al. v. United States of America*, Award, 12 January 2011, available at <http://www.state.gov/documents/organization/156820.pdf> (last visited 30 June 2017).

⁵² *Id.* at para. 182(3).

⁵³ *Id.* at para. 187 (holding that 'whatever unfair treatment was rendered [the claimant] or his business enterprise, it did not rise to the level of an infraction of the fair and equitable treatment standard of 1105, which is limited to the customary international law standard of treatment of aliens.')

⁵⁴ *Id.* para. 210 (noting that 'It may well be, as the Claimants urged, that there does exist a principle of customary international law requiring governmental authorities to consult indigenous peoples on governmental policies or actions significantly affecting them.')

⁵⁵ *Glamis Gold, Ltd. v. United States of America*, Award, 8 June 2009, available at <http://www.state.gov/documents/organization/125798.pdf> (last visited on 30 June 2017).

⁵⁶ *Id.* at para. 359.

⁵⁷ *Id.* at para. 366 (holding that 'the California backfilling measures did not result in a radical diminution in the value of the ... Project').

⁵⁸ *John R. Andre v. Government of Canada*, Notice of Intent to Submit Claim to Arbitration Pursuant to Chapter Eleven of the North American Free Trade Agreement, para 8, 19 March 2010, available at <http://www.italaw.com/sites/default/files/case-documents/italaw6335.pdf> (last visited on 30 June 2017).

⁵⁹ *Id.* para. 12.

⁶⁰ *Id.* para. 51.

⁶¹ *Id.* para. 35.

⁶² *Id.* para. 51.

use only 75-100 caribou quota tags annually. The investor therefore claimed to have been discriminated against on the basis of his U.S. nationality.⁶³ However, further regulation ultimately imposed a full hunting ban throughout the NWT. The hunting ban initially extended even to the traditional caribou hunt. This was later revised, resulting in the prohibition of commercial hunting of caribou⁶⁴ and the preservation of aboriginal subsistence hunting.⁶⁵ The aboriginal exemption was due to the fact that for indigenous hunters, the hunt is part of their culture and supports subsistence. The dispute did not proceed to a hearing and is now described by the Canadian government as inactive.

Third, foreign investors have filed claims against host states contending that the state failed to protect their investments against actions of indigenous peoples. In *Burlington v. Ecuador*, the claimant sought, *inter alia*, to hold Ecuador liable for failing to provide physical protection and security for the company's hydrocarbon concession in blocks 23 and 24 of the Amazonian rain forests.⁶⁶ Burlington complained, *inter alia*, that the opposition of indigenous communities to oil development had impeded its business and that Ecuador's purported failure to provide physical security violated the standard of full protection and security under the U.S.–Ecuador Bilateral Investment Treaty (BIT).⁶⁷ The arbitral tribunal dismissed this specific claim on jurisdictional grounds, stressing the importance of notifying states of disputes so that they have the opportunity to remedy a possible breach and thereby avoid arbitration proceedings.⁶⁸ Burlington had failed to give clear notice to Ecuador of its claims for denial of full protection and security; therefore, arbitrators ruled that the treaty's mandatory six-month waiting period before the initiation of arbitration had not passed. The claim was consequently declared inadmissible.⁶⁹

Fourth, groups of indigenous peoples—who are not party to a given arbitration, but have an interest in the outcome—can seek permission to intervene in the proceedings. The first *amicus curiae* submissions by indigenous peoples before a NAFTA arbitral tribunal were made in the Softwood Lumber case.⁷⁰ In the *Glamis Gold* case, the Tribunal granted the Quechan Indian Nation leave to file a non-party submission.⁷¹ However, in reaching its decision, the tribunal did not refer to any of the arguments advanced by their brief. More recently, in *Border Timbers Limited and others v Republic of Zimbabwe*,⁷²

⁶³ Id. para. 35.

⁶⁴ 'Debate over N.W.T. Caribou Hunting Goes Public', *CBC News*, 9 February 2010, <http://www.cbc.ca/canada/north/story/2010/02/09/nwt-caribou-debate.html>.

⁶⁵ 'New Plan for Canadian Bathurst Caribou Herd Management', *Eye on the Arctic*, 2 June 2010, <http://eyeontheartctic.rcinet.ca/en/news/canada/35-geopolitics/232-new-plan-for-canadian-bathurst-caribou-herd-management>.

⁶⁶ *Burlington Resources, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Jurisdiction, June 2, 2010, at paras. 27–37.

⁶⁷ Id. paras. 26 and 53.

⁶⁸ Id. para. 315.

⁶⁹ Id. paras. 317 and 336.

⁷⁰ See 'WTO Members Comment on Indigenous Amicus Brief in Lumber Dispute', 2 *Bridges Trade BioRes*, 16 May 2002.

⁷¹ *Glamis Gold, Ltd., v. the United States of America*, Decision on Application and Submission by Quechan Indian Nation, 16 September 2005, available at <http://www.state.gov/documents/organization/53592.pdf> (last visited 30 June 2017).

⁷² *Border Timbers Limited, Border Timbers International (Private) Limited, and Hangani Development Co. (Private) Limited v Republic of Zimbabwe*, ICSID Case No. ARB/10/25.

and *Bernhard von Pezold and others v Republic of Zimbabwe*,⁷³ the claimants alleged unlawful expropriation of their farms in Zimbabwe, which were compulsorily acquired by the government of Zimbabwe as part of its land reform programme. An NGO and four indigenous communities requested permission to file a written submission as *amicus curiae* to the Arbitral Tribunals.⁷⁴ The farms are allegedly located on the ancestral territories of indigenous peoples,⁷⁵ and the indigenous communities submitted that ‘the outcome of the present arbitral proceedings w[ould] determine not only the future rights and obligations of the disputing parties with regard to these lands, but m[ight] also potentially impact on the indigenous communities’ collective and individual rights’.⁷⁶ The Tribunal ultimately rejected the petition.⁷⁷ Despite acknowledging that the indigenous tribes have ‘some interest in the land over which the Claimants assert full legal title’, and that ‘it may therefore well be that the determinations of the Arbitral Tribunals in these proceedings will have an impact on the interests of the indigenous communities’,⁷⁸ the Tribunal held that the ‘apparent lack of independence or neutrality of the petitioners [wa]s a sufficient ground for denying the application’.⁷⁹

What is the relevance of these and similar cases to international investment law and international law more generally? In general terms, the issues raised have a significance that extends beyond international investment law itself because of their potential impact on indigenous rights and heritage. From the perspective of international investment law, the aforementioned cases exemplify how arbitral tribunals have dealt with (or chosen not to deal with) arguments concerning indigenous peoples’ rights. While arbitral tribunals have demonstrated some level of deference to state regulatory measures aimed at protecting indigenous cultural heritage, tribunals have adopted a more cautious stance when indigenous arguments are presented by indigenous claimants and *amici curiae*. The arbitral jurisprudence is divided as to whether local protests can amount to a breach of relevant investment treaty provisions. From a broader international law perspective, the collision between international investment law and indigenous human rights law exemplifies the alleged fragmentation of international law and the general question of regime collision. While regime collisions are not a new phenomenon, due to the proliferation of international legal instruments and dispute settlement mechanisms, the mechanisms to cope with such conflicts are far from settled. The following section provides a critical assessment of the current interaction of international investment law with the rights of indigenous peoples, and proposes two methods for improving their interaction.

⁷³ *Bernhard von Pezold and others v Republic of Zimbabwe*, ICSID Case No. ARB/10/15.

⁷⁴ *Bernhard von Pezold and others v Republic of Zimbabwe* (ICSID Case No. ARB/10/15) and *Border Timbers Limited, Border Timbers International (Private) Limited, and Hangan Development Co. (Private) Limited v Republic of Zimbabwe* (ICSID Case No. ARB/10/25), Procedural Order No. 2, 26 June 2012.

⁷⁵ *Id.* para. 18.

⁷⁶ *Id.* para. 21.

⁷⁷ *Id.* para. 64.

⁷⁸ *Id.* para. 62.

⁷⁹ *Id.* para. 56.

5. CRITICAL ASSESSMENT

The collision between international investment law and indigenous human rights law takes place at both procedural and substantive levels. The right of indigenous peoples to participate in the decisions that affect them at the procedural level is crucial to the protection of their cultural heritage.⁸⁰ However, international arbitral tribunals constitute an uneven playing field: indigenous peoples do not have direct access to these fora; instead, their arguments must be espoused by their home government, unless they are the investors. While indigenous peoples can, and have, present(ed) *amicus curiae* briefs reflecting their interests, investment tribunals are not legally obligated to consider such briefs; rather, they have the ability to do so should they deem it appropriate.

Moreover, the interaction between international investment law and other sets of law raises the substantive question as to whether the former is a ‘self-contained’ system.⁸¹ The increased proliferation of treaties and specialisation of different branches of international law make some overlapping with various sets of law unavoidable. In several investment treaty arbitrations, the arguments in support of foreign direct investment are intertwined with indigenous claims.

General treaty rules on hierarchy—namely *lex posterior derogat priori*⁸² and *lex specialis derogat generali*⁸³—may not be wholly adequate to govern the interplay between treaty regimes, as the given bodies of law do not exactly overlap, but have different scopes, aims and objectives.⁸⁴ Unless a cultural norm constitutes *jus cogens*,⁸⁵ it is difficult to foresee and to govern the interaction of different legal regimes.

Can investment treaty tribunals take into account and/or apply other bodies of law in addition to international investment law? Given their institutional mandate to settle investment disputes, there is a risk that investment treaty tribunals water down or overlook noteworthy cultural aspects. International adjudicators may be perceived as detached from indigenous communities and their cultural concerns. For example, they may not have specific expertise in indigenous human rights law, as their appointment

⁸⁰ See Art. 18 of the UNDRIP (stating that ‘Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.’)

⁸¹ Joel P. Trachtman, ‘The Domain of WTO Dispute Resolution’ (1999) 40 *Harvard International Law Journal* 333, 333 ff.

⁸² Vienna Convention on the Law of Treaties (VCLT), opened for signature 23 May 1969, in force 27 January 1980, 1155 UNTS 331, Article 30.

⁸³ The concept *lex specialis derogat legi generali* is ‘a generally accepted technique of interpretation and conflict resolution in international law’. It indicates that ‘whenever two or more norms deal with the same subject matter, priority should be given to the norm that is more specific’. See Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law, adopted by the International Law Commission at its Fifty-eighth session, in 2006, and submitted to the General Assembly as a part of the Commission’s report covering the work of that session (A/61/10, para. 251), at p. 2.

⁸⁴ Donald McRae, ‘International Economic Law and Public International Law: The Past and the Future’ (2014) 17 *Journal of International Economic Law* 627, 635.

⁸⁵ For discussion, see Valentina Vadi, ‘When Cultures Collide: Foreign Direct Investment, Natural Resources and Indigenous Heritage in International Investment Law’ (2011) 42 *Columbia Human Rights Law Review* 797, 857 ff.

requires expertise in international (investment) law. Furthermore, due to the emergence of a *jurisprudence constante* in international investment law, there is a risk that tribunals conform to these *de facto* precedents without necessarily considering analogous indigenous cultural heritage-related cases adjudicated before other international courts and tribunals. This is not to say that consistency in decision-making is undesirable; indeed, it can enhance the coherence and predictability of the system contributing to its legitimacy. However, the selection of the relevant precedents is significant, as it can impact the award.

Two avenues can facilitate the consideration of indigenous peoples' entitlements in international economic disputes: 1) a 'treaty-driven approach', and 2) a 'judicially driven approach'⁸⁶ First, the treaty-driven approach makes the case for a) strengthening the current regime protecting indigenous entitlements, and/or b) inserting relevant exceptions in the text of investment treaties. Although the UNDRIP constitutes the outcome of decades of elaboration and marks a milestone, it should also constitute the point of departure for further analysis and action. As international investment agreements are periodically renegotiated, treaty drafters can expressly accommodate indigenous peoples' entitlements in the text of the treaties.⁸⁷ For example, renegotiation of international investment agreements might take into account the requirements of free prior-informed consent and benefit sharing. This and similar forms of differential treatment may be justified under human rights law and already characterise other branches of international law, such as international environmental law. 'Aboriginal exemptions' commonly feature in a number of international environmental treaties, which include derogations to their main principles to accommodate the needs of indigenous peoples.⁸⁸ For example, the 1946 International Convention for the Regulation of Whaling, which superseded the 1931 Convention, retains aboriginal rights to subsistence whaling.⁸⁹ In parallel, investors can take into account the existence of protected groups when assessing the economic risks of the given investment⁹⁰ and consider incorporating local communities as part of multi-actor contracts.⁹¹

Second, the judicially driven approach addresses the question of whether investment treaty tribunals can acknowledge and/or apply other bodies of law in addition to international investment law. The approach relies on the interpretation and application of international investment law by arbitral tribunals. Investment treaty arbitral tribunals are of limited jurisdiction and cannot adjudicate on eventual infringements of indigenous peoples' rights. Arbitral tribunals lack the jurisdiction to hold states liable for breaches of their human rights obligations. Rather, they can only determine if the protections in the relevant investment treaty have been breached.

⁸⁶ Mihail Krepchev, 'The Problem of Accommodating Indigenous Land Rights in International Investment Law' (2015) 6 *Journal of International Dispute Settlement* 42–73, at 45.

⁸⁷ *Id.*

⁸⁸ Convention on Conservation of Migratory Species art. 3, para 5, 23 June 1979, 19 ILM 11.

⁸⁹ International Convention for the Regulation of Whaling art. III(13)(b), 2 December 1946, 161 UNTS 72, available at <http://www.iwcoffice.org/commission/schedule.htm>.

⁹⁰ Krepchev, 'The Problem of Accommodating Indigenous Land Rights in International Investment Law', 71.

⁹¹ Ibironke T. Odumosu-Ayanu, 'Governments, Investors and Local Communities: Analysis of a Multi-Actor Investment Contract Framework' (2014) 15 *Melbourne Journal of International Law* 473–510.

Nevertheless, this does not mean that indigenous rights should be irrelevant in the context of investment disputes. When interpreting a treaty, arbitrators can consider additional international obligations of the parties according to customary rules of treaty interpretation, as restated by the Vienna Convention on Law of Treaties (VCLT).⁹² Arbitral tribunals can and should interpret international investment law in conformity with *jus cogens*⁹³ and a state's obligations under the United Nations Charter.⁹⁴ Some norms protecting indigenous rights have acquired *jus cogens* status, such as the right to self-determination and the prohibitions of discrimination and of genocide. Moreover, international investment law is not a self-contained regime, but constitutes an important field of international law. As such, international investment law should not frustrate the aim and objectives of the latter, which include the protection of indigenous human rights as expressed, *inter alia*, in the UNDRIP, the Universal Declaration of Human Rights (UDHR),⁹⁵ the International Covenant on Civil and Political Rights (ICCPR)⁹⁶ and the Covenant on Economic, Social and Cultural Rights (ICESCR).⁹⁷ Instead, arbitral tribunals should interpret international investment law, considering 'any relevant rules of international law applicable in the relations between the parties'.⁹⁸

Indigenous cultural entitlements are a significant component of human rights law with provisions across both hard law and soft law.⁹⁹ Indeed, there are many examples of binding cultural entitlements. Article 1 of both the ICCPR and the ICESCR, for example, recognises the right of self-determination, *i.e.*, the people's right to 'freely determine their political status and freely pursue their economic, social and *cultural* development'.¹⁰⁰ The same provision also clarifies that international economic cooperation is 'based upon the principle of mutual benefit, and international law', and that 'in no case may a people be deprived of its own means of subsistence'.¹⁰¹ The principle of self-determination is commonly regarded as a *jus cogens* rule.

Furthermore, as previously stated, indigenous culture plays a central role in the UNDRIP. Although the UNDRIP *per se* is not binding, it can coalesce in customary international law and therefore become binding. Some of its contents already express

⁹² VCLT, Art. 31(3)(c).

⁹³ Vienna Convention on the Law of Treaties (VCLT), done at Vienna on 23 May 1969, in force on 27 January 1980. United Nations Treaty Series, vol. 1155, p. 331, Article 53 (recognizing a *jus cogens* norm as one 'accepted and recognized by the international community of states as a whole as a norm from which no derogation is possible').

⁹⁴ On *jus cogens* and international investment law, see Andrea K. Bjorklund, 'Mandatory Rules of Law and Investment Arbitration' (2007) 18 *American Review of International Arbitration* 175–203; Valentina Vadi, '*Jus Cogens* in International Investment Law and Arbitration' (2015) 46 *Netherlands Yearbook of International Law* 357–388.

⁹⁵ Universal Declaration of Human Rights (UDHR), adopted by the United Nations on 10 December 1948.

⁹⁶ International Covenant on Civil and Political Rights (ICCPR) adopted and opened for signature by General Assembly resolution 2200A (XXI) of 16 December 1966; 999 UNTS 171; 6 ILM 368 (1967).

⁹⁷ International Covenant on Economic, Social and Cultural Rights (ICESCR), adopted and opened for signature by General Assembly resolution 2200A (XXI) of December 16, 1966; 993 UNTS 3; 6 ILM 368 (1967).

⁹⁸ VCLT, Article 31.3.c.

⁹⁹ Due to space limits, this section can provide only a limited number of examples of human rights law provisions recognizing cultural entitlements.

¹⁰⁰ ICCPR, Article 1.1 and ICESCR, Article 1.1 (emphasis added).

¹⁰¹ ICCPR, Article 1.2 and ICESCR, Article 1.2.

customary international law or repeat provisions appearing in (binding) treaty law.¹⁰² In short, although international investment law pays little attention to culture—particularly in the texts of international investment agreements—and international arbitral tribunals consequently have limited or no specific mandate to protect cultural heritage-related rights, provisions such as those of the UNDRIP can influence the interpretation and application of international investment law. This is especially the case with regard to cultural entitlements that are binding or have a peremptory character.

6. CONCLUSIONS

The effective protection of indigenous cultural heritage is important *per se* and for its contribution to the common heritage of mankind and the protection of human rights. The UNDRIP has furthered the ‘culturalization of indigenous rights’,¹⁰³ emphasising the importance of indigenous peoples’ cultural entitlements and highlighting the linkage between the safeguarding of their culture and the protection of their human rights. Although the Declaration *per se* is not binding, it may effectively be or become so, insofar as it reflects customary international law and/or general principles of law and/or *jus cogens*. At the very least, the UNDRIP constitutes a standard that states should strive to achieve.

The interplay between foreign direct investment and indigenous cultural heritage in international investment law and arbitration has risen to the forefront of legal debate. The cases analysed in this chapter provide a snapshot of the clash of cultures between international economic governance and indigenous heritage. They also highlight a fundamental clash between local and global dimensions of regulation. Indigenous heritage is local, belonging to specific peoples and places; meanwhile, economic governance has an inherently international character. At the same time, however, indigenous heritage also belongs to the international legal discourse.

Investment disputes concerning indigenous cultural heritage have been frequently brought before international investment treaty arbitral tribunals. Such disputes often present a public dimension, because they reflect the conflict between fundamental rights, such as cultural and property rights. Therefore, arbitral tribunals may not be the most suitable fora to settle indigenous cultural heritage disputes, as they may face difficulties in finding an appropriate balance between the different interests concerned. Investment arbitral tribunals are courts of limited jurisdiction, and cannot adjudicate on state violations of indigenous peoples’ entitlements.

This is not to say, however, that arbitrators should not take indigenous cultural entitlements into account. This chapter identified two main avenues for considering indigenous peoples’ concerns in the context of investment treaty arbitration. First, *de lege lata*, according to Article 31.3.c. of the VCLT, arbitrators can interpret international

¹⁰² On the role of soft law in international investment law, see e.g. Andrea K. Bjorklund, ‘Assessing the Effectiveness of Soft Law Instruments in International Investment Law’, in Andrea K. Bjorklund and August Reinisch (eds.) *International Investment Law and Soft Law* (Edward Elgar, 2012) 51–81.

¹⁰³ Isabelle Schulte-Tenckhoff, ‘Treaties, Peoplehood, and Self-Determination: Understanding the Language of Indigenous Rights’, in Elvira Pulitano (ed), *Indigenous Rights in the Age of the UN Declaration* (CUP 2012) 64–86 at 67.

investment law while taking into account other international law commitments of the state. If this provision refers to customary law and/or treaty law, a fortiori, it includes reference to *jus cogens*. Second, *de lege ferenda*, states should introduce relevant provisions in their treaties to protect paramount interests and/or reinforce the international safeguarding of indigenous rights.

In conclusion, this chapter does not negate that FDI can represent a potentially positive force for development. However, state policy and practice concerning economic activities must be mindful of the implications for the culture of indigenous peoples. As Reisman contended almost 20 years ago in discussing a draft of the UNDRIP, ‘It remains to be seen whether the words in this noble instrument will be transformed into effective practice or will simply ... collec[t] the alligator tears that have been shed for centuries for the victims of cultural imperialisms.’¹⁰⁴

¹⁰⁴ Michael Reisman, ‘International Law and the Inner Worlds of Others’ (1996) 9 *Saint Thomas Law Review* 25, 30.