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The 'Culture of Balancing' of International Investment Law - Cultural Interests and Investors' Interests in International Investment Treaties and Arbitration

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The 'Culture of Balancing' of International Investment Law

Cultural Interests and Investors' Interests in International Investment Treaties and Arbitration

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1. Introduction

The relationship between international investment law (IIL) and its 'others' has recently attracted the attention of the investment law epistemic community, especially with respect to international human rights law and all the components of sustainable development.[1] In this picture, it is worth noticing that international cultural law (ICL) and cultural heritage are largely absent.[2] Irrespective of the reasons for such a

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[1] Among the abundant literature on the relationship between international investment law and its 'others', see *i.e.* Freya Baetens (ed.), *Investment Law Within International Law: An Integrationist Perspective* (CUP, 2013) (forthcoming); Eric de Brabandere, 'Human Rights Considerations in International Investment Arbitration', in Malgosia Fitzmaurice, Panos Merkouris (eds.), *The Interpretation and Application of the European Convention of Human Rights: Legal and Practical Implications* (Martinus Nijhoff Publishers, 2012); Eric de Brabandere, Tarcisio Gazzini (eds.), *Foreign Investment in the Energy Sector: Balancing Public and Private Interests* (Martinus Nijhoff Publishers, 2013) (forthcoming); Pierre-Marie Dupuy, Ernst U. Petersmann, Francesco Francioni (eds.), *Human Rights in International Investment Law and Arbitration* (OUP, 2009); Rainer Hofmann, Christian J. Tams (eds.), *International Investment Law and its Others*, (Nomos, 2012); Vid Prislan, 'Non-Investment Obligations in Investment Treaty Arbitration – Towards a Greater Role for States?' in Freya Baetens (ed.), *Investment Law Within International Law: An Integrationist Perspective* (CUP, 2013) (forthcoming); Yannick Radi, 'The "Human Nature" of International Investment Law' (2013) 1 *Transnational Dispute Management* 1; Yannick Radi, 'The Tripartite Dimension of Conflicts of Interests – Workers, Foreign Investors and Host States in the Energy Sector' in Eric de Brabandere, Tarcisio Gazzini (eds.), *Foreign Investment in the Energy Sector: Balancing Public and Private Interests* (Martinus Nijhoff Publishers, 2013) (forthcoming); Bruno Simma, 'Foreign Investment Arbitration: a Place for Human Rights?' (2011) 60 *ICLQ* 573; Valentina Vadi, 'Culture Clash? World Heritage and Investors' Rights in International Investment Law and Arbitration' (2013) 28.1 *ICSID Review* 1.

[2] Among the rare literature on this issue, see *i.e.* Annette Froehlich, 'L'enjeu de la culture dans son contexte économique international' in Paul Meerts (ed.), *Culture and International Law* (Hague Academic Press/TMC Asser Press Publishers, 2008) 83; Federico Lenzerini, 'Property Protection and Protection of Cultural Heritage' in Stephan W. Schill (ed.), *International Investment Law and Comparative Public Law* (OUP, 2010) ch. 17; Valentina Vadi, 'When Cultures Collide: Foreign Direct Investment, Natural Resources and Indigenous Heritage in International Investment Law' (2011) 42 *Colum. Hum. Rts. L. Rev.* 797; Valentina Vadi, 'Culture Clash? World Heritage and Investors' Rights in International Investment Law and Arbitration', *supra* 1 note ; Valentina Vadi, *The Cultural Wealth of Nations in International Investment Law and Arbitration* (CUP, 2014) (forthcoming).

disinterest from investment scholars and lawyers,[3] this picture needs to be completed and cultural heritage to be taken seriously, especially because of the increasing interplay between foreign direct investment (FDI) operations and cultural heritage in all its dimensions. In light of this academic deficiency and this societal necessity, the present contribution offers an analysis of the status of cultural heritage in IIL.

This analysis is based on two theoretical premises.[4] First and contrary to mainstream literature which regards IIL as being in conflict with its 'others', one argues that the normative vagueness that characterizes the provisions of international investment agreements (IIA) prevents from framing the debate in terms of a normative conflict. This claim is also supported by the 'public nature' of IIL, the primary aim of which having always been development: from economic development yesterday to (increasingly) sustainable development in the current days.[5] Second and in light of the above, one also puts forth that the type of conflict which is in hand in IIL and more specifically in international investment arbitration should be conceived of as a conflict of interests, *i.e.* a conflict between the public interest of host states and the private interest of foreign investors.[6] In no way should one equate the rights of foreign investors as they are depicted by investors themselves in their claims to the rights granted by IIA provisions in reality.

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[3] Among various factors, the public/private divide that characterizes the 'investment epistemic community' and the consequent lack of knowledge in the area of international cultural law (ICL) and cultural heritage may explain such a disinterest. In this respect, the current publicization of this community will likely result in a greater attention paid to ICL and cultural heritage. On the publicization of the 'investment epistemic community', see *i.e.* Yannick Radi, 'The "Human Nature" of International Investment Law', *supra* note 1, 24-25. On the 'investment law epistemic community', see *i.e.* Moshe Hirsch, 'The Interaction between International Investment Law and Human Rights Treaties: A Sociological Perspective' in Tomer Broude, Yuval Shany (eds.), *Multi-Sourced Equivalent Norms in International Law* (Hart Publishing, 2011) 115; Moshe Hirsch, 'The Sociology of International Economic Law', (2008) 29 *EJIL* 277; Stephan W. Schill, 'W(h)ither Fragmentation? On the Literature and Sociology of International Investment Law' (2011) 22 *EJIL* 875.

[4] For an analysis of these theoretical premises, see Yannick Radi, 'The "Human Nature" of International Investment Law', *supra* note 1, 2-9 and more generally Yannick Radi, *La standardisation et le droit international – Contours d'une théorie dialectique de la formation du droit* (Bruylant, 2013), 23-69;

[5] On the relationship between 'development' and international investment law, see *i.e.* Marie-Claire Cordonier Seger, Markus W. Gehring, Andrew Newcombe (eds.), *Sustainable Development in World Investment Law* (Kluwer, 2011); Rainer Hofmann, Christian J. Tams, Stephan W. Schill (eds.), *International Investment Law and Development: Friends or Foes ?* (2014) (forthcoming); Yannick Radi, 'International Investment Law and Development: a History of Two Concepts', in Rainer Hofmann, Christian J. Tams, Stephan W. Schill (eds.), *International Investment Law and Development: Friends or Foes ?, ibid.*

[6] As discussed in the conclusion, international investment law is not only characterized by public/private conflicts of interests, but also by public/public conflicts of interests.

In light of the above, this article argues that the issue of the status of cultural heritage in IIL and international investment arbitration should be understood as raising the question of the conflict between the cultural interests of host states and the private interests of foreign investors (*the culture-investment conflict of interests*). The issue at stake is not a normative conflict between IIL and international cultural law as such. In this conceptual framework, this article puts forth and aims at shedding light on the 'sensitiveness' of IIL to cultural heritage, *i.e.* the fact that the conventional granting of rights to foreign investors does not result in a regulatory chill with respect to the protection/promotion of cultural heritage. At the core of this claim lies the fact that the IIL regime, as illustrated by the existing case-law, strikes balances of interests that evidence the taking into account of cultural interests and leave an undeniable regulatory space to states to enact measures aiming at the protection/promotion of cultural heritage.

To argue this claim, the article first highlights the *culture-investment conflict of interests* by analysing the nature and specificities of cultural interests in relation to the concept of cultural heritage (Section 2). It then proceeds with a discussion of the current case-law that illustrates the 'sensitiveness' of IIL to cultural interests (Section 3). More prospectively, the article finally assesses the ways to foster the 'sensitiveness' of IIL to cultural heritage in light of the new generation of IIA (Section 4). Moving from the *culture-investment conflict of interests*, it concludes with some remarks on the conflicts between cultural interests and other public interests and how IIL could come into play to tame these conflicts that take place within the 'box' of the public interest.

2. The concept of cultural heritage

From an anthropological and sociological point of view, this is a truism to say that culture is a universal phenomenon characterized by its relativity and diversity. From the standpoint of international law,[7] it is worth noticing that the concept of culture has been characterized over time by a process of heterogenisation and diversification.

[7] On culture in international law, see *i.e.* S. Borelli, *Cultural Heritage, Cultural Rights, Cultural Diversity: New Developments in International Law* (Martinus Nijhoff Publisher, 2012); C. Forrest, *International Law and the Protection of Cultural Heritage* (Routledge, 2010); James A. R. Nafziger, *Cultural Heritage Law* (E. Elgar, 2012) ; Paul Meerts (ed.), *Culture and International Law, supra* note 2; Valentina Vadi, *The Cultural Wealth of Nations in International Investment Law and Arbitration, supra* note 2.

Originally, international law approached culture in terms of property, focusing on specific assets. Implicit in the conventions adopted at the start of the 20th century,[8] this approach was made explicit in the Hague Convention for the protection of cultural property in the event of armed conflict.[9] The Convention concerning the protection of the world cultural and natural heritage constituted a landmark evolution in the conceptualization of culture in international law.[10] Indeed, the shift that it embodies from 'property' to 'heritage' paved the way for the protection of intangible assets as illustrated for instance by the Convention for the safeguarding of intangible cultural heritage.[11]

From a legal point of view, this evolution has led to the diversification of the forms of culture protected under international law, *i.e.* tangible and intangible assets. From a conceptual and practical point of view, it has resulted in the difficulty to provide a general definition of cultural heritage or to identify general criteria of identification. This is well illustrated by article 2.2 of the Convention for the safeguarding of intangible cultural heritage which provides: 'The 'intangible cultural heritage', as defined in paragraph 1 above, is manifested inter alia in the following domains: (a) oral traditions and expressions, including language as a vehicle of the intangible cultural heritage; (b) performing arts; (c) social practices, rituals and festive events; (d) knowledge and practices concerning nature and the universe; (e) traditional craftsmanship.[12]'

Beyond its complexity, cultural heritage appears to be characterized by the 'semiotic link' between an 'item' and a group.[13] The Convention for the safeguarding of intangible cultural heritage well evidences this conceptual approach to cultural heritage: 'The "intangible cultural heritage" means the practices, representations,

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[8] See for instance art. 56 of the 1907 Hague Convention : 'The property of municipalities, that of institutions dedicated to religion, charity and education, the arts and sciences, even when State property, shall be treated as private property. All seizure of, destruction or wilful damage done to institutions of this character, historic monuments, works of art and science, is forbidden, and should be made the subject of legal proceedings', Convention (IV) respecting the laws and customs of war on land and its annex: Regulations concerning the laws and customs of war on land (1907), available at http://www.icrc.org/ihl/ (accessed 15 June 2013).

[9] Hague Convention for the protection of cultural property in the event of armed conflict (1954), available at http://portal.unesco.org/en/ (accessed 15 June 2013).

[10] Convention concerning the protection of the world cultural and natural heritage (1972), available at http://whc.unesco.org/en/ (accessed 15 June 2013).

[11] Convention for the safeguarding of intangible cultural heritage (2003), available at http://www.unesco.org/culture/ich/ (accessed 15 June 2013).

[12] *Ibid*.

[13] See *i.e.* Clémentine Bories, *Le patrimoine culturel en droit international* (Pédone, 2011), 41-50.

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.*[14]' This is the recognition indeed that enshrines an 'item' in the cultural heritage of a group. As stated by Bories : 'Le patrimoine culturel est ancré dans l'humain et dans le mouvement, et il a besoin d'un enracinement pour exister en cette qualité. Il est un objet juridique contextualisé, c'est à dire un objet juridique qui ne revêt sa singularité et donc sa qualification juridique propre que du fait de son lien à un contexte.[15]'

This understanding of cultural heritage has two consequences. From a quantitative point of view, it entails that the recognition which enshrines an 'item' in the cultural heritage of a group can emanate from diverse groups: minorities, populations, nations, regions, Mankind. These 'circles of recognition' often overlap. From a qualitative point of view, this semiotic approach means that the opinion of the group is crucial and pre-eminent in the identification of cultural heritage. Due respect should be paid to these opinions when a dispute involving a cultural 'item' is at stake. This brings us to the discussion of the extent to which international investment law allows states to protect and promote 'what' their official authorities or/and local groups regard as forming part of their cultural heritage.

3. The *culture-investment conflict of interests* in the current IIL framework

In relation with the above-mentioned 'semantic link', the current evolution of investment arbitration reveals the 'procedural sensitiveness' of IIL to cultural interests. Indeed, the increasing transparency and opening of arbitration proceedings,[16] especially through *amicus curiae*,[17] enables local population to 'say

[14] Emphasis added.

[15] Clémentine Bories, *Le patrimoine culturel en droit international*, *supra* note 13, 42.

[16] See *e.g.* OECD, *Transparency and third party participation in investment-state dispute settlement procedures* (2005), available at http://www.oecd.org/daf/inv/investment-policy/34786913.pdf (accessed 15 June 2013).

[17] See Rule 37 of the ICSID arbitration rules, available at https://icsid.worldbank.org/ICSID/ICSID/RulesMain.jsp (accessed 15 June 2013). In the ICSID context, NGOs got for the first time access to proceedings when the *Suez/Vivendi* tribunal recognized the authority of arbitrators to receive *amicus curiae* briefs, *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic,* Order in response to a petition for transparency and participation as amicus curiae, 19 May 2005, ICSID Case No. ARB/03/19. In the context of the North American Free Trade Agreement (NAFTA) and in application of art. 15 of the UNCITRAL arbitration rules of procedure, the *Methanex* tribunal was the first one to accept such briefs, *Methanex v. United States,* Decision of the tribunal on petitions from third persons to intervene as 'amici curiae', 15 January 2001, decisions available at http://www.italaw.com/ (accessed 15 June 2013). This decision was later confirmed by the NAFTA Free Trade Commission, see Statement of the

their word' about disputes involving an 'item' that they regard as belonging to their cultural heritage.[18] Beyond this 'procedural sensitiveness', one argues that IIL has a 'substantive sensitiveness'. Indeed, the balancing of interests that characterize IIL and investment arbitration allows the taking into account of cultural interests and leaves an undeniable regulatory space to host states to protect/promote their cultural interests. To illustrate this claim and because of space constraints, this article focuses on expropriation. It starts with a casuistic review of a sample of cases submitted to arbitration tribunals: the *Glamis,*[19] *SPP*[20] and *Santa Elena*[21] cases (3.1). It then enters into a theoretical discussion of the 'sensitiveness' of this treaty provision to cultural interests (3.2).

3.1. The 'sensitiveness' of the expropriation provision in practice: case-review

The *Glamis* case originates in a series of federal government and Californian measures enacted with respect to a mining project ('the Imperial Project') located in an area of the Californian desert regarded by the Quechan Indian tribe as a sacred site. In particular, these measures required the backfilling and grading for mining operations in the vicinity of this sacred site. Glamis claimed that these measures resulted in the violation of article 1110 ('Expropriation and Compensation') and article 1105 ('Minimum Standard of Treatment') of the North American Free Trade Agreement (NAFTA).[22] As to indirect expropriation, the tribunal considered in reference to the *Tecmed* award[23] that an indirect expropriation can only result from a

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Free Trade Commission on non-disputing party participation, 31 July 2001, available at http://www.state.gov/documents/ (accessed 15 June 2013). On *amicus curiae* see *i.e.* E. De Brabandere, 'NGOs and the "Public Interest": The Legality and Rationale of Amicus Curiae Interventions in International Economic and Investment Disputes' (2011) 12.1 *Chicago Journal of International Law* 95; S. Ménetrey, *L'amicus curiae - Vers un principe commun de droit procédural* (Dalloz, 2010),156-180.

[18] See *e.g.* the authorization granted by the arbitration tribunal in the *Glamis* case to the Quechan Indian Nation to submit an *amicus curiae, 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.italaw.com/ (accessed 15 June 2013).

[19] *Glamis Gold, Ltd v. The United States of America*, Award, 8 June 2009, available at http://www.italaw.com/ (accessed 15 June 2013).

[20] *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, Award on the merits, 20 May 1992, ICSID Case No. ARB/84/3, available at https://icsid.worldbank.org/ (accessed 15 June 2013).

[21] *Compania del Desarrollo de Santa Elena, S.A. and the Republic of Costa Rica*, Final award, 17 February 2000, Case No. ARB/96/1, available at https://icsid.worldbank.org/ (accessed 15 June 2013).

[22] North American Free Trade Agreement (1994), available at http://www.nafta-sec-alena.org (accessed 15 June 2013).

[23] *Tecnicas Medioambientales Tecmed S.A. v. The United Mexican States,* Award, 29 May 2003, ICSID Case No. ARB(AF)/00/2, para. 115, available at http://www.italaw.com/ (accessed 15 June 2013).

'radical deprivation of the economical use and enjoyment of its investments'. Therefore, noting that 'mere restrictions on the property rights do not constitute takings', it assessed 'whether a violation of Article 1110 of the NAFTA has occurred by determining whether the federal and California measures "substantially impair[ed] the investor's economic rights, *i.e.* ownership, use, enjoyment or management of the business, by rendering them useless"'.[24] Relying on this test, the arbitration tribunal first concluded that the federal record of decision denying approval of the Imperial Project was quickly reversed and therefore of short duration. As a consequence, it denied that the delay and temporary denial occasioned by 'the federal government either individually or in combination with subsequent complained of measures of the State of California were violations of Article 1110'.[25]

In the *SPP* case, a company from Hong Kong invested in Egypt for the construction of two tourist complexes, in particular one at the Pyramids Oasis. Following the discovery of antiquities in the Pyramid Oasis and the opposition of the population and the Parliament to the project, the Egyptian government enacted measures, one of them conducting to the cancellation of the project. The investor regarded these measures as constitutive of an expropriation. The government argued that this cancellation was required under Egyptian law and the World Heritage Convention.[26]
The tribunal recognized the public interest dimension of the measure aiming at the protection and preservation of the antiquities. It stated: 'Clearly, as a matter of international law, the Respondent was entitled to cancel a tourist development project situated on its own territory for the purpose of protecting antiquities … the right was exercised for a public purpose, namely, the preservation and protection of antiquities in the area.[27]' However, the arbitration tribunal put forth that 'the rules of Egyptian law and international law governing the exercise of the right of eminent domain impose an obligation to indemnify parties whose legitimate rights are affected by such exercise'.[28] In the view of the tribunal, the World Heritage Convention did not come as a justification because of the 'timing' of the cancellation. Indeed, it was decided

[24] *Glamis Gold, Ltd v. The United States of America,* Award, 8 June 2009, para. 357, *supra* note 19.
[25] *Ibid.*, para. 360.
[26] Convention concerning the protection of the world cultural and natural heritage (1972), *supra* note 10.
[27] *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, Award on the merits, 20 May 1992, ICSID Case No. ARB/84/3, para. 158, *supra* note 20.
[28] *Ibid.*, para. 159.

before the inscription of the site on the list.[29] On the other hand, the tribunal took into account the Convention in the calculation of compensation. Indeed, it stated: 'Even if the Tribunal were disposed to accept the validity of the Claimants' DCF calculations, it could only award *lucrum cessans*, when the obligations resulting from the UNESCO Convention with respect to the Pyramids Plateau became binding on the Respondent. From that date forward, the Claimants' activities on the Pyramids Plateau would have been in conflict with the Convention and therefore in violation of international law, and any profits that might have resulted from such activities are consequently non-compensable.[30]'

In the *Santa Elena* case, CDSE, a Costa Rican corporation whose shareholders were mainly US citizens was formed in 1970 to purchase the Santa Elena property located in the Guanacaste Province. The terrain was characterized by its geographical and geological features: it consisted of over 30 kilometres of Pacific coastline and numerous rivers, springs, valleys, forests and mountains. In addition, it was home to a variety of flora and fauna indigenous to the region. CDSE intended to develop a tourist resort and residential community. In 1978, Costa Rica issued an expropriation decree,[31] the aim of which being the enlargement of the Guanacaste conservation area, which was subsequently added to the World Heritage List.[32] Costa Rica proposed to pay a compensation that was regarded as insufficient by the investor. Discussing the question of compensation, the tribunal considered that the public purpose of the Costa Rican measure did not affect the compensation: 'While an expropriation or taking for environmental reasons may be classified as a taking for a public purpose, and thus may be legitimate, the fact that the Property was taken for this reason does not affect either the nature or the measure of the compensation to be paid for the taking. That is, the purpose of protecting the environment for which the Property was taken does not alter the legal character of the taking for which adequate compensation must be paid. The international source of the obligation to protect the

[29] *Ibid.*, para. 154.
[30] *Ibid.*, para. 191.
[31] *Compania del Desarrollo de Santa Elena, S.A. and the Republic of Costa Rica*, Final award, 17 February 2000, Case No. ARB/96/1, paras. 15-17, *supra* note 21.
[32] Valentina Vadi, 'Culture Clash? World Heritage and Investors' Rights in International Investment Law and Arbitration', *supra* note 1, 11.

environment makes no difference.[33]' It concluded: 'Expropriatory environmental measure –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 tale 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.[34]'

3.2. The 'sensitiveness' of the expropriation provision in theory: general remarks

At first glance, the above-mentioned awards may give the impression to confer various degrees of deference to the exercise of state regulatory power in favour of the protection/promotion of cultural heritage. Among them, the *Santa Elena* award has been regarded as the embodiment of the '*sole effect doctrine*' and of a pro-investor approach to expropriation.[35] In this respect, two remarks can be formulated. First of all, as noted in the literature,[36] the *Santa Elena* award does not concern a situation of indirect expropriation, but of direct expropriation instead. Second of all, and beyond the direct/indirect expropriation dichotomy, one should not forget that the public interest is, among others, one of the condition of legality of expropriation, together with compensation. In this context, one can only agree with the above-mentioned statement of the *Santa Elena* tribunal.[37] Following this line of argumentation, one puts forth that the distinction between regulatory and expropriatory measures hardly makes sense.[38] The distinction to be made is between compensable and non-compensable measures, the issues being the criteria of the distinction and the amount of compensation to be paid.

With respect to these two issues, one argues that the above-mentioned case-law and the case-law on (indirect) expropriation as a whole evidences the 'sensitiveness' of

[33] *Compania del Desarrollo de Santa Elena, S.A. and the Republic of Costa Rica*, Final award, 17 February 2000, Case No. ARB/96/1, para. 71, *supra* note 21.
[34] *Ibid.*, para. 72.
[35] See Ben Mostafa, 'The Sole Effects Doctrine, Police Powers and Indirect Expropriation under International Law' (2008) 15 *Australian Intl. L. J.* 267.
[36] See Valentina Vadi, 'Culture Clash? World Heritage and Investors' Rights in International Investment Law and Arbitration', *supra* note 1, 11.
[37] *Compania del Desarrollo de Santa Elena, S.A. and the Republic of Costa Rica*, Final award, 17 February 2000, Case No. ARB/96/1, para. 71, *supra* note 21.
[38] Yannick Radi, 'Realizing Human Rights in Investment Treaty Arbitration: a Perspective From Within the International Investment Law Toolbox' (2012) *N.C.J. Int'l. L. & Com. Reg.* 1107, 1177. In that sense, see also Rosalyn Higgins, 'The Taking of Property by the State: Recent Developments in International Law' (1982) *RCADI* 259, 331.

IIL with respect to cultural interests and more generally to the public interest. Starting with the criteria to be used to distinguish compensable from non-compensable measures, one reached the conclusion elsewhere that beyond the *dogma* of *obiter* consecrating the '*sole effect doctrine*'[39] and the '*police power doctrine*',[40] most tribunals follow this approach:[41] a state measure should be regarded as an expropriatory measure and be compensated in case it results in the loss of the investment or the radical deprivation of its value.[42] Such a balanced approach that is made explicit through the recourse to the test of proportionality[43] leaves room to the exercise of state regulatory power. A state can freely exercise this power until the point where such measure has the above-mentioned effect, the state having at that point to bear the brunt of its public interest. In this respect, the *Glamis* award well illustrates this approach and the extent to which states enjoy an undeniable regulatory freedom to protect and promote their cultural interests. So do the *SPP* and *Santa Elena* awards. In these two cases that relate respectively to indirect and direct expropriation, the investor was deprived of its property, a circumstance that justified the qualification of the measure as being expropriatory. The *SPP* award also illustrates the fact that even though an expropriation to be compensated may be identified by the tribunal, the cultural interests in hand can be taken into account at the stage of the assessment of the compensation to be paid.

Despite this 'sensitiveness', it remains that IIL is often perceived as a 'foe' to the public interest in general and cultural interests in particular. This brings us to the discussion of the policy evolutions that could foster the 'sensitiveness' of IIL to cultural heritage.

[39] For a radical expression of this doctrine, see *i.e. Metalclad Corporation v. Mexico,* Award, 30 August 2000, ICSID Case No. ARB(AF)/97/1, para. 103, available at http://www.italaw.com/ (accessed 15 June 2013).

[40] For a radical expression of this doctrine, see *i.e. Methanex v. The United States,* Final award, 3 August 2005, para. 7, available at http://www.italaw.com/ (accessed 15 June 2013).

[41] Compare for instance on the one hand, the *Feldman* and *Tecmed* cases and on the other hand, the *Encana* case. See *Feldman v. Mexico*, Award on merits 16 December 2002, ICSID Case No. ARB(AF)/99/1, para. 152; *Tecnicas Medioambientales Tecmed, S.A. v. United Mexican States*, Award, 29 May 2003, ICSID Case No. ARB (AF)/00/2, para. 115; *EnCana Corporation v. Republic of Ecuador*, 3 February 2006, LCIA Case No. UN3481, para. 169, awards available at http://www.italaw.com/ (accessed 15 June 2013).

[42] Yannick Radi, *La standardisation et le droit international – Contours d'une théorie dialectique de la formation du droit*, *supra* note 4, 331-336.

[43] *Tecnicas Medioambientales Tecmed, S.A. v. United Mexican States*, Award, 29 May 2003, ICSID Case No. ARB (AF)/00/2, para 122, *supra* note 41; *Total S.A. v. République d'Argentine,* Award, 27 December 2010, ICSID Case No. ARB/04/01, para. 232, available at http://www.italaw.com/ (accessed 15 June 2013).

4. The *culture-investment conflict of interests* in a future IIL framework

Traditionally, IIA have not referred explicitly to the public interest in general and specific public interests, such as human rights or the environment. Furthermore, they have not provided for the 'sanctuarization' of the regulatory power of states. However, in the aftermath of the multilateralization of capital flaws and the *de facto* bilateralization of IIA, it is worth noticing that the risk of being faced with treaty claims has led Western states to incorporate new provisions protective of states' regulatory power and public interests in their BIT models.[44] One also finds such provisions in the investment chapters of free trade agreements. These provisions are of a different nature. Some are mentioned in the preamble as an objective of the treaty.[45] Others aim at 'sanctuarizing' the regulatory power of states by providing that a measure aiming at the protection/promotion of the public interest or of a specific public interest should not be regarded as being in violation of the IIA, limiting[46] or not[47] this to the conformity with the terms of the treaty or placing limits with respect to rare circumstances.[48] Another set of provisions, in a binding or non-binding language, aims at avoiding a 'race-to-the-bottom' between states with the view to attract foreign investors[49] or more generally to require from them that they respect their international commitments[50].[51]

Three remarks can be made as to these provisions. First of all, it is worth noticing that some address the public/private conflict of interests while other appear relevant with

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[44] Yannick Radi, *La standardisation et le droit international – Contours d'une théorie dialectique de la formation du droit*, *supra* note 4, 331-336.
[45] See *e.g.* the Preamble of the NAFTA, *supra* note 22; the Preamble of the Netherlands-Namibia BIT (2002), available at http://unctad.org/sections/dite/iia/docs/bits/ (accessed 15 June 2013).
[46] See *e.g.* art. 1114(1) of the NAFTA, *supra* note 22.
[47] See *e.g.* art. 10.1 of the Canadian Model agreement for the promotion and protection of investments (2004), available at http://www.international.gc.ca/trade-agreements-accords-commerciaux/ (accessed 15 June 2013).
[48] See *e.g.* annex B ('Expropriation') of the US Model bilateral investment treaty (2012), available at http://www.ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf (accessed 15 June 2013).
[49] See *e.g.* art. 18.2.1 of the Peru-Korea FTA (2010), available at http://www.customs.go.kr/kcshome/main/content/ContentView.do?contentId=CONTENT_ID_000002364&layoutMenuNo=23272 (accessed 15 June 2013).
[50] See *e.g.* art 17.1.2 of the US-Singapore FTA (2004), available at http://www.ustr.gov/trade-agreements/free-trade-agreements/singapore-fta (accessed 15 June 2013).
[51] For analyses of this set of provisions with respect to labor standards, see *i.e.* Yannick Radi, 'The Tripartite Dimension of Conflicts of Interests – Workers, Foreign Investors and Host States in the Energy Sector', *supra* note 1; Vid Prislan, Ruben Zandvliet, 'Labor Provisions in International Investment Agreements: Prospects for Sustainable Development', *Yearbook of International Investment Law and Policy* (OUP, 2013) (forthcoming), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2171716, 28 (accessed 15 June 2013).

respect to another type of conflict, *i.e.* the public/public conflict of interests that is discussed below in the conclusion. Concerning the former, one can notice that the treaty provisions refer generally to public interests or more specifically to human rights, the environment, labour standards and corruption.[52] The protection/promotion of cultural heritage is rarely addressed and it is so in a restrictive manner, mainly through the exclusion of some cultural areas, 'items' and regulations from the scope of treaties.[53] In that normative context, policy-makers could rely on similar tools to foster the protection/promotion of cultural heritage. That being said, one should not be mistaken as to the 'added-value' of such an evolution. One argues here that it would not result in a significant 'substantive added-value'. As above-mentioned, most of the existing treaty provisions place limits -'exceptions to exceptions'- which are likely not different from the situations when arbitration tribunals generally reach the conclusion of a treaty violation, *e.g.* loss of control of the investment or radical deprivation of value with respect to indirect expropriation. Nevertheless, such a treaty evolution would embody two important added values. First of all, it would provide a greater stability to the 'community of states and investors'[54] by ensuring that arbitration tribunals do not depart from mainstream practice and thereby unduly restrain state regulatory power in the benefit of the protection/promotion of cultural heritage. Secondly, it would contribute to the legitimization of investment treaty arbitration and the IIL regime as a whole by making explicit that cultural interests are taken seriously. In that sense, it would have a significant 'symbolic added value'.

5. Conclusion

The stabilizing and symbolic inputs of a new set of provisions enshrining in treaty practice the taking into account of cultural interests would greatly complement the

[52] OECD, 'International Investment Agreements: A Survey of Environmental, Labour and Anti-Corruption Issues' (2008), available at http://www.oecd.org/corporate/mne/40471550.pdf (accessed 15 June 2013).

[53] For detailed analyses of these provisions, see *i.e.* Laurence Mayer-Robitaille, *Le statut juridique des biens et services culturels dans les accords commerciaux internationaux* (L'Harmattan, 2008); Lilian Richieri-Hanania, 'Cultural Diversity and Regional Trade Agreements – The European Union Experience with Culture Cooperation Frameworks' (2012) SIEL Working Paper, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2087639 (accessed 15 June 2013); Valentina Vadi, 'Culture Clash? World Heritage and Investors' Rights in International Investment Law and Arbitration', *supra* note 1, 17-20.

[54] *Burlington Ressources Inc. And others v. Republic of Ecuador and Empresa Estatal Petroleos del Ecuador (PetroEcuador),* Decision on jurisdiction, 2 June 2010, ICSID case No. ARB/98/2, para. 119, available at http://www.italaw.com/ (accessed 15 June 2013).

undeniable regulatory freedom that states already enjoy to protect and promote cultural heritage under the current IIL framework.

Beyond this result linked to the public/private conflict of interests, reforms modeled on the above-mentioned provisions aiming at avoiding 'races-to-the-bottom' and reinforcing the compliance to international commitments would address a different type of conflict of interests:[55] the public/public conflict of interests. Indeed, by mentioning provisions addressing the respect of UNESCO conventions or the 'non-lowering' of cultural standards, IIA would prevent -in a more or less binding manner-states to favour one public interest, *i.e.* the promotion of economic development for the benefit of another public interest, *i.e.* cultural heritage. This evolution, linked to the fact that humanity is often also the beholder of cultural heritage, would erect international investment law as a tool of global governance for the active protection of the international public good that is cultural heritage.

[55] See *supra* note 49 and 50.