CHAPTER 19 Culture, Development and International Law: The Linkage between Investment Rules and the Protection of Cultural Heritage

Valentina Sara Vadi*

1. Introduction

Culture influences, and is influenced by, development. As Amartya Sen once put it, “The issue is not whether culture matters […]. The real issue, rather, is how – not whether – culture matters”. While a rational and sustainable use of a State’s cultural patrimony may lead to human and cultural development, it also “sustain[s] a society’s sense of identity and continuity with the past”. In parallel, development may be conceived as a process for expanding individual freedom, including cultural freedom. At the normative level, the nexus between culture and development is made explicit by a series of international law instruments. For instance, the Universal Declaration on Cultural Diversity acknowledges that “cultural diversity […] is one of the roots of development, understood not simply in terms of economic growth, but also as a means to achieve a more satisfactory intellectual, emotional, moral and spiritual existence”.

Culture influences, and is influenced by, development in several different ways. While some authors have already analyzed the interaction between cultural matters and international trade law, there is a general lack of literature concerning the link between cultural heritage and foreign direct investment (FDI). This chapter aims precisely at

* Marie Curie Postdoctoral Fellow (Maastricht University). The author wishes to thank Professor Francesco Francioni, Professor Mel Marquis, and Professor Ernst-Ulrich Petersmann for their useful comments. The usual disclaimer applies.

3 A. Sen, Development as Freedom (Oxford University Press, 1999).
5 See, for instance, P. Van den Bossche, Free Trade and Culture (Boekmanstudies, 2007).
coping with this existing lacuna in contemporary legal studies, and sheds light on the link between the promotion of FDI, which is a critical factor for development, and the protection of cultural heritage. Are investment treaties compatible with States’ obligations to protect cultural heritage? Is investor-State arbitration a suitable forum to protect public interests? A number of investment treaty arbitrations involving elements of cultural heritage have shown the increasing association between foreign investment and economic development on the one hand and cultural development on the other.

This study also proposes legal methods to reconcile these different values. The underlying thesis of the chapter is that reconciliation is possible, and that development should be conceived as a broad concept inclusive not only of mere economic growth but also of human well-being for which cultural elements are crucial. The organization of the discussion is as follows. First, the chapter will explore the legal framework for the protection of cultural heritage at the international law level. Second, the investment law framework will be sketched out. Third, the conflict areas between investment law and cultural heritage law will be scrutinized through an analysis of some relevant case studies. Fourth, legal options will be discussed which may reconcile the different interests at stake, and fifth, the conclusions shall be put forward.

2. The Protection of Cultural Heritage

Cultural heritage can be defined as “the totality of cultural objects, traditions, knowledge and skills that a given nation or community has inherited by way of learning processes from previous generations and which provides its sense of identity to be transmitted to subsequent generations”.6 This expression is relatively recent. Early treaties did not use the term “heritage”; rather, they referred to the narrower concept of “cultural property”.7 The term “heritage” was officially adopted by UNESCO in the 1972 World Heritage Convention.8 This paradigm shift was due to the conceptual necessity of bringing together natural sites and cultural properties of outstanding and universal value. However, subsequent treaties and international legal instruments consolidated this move, thus indicating that it was not a mere nominal change but a more substantive evolution.9

---

6 Francioni (above n. 2), p. 6.
8 Convention concerning the Protection of the World Cultural and Natural Heritage (Paris, 16 November 1972); 1037 UNTS 151; hereinafter “World Heritage Convention”.
9 For instance, the General Assembly has recognized “the right of members of all civilizations to preserve and develop their cultural heritage within their own societies” (UN doc. A/RES/56/6).