Valentina Vadi, *Cultural Heritage in International Investment Law and Arbitration*, (Cambridge University Press, 2014), xxxiii-344pp. ISBN 978-1-107-038486

'Can States promote economic development without infringing their cultural heritage?'[1] This is the introductory question asked by Professor Valentina Vadi in her monograph on the relation between cultural heritage and international investment law. Her analysis is structured in three parts. The first part (Cultural heritage and foreign direct investments: defining and connecting the two fields) is dedicated to the definition of the fields of international cultural law and international investment law. The author defines first the concept of cultural heritage, sketches the international regulatory framework on cultural resources and addresses the linkages between culture and development. She then proceeds to provide a brief historical background of international investment law, before presenting a particularly well-written critical overview of the current international law rules on investors' protection, with particular focus on expropriation, as well as on investor-State dispute settlement. The second part (When cultures collide: cultural heritage and foreign direct investment) examines the interplay between cultural policies and the protection of foreign direct investors. The author has chosen to focus on specific aspects of international cultural law, namely the rules on world heritage, underwater cultural heritage, cultural diversity, intangible heritage and indigenous cultural heritage. She examines the relation of these rules with the international rules on foreign direct investment (FDI), while providing a systematic and comprehensive survey of the existing relevant arbitral case law. In the third and final part of the book (Investing in culture), the author explores existing mechanisms for the settlement of investor-State disputes involving cultural heritage as well as possible mechanisms that could reconcile the protection of cultural heritage with the promotion of FDI, particularly, the introduction of cultural exceptions and cultural impact assessments.

Aside from the wealth of information as well as the quality of its analysis, the book of Professor Vadi covers a gap in the relevant literature. Indeed, apart from a limited number of studies focusing on aspects of the relation between cultural heritage and international investment law, there has been no in-depth study while the book remains the sole comprehensive contribution to the subject. Furthermore, while most of the existing studies have approached the relation between cultural heritage and international investment law from the international investment law standpoint, the book offers an interdisciplinary approach, focussing on cultural and on

[1] V. Vadi, *Cultural Heritage in International Investment Law and Arbitration* 1 (Cambridge University Press, 2014).

investment law aspects alike. To many an extent, the book anticipated also the evolution of research in international investment law. Indeed, it is by no means a coincidence that in 2016, the International Economic Law Interest Group of the European Society of International Law dedicated a conference to cultural heritage, giving the opportunity to a number of distinguished scholars to discuss anew problems of the relation between cultural heritage and international investment law.[2]

A number of investment law scholars have analysed the relation between cultural heritage and international investment law from the standpoint of sovereignty, namely, the boundaries of the right of the States to regulate the activities of foreign investors, in derogation of international commitments that they have undertaken.[3] By way of illustration, Titi examines provisions contained in trade and investment agreements that allow the contracting parties to take exceptional measures to protect, amongst others, the public interest or special interests like cultural diversity.[4] From this perspective, the discussion on the protection of cultural heritage relates to the conflict between domestic and international investment law and is no different from the discussion on the protection of other essential interests of the State. The choice of this approach is far from accidental. As Mann explains, [t]he right to regulate, is a predominant theme in the discourse between those who promote the expansion or the regime and those who question its role and direction in an age of globalisation.' This discourse is 'framed in terms of policy space for environmental protection, human health issues, worker safety, basic labor rights, and so on. In other words, the focus is on the environmental, social, and human rights issues that prevail in Western political debates about investment treaties'.[5]

Professor Vadi has not disregarded this discourse. She discusses the clash between national cultural policies and FDI from an international investment law perspective already in her introduction, referring to the legitimacy for the State to adopt cultural policies, the limits to state intervention in cultural matters and the boundaries between the legitimate regulation and

[2] UNESCO World Heritage between Education and Economy: A Legal Analysis, Ravenna, 27-28 October 2016, <http://www.esil-sedi.eu/sites/default/files/4%20October%20Ravenna%20Unesco%20Conference%20%282%29.pdf> (accessed on 10 October 2017).

[3] A. Titi, *The Right to Regulate in International Investment Law* 33, 37 (Hart Publishing 2014).

[4] *Ibid*., at 102, 216-233.

[5] H. Mann, 'The New Frontier: Economic Rights of Foreign Investors Versus Government Policy Space for Economic Development', in *Alternative Visions of the International Law on Foreign Investment: Essays in Honour of Muthucumaraswamy Sornarajah* 290 (C.L. Lim ed., Cambridge University Press, 2016).

violation of investment treaty provisions.[6] She returns to these questions in her critical overview of the current international law rules on investors' protection and on investor-State dispute settlement. Analysing the expropriation test of the 2012 US Model BIT, she highlights that heritage conservation is likely to be a 'legitimate public welfare objective'.[7] Furthermore, she analyses the 'many recent arbitral awards' concerning 'the appropriate boundary between two conflicting values: the legitimate sphere for state regulation in the pursuit of public goods on the one hand, and the protection of private property from state interference on the other'. [8] Finally, in her conclusions, she notes that: '[t]he regulatory autonomy of the host state must find a balance between individual economic freedoms and the common weal thus complying with the relevant international law obligations of the state.'[9]

In the second part of her book however, Professor Vadi adopts the international cultural law perspective.[10] Examining the 'impact of investors' rights on … five different but related categories of culture',[11] she sees the relation between cultural heritage and international investment law as a problem of ''clash of cultures' between international investment law and international cultural law',[12] in other words, a problem of conflict between two sets of international law rules: those protecting cultural heritage and those protecting foreign direct investors. In this context, she adopts 'a unitarian approach', supporting 'the argument that international law, albeit decentralized, is not an anarchic amalgam of different norms, but has a structure similar to a system'[13] and looks for the solutions to the clash in the linkage paradigm, 'the specific interplay between cultural heritage and international investment law'.[14]

By way of illustration, the author analyses the content of the UNESCO World Heritage Convention (WHC) before examining its application in investor-State arbitral awards. In her critical assessment, she relies on an observation of the AALP tribunal that '[i]nternational

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[6] Vadi, *supra* n. 1, at 4.

[7] *Ibid*., at 65.

[8] *Ibid*., at 80.

[9] *Ibid*., at 295.

[10] *Cf*. J.E. Viñuales, *Foreign Investment and the Environment in International Law* 3-4 (Cambridge University Press, 2012) (Referring to different approaches of environmental and investment lawyers, the first focussing on normative conflicts, the second on legitimacy conflicts).

[11] Vadi, *supra* n. 1, at 9.

[12] *Ibid*., at 1.

[13] *Ibid*., at 49.

[14] *Ibid*., at 17.

investment law is 'not a self-contained closed legal system' but has to be 'envisaged within a wider juridical context in which rules from other sources are integrated''.[15] She furthermore refers to the principles of systemic interpretation, restated by Article 31(3)(c) of the Vienna Convention on the Law of Treaties (VCLT), claiming that arbitral tribunals should take into account 'any relevant rule of international law applicable in the relationship between the parties'.[16] She thus concludes that '[i]f the host state that is party to the investment treaty dispute has ratified the WHC, the relevant provisions of the WHC come into play. Because of their limited mandate, the arbitrators cannot adjudicate on the eventual breach of cultural heritage law, but may analyse the specific investment claims in the light of the relevant rules of international law applicable in the relationship between the parties, including the WHC. The consideration of international cultural law would be *incidenter tantum*'.[17]

The author draws an analogous conclusion in relation to the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions as well as the UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage.[18] In the same chapter, after reviewing relevant investor-State arbitral awards, she observes that 'international investment law has not yet developed any institutional machinery for the protection of cultural diversity and intangible heritage the investment dispute settlement'.[19] Nevertheless, she identifies 'underlying processes of investment treaty arbitration that lead to a construction of unity and coherence in international law'.[20] In her critical assessment of the rules on indigenous cultural heritage, the author draws a similar conclusion. Relying on '[t]he fact that arbitrators have taken non-investment values into account', she identifies 'a trend towards the unity of international law'.[21]

There are important differences between the standpoint of sovereignty and that of conflict between international cultural and international investment law. The first focuses on the protection of cultural rights by the sovereign State whereas the second focuses on the protection of cultural rights by international law. Of course, neither States always privilege cultural

[15] *Ibid*., at 134 (Referring to Asian Agricultural Products Ltd v. Sri Lanka (AAPL V. Sri Lanka), ICSID Case ARB/87/3, Awards of 27 June 1990, 4 ICSID Reports 245 (1997), par. 21).

[16] *Ibid*., at 134.

[17] *Ibid*., at 134-135.

[18] *Ibid*., at 202-203.

[19] *Ibid*., at 200.

[20] *Ibid*.

[21] *Ibid*., at 232.

heritage over other interests nor international law protects all aspects of cultural heritage. As a result, none of the two may ensure comprehensive protection. Furthermore, the standpoint of sovereignly focuses on conflicts between domestic and international law that differ from conflicts arising between international cultural and international investment law.

In that respect, Viñuales rightly draws the distinction between legitimacy conflicts (conflicts between norms of different legal orders) and normative conflicts (conflicts between norms of the same legal order), explaining that '[d]espite the thin boundary between normative and legitimacy conflicts, the distinction remains important because applicable to solving normative conflicts are different from those applicable to solve legitimacy conflicts'.[22] Indeed, save for the cases where the relevant treaties contain specific conflict rules, arbitrators will have to solve normative conflicts through the general rules of international law, including Article 31(3)(c) of the VCLT and legitimacy conflicts through the general rules on the relation between national and international law.[23] Aside from the reluctance of arbitral tribunals to find normative conflicts, the difference of treatment of normative and legitimacy conflicts is not deprived of legal implications.

Most importantly, different tribunals have taken diametrically opposed stances on both normative and legitimacy conflicts. While some tribunals ruled that the international source of the obligation makes no difference to the State's obligation to pay compensation,[24] others have denied compensation to investors' activities violating international law.[25] Similarly, some tribunals ruled that the right to regulate has no influence to the payment of compensation, whereas others ruled that the mere existence of public interest in the interference will mean that no expropriation has occurred.[26] If, as Professor Vadi rightly observes, tribunals increasingly take non-investment values into account in their rulings on investor-State disputes, much remains to be done to achieve integration of international cultural and international investment law. Whether this will actually ever happen, remains to be seen.

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[22] Viñuales, *supra* n. 8, at 38.

[23] *Ibid*., at 33, 133-157, 281-290

[24] *Compañia del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica* (ICSID Case No. ARB/96/1), Award of 17 February 2000, paras 71-72.

[25] *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt* (ICSID Case No. ARB/84/3), Award of 20 May 1992, para. 191.

[26] U. Kriebaum, *Regulatory Takings: Balancing the Interests of the Investor and the State*, 8 Journal of World Investment & Trade 724-727 (2007).

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