
Public and Private in the International Protection of Global Cultural Goods

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Abstract

The idea of cultural heritage as an ‘international public good’ can be traced back to the Preamble to the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, according to which ‘damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind, since each people makes its contribution to the culture of the world’. But how can this idea of cultural heritage as a global public good be reconciled with the infinite variety of cultural expressions and with the role of art as a medium essentially devoted to giving form to the plurality and diversity of tastes, beliefs, and inclinations of the different societies in which it is produced? In this article I will examine the issue of pluralism and legal interaction within three perspectives: (1) the plurality of different meanings of cultural property and cultural heritage; (2) the plurality and interaction between different legal regimes of protection – international and domestic, private and public, peacetime and wartime; and (3) the plurality and interaction between different mechanisms of enforcement at the international and domestic levels.

1 Pluralism in Law and in Culture

In a symposium dedicated to the plurality of legal orders and global public goods, it is worth recalling that the idea of ‘legal order’ (*ordinamento giuridico*, *ordonnance juridique*, *Rechtsordnung*) emerged at the beginning of the 20th century largely as a reaction to the dominant theories of legal positivism. A sophisticated conceptualization of it can be found in the work of a Sicilian jurist, Santi Romano, whose ground-breaking book *L’Ordinamento giuridico*, published in 1907, is premised on the idea that law as a *legal order* is not the sum total of binding norms, as assumed by legal positivism, but is rather the underlying social structure made up of the individual and

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collective beliefs, practices, and shared inclinations of members of the society and the material organization that is the reflection of such practices and inclinations. This is what has been called the ‘institutional’ theory of the law, a theory that is easier to comprehend when using a language, like Italian, which has different words for law as a legal order (*diritto*) and law as binding enactment of a recognized legislative authority (*legge*).

But the main reason for connecting Santi Romano’s work to the theme of this conference is his idea of law as a ‘plurality of legal orders’, law beyond the state, and as a product of the social organization of any given society within, outside, and above the state. This idea is incredibly modern in today’s globalized world. But, more importantly, it fits the context of this conference on pluralism and international public goods and, more particularly, the subject of this article on international cultural goods. The reason becomes clear when we consider that pluralism and diversity are the distinguishing features of cultural expressions. Art itself, as a medium essentially devoted to giving form to cultural expression, always transcends its economic value as a mere object and reflects the pluralism and diversity of tastes and inclinations of the societies that have produced it. In this respect, it corresponds well with the idea of law in Santi Romano’s theory of plurality of legal orders. This is evident to anyone who visits this very small part of the world that we call Europe. Exploring its territory, the visitor will find traces of almost 3,000 years of human history in the Etruscan cities of the dead, in the magnificent vestiges of Greek colonization and of Imperial Rome, in the amazing variety of styles in architecture and urban landscape, ranging from the severe Romanesque parish churches that punctuate the pilgrims’ roads of the Middle Ages to the imposing gothic cathedrals and the ornate drama of the Baroque. This variety is not only due to the succession of different periods of history: it is also due to different interpretations and renditions of the spirit of the same epoch. This is evident when we compare the luminous elegance of the Renaissance buildings in the Florence of Leon Battista Alberti with the monumental grandeur of papal Rome, and with the richly ornate Venetian style of the same epoch, so clearly contaminated by its oriental influences.

In the infinite variety of their expressions, art and heritage reflect the variety of collective inclinations and social organizations of the communities that have produced and maintained them. To paraphrase the old adage used by Santi Romano, *ubi societas ibi jus*, we could say *ubi societas ibi ars et jus*.

Within this perspective, I will briefly examine in this article: (1) the plurality and interaction of different legal meanings of cultural heritage; (2) the plurality and interaction of different legal regimes on the protection of cultural heritage; and (3) the plurality and interaction between different mechanisms of enforcement at the international and domestic levels.

2 Epistemological Perspectives

On the notion and significance of cultural heritage, international and comparative law scholarship, as well as cultural heritage diplomacy, has been divided until recently between two conceptions of cultural property: those who viewed it as part of the

Nation and those who looked at it as part of the heritage of Humankind. The first epistemological perspective would justify the retention of cultural objects within the territory of the state and the imposition of export controls and limitations on private ownership over cultural goods in the name of public interest. The second perspective, on the contrary, would underplay the role of cultural heritage as an element of national identity and would emphasize its significance as part of the heritage of humanity, thus supporting the broadest access to it and its international circulation to facilitate exchange and cultural understanding among different peoples of the world. It is a commonplace that this latter view is not favoured by 'source countries', which have suffered the loss of their cultural patrimony in the past and may continue to suffer today as a result of illicit traffic. On the contrary, it is preferred by policy-makers, collectors, and museums in art-importing countries for its capacity to contribute to a cosmopolitan order in which cultural exchange can support the intellectual and moral progress of humanity.

One may wonder whether this dual perspective has ever accurately reflected the spirit of the law and policy attitudes toward the conservation and management of cultural heritage as a public good. Certainly, this black and white view of the role and significance of cultural heritage is today being replaced by a more sophisticated and pluralistic conception of cultural expressions that transcends the raw distinction between national and international attitudes.

Today, cultural property may be seen as part of national identity, especially in the post-colonial and post-communist contexts, where cultural heritage plays an important role in 'transitional justice', in the form both of restitution of art looted or destroyed and the reinstatement of monuments charged with political meanings.¹ At the same time, cultural objects can be seen as part of the physical public space that conditions our world view and is part of what we normally call 'the environment' or the 'landscape'. This role of cultural heritage as part of public space opens the way to a holistic approach to heritage, i.e., an approach that brings together cultural and natural heritage and takes into account the interactive link of such heritage with the real life of people inhabiting it. It is this holistic conception of heritage that underlies the very recent effort by UNESCO to undertake a preliminary feasibility study in view of the elaboration of a new global convention on the protection of Landscape.²

Cultural property may be seen as moveable artifacts susceptible to economic evaluation, and for this reason subject to exchange in domestic and international commerce; but it may also be seen as objects endowed with intrinsic value as expressions of human creativity and as part of a unique or very special tradition of human skills and craftwork, which today we call 'intangible cultural heritage'.³ Masterpieces of

¹ See the removal of the monument to the resistance to Nazism in Estonia, which provoked a crisis with Russia.

² See the legal opinion provided by this author on the subject in view of the decision of the Executive Board of UNESCO of 11 May 2011. On file with the author.

³ See the UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage, adopted in Paris on 17 Oct. 2003, available at: http://portal.unesco.org/en/ev.php-URL_ID=17716&URL_DO=DO_TOPIC&URL_SECTION=201.html.

painting, sculpture, mosaics, inlaid wood, musical instruments, and oral heritage displayed today in museums, exhibitions, and shops owe their existence to social structures and traditions that have nurtured and maintained the human knowledge and skills necessary to produce them.

Cultural property today can be seen as the object of individual rights, property rights, but also as ‘communal property’ or public patrimony, which is essential to the sentiment of belonging to a collective social body and to the transmission of this sentiment to future generations. In this sense, cultural heritage becomes an important dimension of human rights, in as much as it reflects the spiritual, religious, and cultural specificity of minorities and groups. This specificity, which is antagonistic to the dominant idea of heritage as part of the Nation, finds its most pregnant expression in the cultural rights of indigenous peoples in the 2007 UN Declaration.⁴

3 Plurality and Interaction of Cultural Heritage Regimes

This diversification in the way of thinking about cultural property has been accompanied by a growing complexity of the law and by increasing interaction between different regimes of international regulation. Since the creation of the United Nations Educational, Scientific and Cultural Organization (UNESCO),⁵ numerous multilateral treaties have been adopted that have contributed to giving a precise definition to the concept of ‘cultural property’, as an autonomous category of goods previously considered elusive and fragmented.⁶ At the same time, international practice and treaty law have seen a dynamic evolution from the concept of ‘cultural property’ as an object to the broader concept of ‘cultural heritage’. This has been made possible thanks to the interaction of cultural property law with human rights law, which has permitted an expansion of the scope of protection from material cultural goods to the ‘associative’ social value of these goods as significant elements of a cultural community and as expression of its creative spirit and identity.

Plurality and interaction of legal orders also underlies the reciprocal influence between international humanitarian law and the specific rules on the protection of

⁴ UN Declaration on the Rights of Indigenous Peoples, GA Res., 13 Sept. 2007, Sixty-first Session, Supplement No. 53 (A/61/53), especially Arts 11, 12, 13, 14, 15, and 16.

⁵ UNESCO was created on 16 Nov. 1945 by the representatives of 37 countries which signed the Constitutive Act (entry into force 4 Nov. 1946, available at: www.unesco.org/new/en/unesco/about-us/who-we-are/history/constitution/).

⁶ The synthetic expression ‘cultural property’ was used for the first time in the Hague Convention on the protection of cultural property in the event of armed conflict of 1954, available at: http://portal.unesco.org/en/ev.php-URL_ID=13637&URL_DO=DO_TOPIC&URL_SECTION=201.html. In the preceding international instruments there was no unitary notion of cultural property, but rather an empirical indication of objects of historical, monumental, or humanitarian interest that should be spared from acts of war. See Arts 27 and 56 of the Annexed Reg. of the IV Hague Convention of 1907, as well as Art. 5 of the IX Hague Convention.

cultural property in the event of armed conflict, both international and internal.⁷ Further, international law of armed conflict has converged with international criminal law and has become an element for innovation and the progressive development of international cultural heritage law in three distinct directions: (1) the elevation of attacks against cultural property to the legal status of international crimes, especially war crimes and crimes against humanity;⁸ (2) the consolidation of the law of individual criminal responsibility *under international law*, not only under domestic law, for serious offences against cultural objects;⁹ (3) the progressive development of the law of state responsibility for the intentional destruction of cultural heritage.¹⁰

In the field of peacetime international law, public law and private law have converged towards the development of obligations to prevent and repress the illicit traffic of moveable cultural property.¹¹ At the level of public law, a growing number of importing and exporting states have ratified the 1970 UNESCO Convention on illicit traffic of cultural property – now in force in all major art market countries.¹² At the level of private international law, the adoption of the 1995 UNIDROIT Convention¹³ has laid down innovative rules on acquisition of title over stolen or illegally exported cultural goods, on restitution and compensation of *due diligence* purchasers, on time limits for the presentation of claims, and on the relevance of foreign public law in restitution disputes. With regard to these two instruments, one can appreciate the interaction between public international law and private law with the goal of preventing and suppressing the illicit traffic in cultural objects. The UNIDROIT Convention incorporates the international public policy principle that legal acquisition of a stolen cultural object must never be allowed and provides that the possessor of a stolen cultural object shall be bound to

⁷ See the 1949 Geneva Conventions (Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; Convention (III) relative to the Treatment of Prisoners of War; and Convention (IV) relative to the Protection of Civilian Persons in Time of War), as well as their Additional Protocols of 1977, particularly Arts 52(1), 53, and 86 of Protocol I and 16 of Protocol II.

⁸ See Art. 3(d) of the Statute of the International Criminal Tribunal for Yugoslavia and Art. 8(b)(ix) and €(iv) of the Statute of the International Criminal Court.

⁹ Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, adopted 26 Mar. 1999, 38 ILM (1999) 769, especially Arts 15–18; Art. 3(d) of the Statute of the International Criminal Tribunal for Yugoslavia, 32 ILM (1993) 1192, and Art. 8 of the Statute of the International Criminal Court, 37 ILM (1998) 999.

¹⁰ See the UNESCO Declaration Concerning the Intentional Destruction of Cultural Heritage adopted by the General Conference of UNESCO at its 33rd session, Paris, 19 Oct. 2005, reprinted in *Standard Setting in UNESCO* (2007), ii, at 733. See also Francioni and Lenzerini, 'The Destruction of the Buddhas of Bamiyan and International Law', 14 *EJIL* (2003) 619.

¹¹ Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, adopted in Paris on 14 Nov. 1970, available at: http://portal.unesco.org/en/ev.php-URL_ID=13039&URL_DO=DO_TOPIC&URL_SECTION=201.html.

¹² See <http://portal.unesco.org/la/convention.asp?KO=13039&language=E&order=alpha>. This Convention has been ratified by 120 states, among which are the largest importers and exporters of cultural objects, such as the US, the UK, Switzerland, Japan, Italy, and France.

¹³ UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, adopted 24 June 1995, available at: www.unidroit.org/english/conventions/1995culturalproperty/1995culturalproperty-e.pdf.

return it.¹⁴ In this sense, principles of public international law become the instrument to bridge the gap between incompatible domestic legal orders, establishing on the one side (civil law) that the *bona fide* purchaser of a stolen moveable shall acquire the legal title, and on the other side (*common law* systems) that the purchase *a non domino* of a stolen object will not permit the acquisition of the legal title.

The UNIDROIT Convention offers other examples of a fruitful interaction of different legal orders with a view to advancing the objective of a more effective protection of cultural property against the danger of clandestine traffic and of consequent loss and dispersion. One such example is provided by Article 3(2) which permits the qualification as ‘stolen object’ – thus subject to mandatory return – of ‘a cultural object which has been unlawfully excavated or lawfully excavated but unlawfully retained’, when such qualification is consistent with the law of the state in which the excavation took place. It is evident that this provision makes it possible to overcome the obstacle posed by the autonomy of different domestic legal orders, which on the one side consider the underground archaeological heritage as part of the public patrimony, and which on the other side permit private ownership of archaeological objects by the owner of the land and by private parties. The solution offered by the UNIDROIT Convention reflects the awareness of a conflicting relationship between a plurality of domestic legal orders and a progressive accommodation between them in support of a policy of legal cooperation in the fight against illicit traffic of antiquities.

In a more nuanced mode, interaction between private law and public law can be discerned in certain restitution disputes when the act of returning the cultural object involves not only the restoration of ownership to the original title holder (as in the case of theft or illegal export), but also the acknowledgement of a past injustice. This is the case in the many recent disputes involving holocaust looted art,¹⁵ war plunder, and acts of cultural dispossession during periods of colonial domination. In these cases, the principle of non-retroactivity of international treaties can be a formidable obstacle to the return of cultural objects to their lawful owners. Yet, the rigidity of the non-retroactivity principle can be tempered by principles of transitional justice, and more precisely by the principle of ‘non-legitimation’ of past wrongs, such as that which may be found in Article 10(3) of the UNIDROIT Convention.¹⁶

Interaction between international law and domestic law is at the heart of the innovative regime of ‘world heritage’ protection as provided by the 1972 UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage. This Convention, with its 189 contracting parties coinciding with the near totality

¹⁴ *Ibid.*, Art. 3.

¹⁵ On this see O’Donnell, ‘The Restitution of Holocaust Looted Art and Transitional Justice: The Perfect Storm or the Raft of the Medusa?’, 22 *EJIL* (2011) 49.

¹⁶ Art. 10(3) reads as follows: ‘This Convention does not in any way legitimize any illegal transaction of whatever nature which has taken place before the entry into force of this convention ... nor limit any right of a State or other person to make a claim under remedies available outside the framework of this Convention for the restitution or return of a cultural object stolen or illegally exported before the entry into force of this Convention.’ The same concept is affirmed in the sixth para. of the Preamble to the UNIDROIT Convention, *supra* note 13.

of the international community of states, has established and developed a system of international cooperation for the conservation and valorization of certain cultural and natural properties of outstanding universal value.¹⁷ The secret of its success lies in the careful combination of national legal orders, based on the principle of territorial sovereignty, with the international law concept of 'world heritage' attached to properties of such exceptional value as to entail the general interest of the international community for their conservation and management. The interaction between national law and international law follows a creative pattern of division of labour between the national and international levels. At the national level, the territorial state maintains the exclusive right to identify and propose the nomination of a property located in its territory for inscription in the World Heritage List. At the international level, the competent body of the Convention – the World Heritage Committee – has the power to evaluate the proposed property, to approve or reject its inscription in the List, and to monitor its state of conservation for the purpose of maintaining its world heritage status, its demotion in the List of World Heritage in Danger, or even its deletion from the List.¹⁸ The World Heritage regime is a good example of how even the fundamental principle of territorial sovereignty can interact with international law. World heritage properties, unlike common heritage resources,¹⁹ remain subject to the sovereignty of the territorial state; at the same time such sovereignty must be exercised in such a way as to be functional to the international law objective of conserving and protecting a property in the general interest of the international community.

More recently, at the threshold of the 21st century, other manifestations of the plurality and interaction of legal orders in the regulation of cultural heritage have emerged in connection with the development of treaty regimes for the protection of underwater cultural heritage²⁰ and for the safeguarding of intangible cultural heritage.²¹ The first was the result of the gaps in, and unsatisfactory application of, the international legal order of the oceans, as codified in the 1982 UN Convention on the Law of the Sea, with regard to the protection of underwater cultural heritage from the risk of unauthorized and unregulated retrieval of such heritage for purely commercial purposes. The 2001 UNESCO Convention, with its technical annex on 'rules concerning activities directed to underwater cultural heritage', in spite of its still limited number of ratifications and the criticism raised regarding its cumbersome system of inter-state cooperation, represents a commendable effort at integrating cultural heritage concerns in the legal order of the oceans, which since time immemorial had developed under the impulse of prevailing commercial and security interests.

¹⁷ Convention concerning the Protection of the World Cultural and Natural Heritage, adopted in Paris on 16 Nov. 1972, available at: http://portal.unesco.org/en/ev.php-URL_ID=13055&URL_DO=DO_TOPIC&URL_SECTION=201.html.

¹⁸ This has occurred twice in relation to a natural site in Oman and in relation to the cultural site of the city of Dresden, Germany.

¹⁹ That is, the mineral resources of the international seabed area under Part XI of UNCLOS.

²⁰ Convention on the Protection of the Underwater Cultural Heritage, adopted in Paris on 2 Nov. 2001, available at: http://portal.unesco.org/en/ev.php-URL_ID=13520&URL_DO=DO_TOPIC&URL_SECTION=201.html.

²¹ Convention for the Safeguarding of the Intangible Cultural Heritage, *supra* note 3.

The 2003 Convention for the Safeguarding of Intangible Cultural Heritage and the 2005 Convention on cultural diversity are themselves the product of the growing concern with the preservation of cultural pluralism and diversity in the age of globalization. But in a deeper sense they are also the result of an interaction between two different sets of international norms: cultural heritage norms and human rights norms. The novelty of the intangible heritage regime is in the protection of cultural heritage not as a *res* endowed with its own intrinsic value – aesthetic, historical, archaeological – but rather because of its association with a social structure of a cultural community which sees the safeguarding of its living culture as part of its human rights claim to maintain and develop its identity as a social body beyond the biological life of its members. In this perspective, the 2003 Convention denotes a confluence of international cultural heritage law with human rights law, the protection of minorities, and the emerging law on the protection of the rights of indigenous peoples.

4 The Enforcement Deficit in International Cultural Heritage Law

Unlike other fields of international law, such as foreign investment, trade, and human rights, international cultural heritage law does not have an *ad hoc* mechanism of norm enforcement and dispute settlement. No general court exists nor is envisaged in this respect, and even the UNESCO Committee on Restitutions, which is the result of an internal decision of the Organization rather than an institutional organ of the 1970 Convention, is severely under-utilized and remains unavailable to private parties. The International Court of Justice (ICJ), as the principal organ of the UN, has rarely had an opportunity to address questions of cultural property and cultural heritage. In the old case of the *Temple of Preha Vihear*, now revived before the Court in matters of interpretation,²² although the cultural property in question was not the subject matter of the dispute *in se et per se* – it was only the point of reference for the establishment of a controversial boundary – the Court ruled that Thailand was under an international obligation to return parts of the cultural property that had been removed from the site of the temple. Another case brought by Liechtenstein against Germany in 2004 for the return of certain works of art confiscated after World War II in a third country never moved beyond the preliminary objection phase when the Court declined to exercise jurisdiction.²³ More recently, the ICJ has had the opportunity of elaborating on the relevance of cultural heritage in the context of genocide,²⁴ and in the 2009 case

²² *Case Concerning the Temple of Preha Vihear (Cambodia v. Thailand)*, judgment of 15 June 1962 [1962] ICJ Rep 6.

²³ *Certain Property (Liechtenstein v. Germany)*, judgment of 10 Feb. 2005 [2005] ICJ Rep 6.

²⁴ *Genocide case (Bosnia-Herzegovina v. Serbia)*, judgment of 26 Feb. 2007 [2007] ICJ Rep 43. Here the Court was presented with the applicant's argument that the documented systematic destruction of religious buildings, libraries, and other cultural properties was evidence of the respondent's plan to accomplish a deliberate act of obliteration of all traces of life and culture of the Muslim population in the targeted territory, so as to amount to genocide. The Court, although recognizing the international crimes character of such acts, declined to consider them as evidence of the special intent to commit genocide. See paras 335–344.

of *Navigational and Related Rights (Costa Rica v. Nicaragua)* upheld the cultural traditions of the local indigenous population (fishing) as a component of their right to the preservation of a form of subsistence economy.²⁵

The absence of a specialized forum for the enforcement of cultural heritage norms and the scarcity of cases brought before the ICJ is somewhat compensated for by the use of 'borrowed fora', that is of dispute settlement mechanisms established for the enforcement of other categories of international norms. This is the case with human rights courts and with international criminal jurisdictions the jurisprudence of which shows a growing number of cases involving a close interaction, and sometimes a conflict, between human rights standards and cultural heritage norms. This occurs especially when an individual or a private entity invokes international law in order to protect property rights. The European Court of Human Rights has adjudicated on several cases involving the difficult accommodation of the individual right to private property and the public interest in the conservation of cultural goods. In these cases²⁶ the Court has not gone beyond a strict application of the provisions of Protocol I on the protection of the individual right of 'every natural or legal person to the peaceful enjoyment of his possessions'.²⁷ Thus, the public interest in the conservation of a collective cultural patrimony or of the public value of a cultural landscape has been left in the shadow of the law or, conversely, has been assessed as an element capable of increasing the market value of the property in dispute. A more progressive balancing between individual rights and public interest in cultural property has been achieved by the American Court of Human Rights. Its jurisprudence broke new grounds in the interpretation of Article 21 of the American Convention on Human Rights. This Article, originally conceived as an individual right, was construed in light of the collective interest of cultural communities, local groups, and indigenous peoples to enjoy and develop their special relationship with cultural sites and ancestral lands as part of a communal cultural right. The American Court inaugurated this bold hybridization of the individual right to property with a communal notion of cultural property in the 2001 judgment in the *Awasi Tingni* case, and confirmed this approach in subsequent case law, notably, in *Moiwana Community v. Suriname* and *Yakye Axa v. Paraguay* (2005).

Another area of international dispute settlement that reveals potential for cross-fertilization between cultural heritage norms and other branches of international law is international arbitration. Here I just want to point out that a distinct practice in the field of investment arbitration is emerging in which cultural heritage norms, even if they are not part of the applicable law, influence the way in which the applicable treaty norms are interpreted and implemented by the arbitrators, thus

²⁵ Judgment of 13 July 2009 [2009] ICJ Rep 213, at paras 134–144.

²⁶ See particularly App. No. 33202/96, *Beyeler v. Italy*, decision of 5 Jan. 2000, concerning the compatibility of Italy's pre-emption and export control law on art works with Protocol 1 to the ECHR, and App. No. 75909/01, *Sud Fondi Srl v. Italia*, decision of 20 Jan. 2009, where the Court found that the Italian decision to demolish a large building erected in a protected coastal area in violation of national landscape regulation amounted to a breach of the principle *nullum crimen sine lege* (Art. 7 of the Convention) and of the right to property.

²⁷ Art. 1 of Protocol I.

ultimately conditioning the outcome of the decision. A pertinent example is provided by the *Parking* arbitration concerning a dispute arising from a public tender launched by the city of Vilnius, Lithuania, for the construction of a modern car park in the historical city centre, a site inscribed on the UNESCO World Heritage List. The claimant, a Norwegian company, complained that the Lithuanian authorities had breached the most favoured nation clause contained in the applicable Bilateral Investment Treaty by awarding the contract to a Dutch company. In rejecting the claim, the ICSID arbitral tribunal gave considerable weight to the cultural heritage impact of the claimant's project as compared to the less intrusive project of the Dutch bidder, and concluded that the two investors were not in 'like circumstances' for the purpose of the applicable investment treaty:

The difference in size of [the] project, as well as the significant extension of the [claimant's project] into the Old Town near the cathedral area, are important enough to determine that the two investors were not in *like circumstances*. Furthermore, the Municipality of Vilnius was faced with numerous and solid oppositions from various bodies that relied on archaeological and environmental concerns. In the record, nothing convincing would show that such concerns were not determinant or were built upon to reject [the claimant's project]. Thus, the city of Vilnius did have legitimate grounds to distinguish between the two projects.²⁸

This award breaks new ground in introducing cultural heritage concerns as legitimate aims that the host state may pursue in adopting regulations or taking measures that have an impact on the economic interests of an investor and may constitute a *prima facie* violation of its obligations under international investment law. It builds upon earlier precedents, such as *SSP v. Egypt*, in which the ICSID tribunal had even recognized international cultural heritage norms – also in this case the World Heritage Convention – as relevant applicable law in an investment dispute. This trend has been confirmed in more recent practice. In *Glamis Gold* (2009) and *Grand River* (2011), both involving investors' claims against the US under NAFTA Chapter 11, the arbitral tribunals based their decisions on the assumption that cultural heritage standards may be relevant in the assessment of the legality of the host state's regulatory action affecting the economic interests of the investor. In the first case, the ICSID tribunal rejected the claim of a Canadian company that the stringent regulations adopted at the federal and state level on the conduct of mining operations in California would amount to indirect expropriation and breach of legitimate expectations of the foreign investor. The cultural value of the mining site as ancestral land of a tribal community of Native Americans, together with compelling environmental considerations, was a factor in support of the legitimacy of the regulatory measures imposed by the US' authorities with a view to protecting the environment and landscape value of the relevant territory.

The second case, decided in January 2011, concerned a complaint by a Canadian indigenous community that the federal compensation scheme imposed in the US on the tobacco industry to recompense the victims of smoking amounted to a breach of

²⁸ ICSID case No AR/05/08, Sept. 2007.

their investors' rights under NAFTA. The award rejected the complaint in the merit, but at the same time made express reference to relevant international standards on cultural heritage, notably the 2007 UN Declaration on the Rights of Indigenous Peoples, as potentially applicable law also in economic disputes.

5 National Courts and International Law

So far, I have examined the interaction among mechanisms of law enforcement in a 'horizontal' dimension, i.e., in the relationship between different bodies of international adjudication. But today an intense interaction occurs also in a 'vertical' dimension, that is, between national courts and international mechanisms of dispute settlement. National courts can be a catalyst in accelerating the settlement of a cultural property dispute at the international or transnational level. One may recall the *Altman* case, in which the US Supreme Court held that the Government of Austria could not enjoy sovereign immunity in relation to a civil action brought before American courts for the restitution of a series of valuable paintings (Klimts) that Austria had obtained as a consequence of Nazi persecution of Austrian Jews. This decision was followed by consent to arbitration by the disputing parties, which eventually led to the restitution of the disputed art to the claimant. In criminal matters, the high profile prosecution in Italy of Marion True, former curator of the Getty Museum, for her alleged implication in the 'Medici connection' (from the name of the person responsible for the organized looting) in illicit traffic of antiquities from Italy to the US, paved the way and set new patterns for the negotiation and conclusion of innovative agreements between the Italian Government and several major US Museums, among them the Getty, Metropolitan of New York, Boston, and Cleveland museums. Similarly, the 2009 action brought by Peru in the US against Yale University for the return of the treasures of Macchu Picchu influenced the negotiation of a 2010 accord between Peru and Yale and the subsequent conclusion of a memorandum of understanding in February 2011 between Yale and Cuzco Universities for the development of a joint centre for the study of Inca culture and the shared management of the disputed antiquities.

6 Conclusions

The idea of cultural heritage as a 'common heritage of humanity' can be traced back to the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, according to which 'damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind, since each people makes its contribution to the culture of the world'. This universalist idea must be reconciled with the infinite variety of cultural expressions and with the role of art as a medium essentially devoted to giving form to the plurality and diversity of tastes, beliefs, and inclinations of the different societies in which it is produced and maintained. In this contribution I have tried to show how different legal orders and

different sets of norms – public and private, domestic and international, wartime and peacetime – interact one with another at different levels of regulation and protection of cultural property. This interaction is all the more significant at the level of enforcement of international standards where the absence of a centralized system of dispute settlement shifts the responsibility for the effective implementation of the law to the initiative of national courts and tribunals, governmental agents, and private actors, such as museums and art collectors. All of them, with different roles and different normative perspectives, contribute to the enforcement of international standards on the conservation and management of cultural property as part of the ‘cultural heritage of humanity’.