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ARTICLE

Arbitrating African cultural heritage disputes

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Abstract

Legal, ethical, historical, cultural, and political questions in relation to African cultural heritage are increasingly the focal point of international, regional, and national debates. It is now widely recognized that African cultural disputes – often between African States (or State institutions) on the one hand, and Western States, State institutions and private actors on the other – are ripe for settlement, especially on the basis of law, including international law. This article focuses on international arbitration as a means for resolving African cultural heritage-related disputes and, for the first time analyses the benefits of all types of international arbitration (State-to-State arbitration, investment treaty arbitration and commercial (contract-based) arbitration) from the perspective of African States and actors in relation to the resolution of African cultural heritage disputes, which include disputes regarding the return of African cultural objects. This article examines for the first time the potential role of all types of arbitral proceedings ((i) State-to-State arbitration, (ii) international investment treaty arbitration (or, as often-called, Investor-State Dispute Settlement (ISDS)), and (iii) commercial arbitration) for the resolution of Africa-related cultural heritage disputes.

Keywords: Africa; cultural heritage; disputes; arbitration

Introduction

Legal, ethical, historical, cultural, and political questions in relation to African cultural heritage are increasingly the focal point of international, regional, and national debates.[1] It is now widely recognized that African cultural heritage–related disputes – often between African states (or state institutions) on the one hand, and Western states, state institutions, and private actors on the other – are ripe for settlement, especially on the basis of law, including international law.[2] However, as Vadi accurately observes, whether it be for Africa-related cultural heritage disputes or otherwise, there is no single, universally (or, at least, generally) accepted judicial forum for doing so:

> [a]s cultural heritage-related disputes often lie at the heart of state sovereignty, states have not been able to agree on establishing dedicated courts and tribunals. The absence of a World Heritage Court determines a sort of 'diaspora' of cultural heritage-related

[1] See e.g. Abungu and Ndoro, 2023.
[2] See Risvas, 2020.

disputes before other courts and tribunals which may lack the mandate to adjudicate on the violation of cultural heritage law.[3]

This article focuses on international arbitration as a means for resolving African cultural heritage–related disputes and, for the first time, analyzes the benefits of all types of international arbitration – (1) state-to-state arbitration, (2) International Investment Treaty arbitration (often called, investor–state dispute settlement [ISDS]), and (3) commercial (contract-based) arbitration – from the perspective of African states and actors in relation to the resolution of African cultural heritage disputes, which include disputes regarding the return of African cultural objects. Even though some attention has been paid to arbitration pursuant to contracts (usually between private parties)[4] or arbitration on the basis of international investment treaties[5] in the field of cultural heritage law, this article examines for the first time the potential role of all types of arbitral proceedings for the resolution of Africa-related cultural heritage disputes.

This article does not purport to offer a comprehensive comparison between different types of international dispute resolution mechanisms[6] in the context of African cultural heritage disputes. Dispute resolution is understood broadly and includes not only unresolved present disputes but also future disputes that might arise regarding African cultural heritage issues. For example, concluding international treaties or, more commonly, contracts resolving specific African cultural heritage disputes does not preclude future disputes regarding the application and/or interpretation of such treaties or contracts. Therefore, it would be beneficial (for reasons explained subsequently) to include in such agreements dispute resolution provisions providing for international arbitration. The choice of the dispute settlement method is a complex strategic decision that the parties should make only after careful consideration of their legal and factual position and in close cooperation with their counsel and legal advisors. However, in general, this article highlights the main advantages of international arbitration from an African perspective in the realm of cultural heritage law for resolving related disputes, including neutrality, inclusion, flexibility, and confidentiality. In doing so, it aspires to draw the attention of African decision makers to arbitration which could be used as a means for the promotion of African interests and, ultimately, lead to a more balanced and fair distribution and management of African cultural heritage internationally.

African cultural heritage disputes against the current context

After decades, if not centuries, of reluctance on the part of Western countries to acknowledge, let alone address, the looting of African art objects and their repatriation, things are beginning to change. In a landmark 2017 speech at the University of Ouagadougou, in Burkina Faso, French President Emmanuel Macron stated that he "c[ould] not accept that a large part of cultural heritage from several African countries is in France" and that "[i]n the next five years, [he] want[ed] the conditions to be met for the temporary or permanent restitution of African heritage to Africa."[7] Following the appointment of two experts, Bénédicte Savoy (a French art historian) and Felwine Sarr (a Senegalese writer and professor), and the publication of their report calling for restitution and a more balanced

[3] Vadi, 2023, 156.
[4] See Varner, 2012; Sidorsky, 1996.
[5] See Vadi, 2023; Vadi, 2014.
[6] See Stamatoudi, 2016; and, more generally, Shehade, Fouseki and Walker Tubb, 2016.
[7] Risvas, 2020, 265.

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distribution of African cultural heritage between European and African museums, France announced the return of 26 art objects from the Quai Branly–Jacques Chirac Museum, in Paris, to Benin in 2021. The National Council of Reflection on the Circulation and Return of Extra-European Cultural Goods ("Conseil national de réflexion sur la circulation et le retour de biens culturels extra-européens") was created in 2022 for that purpose.[8] However, as Stahn highlights:

> [t]he French approach has thus been marked by a striking paradox. What started as an ambitious return agenda by President Macron and the recommendations of the Sarr and Savoy report has gradually been narrowed down through parliamentary debates, resistance in the museum world and the constraints of Realpolitik. Within a period of five years, Macron's 2017 speech has produced more visible changes in Germany, the Netherlands, or Belgium than at home.[9]

More recently, in June 2024 the Qingdao Recommendations for the Protection and Return of Cultural Objects Removed from Colonial Contexts or Acquired by Other Unjustifiable or Unethical Means was launched during the International Conference on the Protection and Return of Cultural Objects Removed from Colonial Contexts, which was held in Qingdao, China.[10] Naturally, these recommendations are not legally binding; however, as is often the case, they can be proven to be persuasive depending on the broader political consensus at the international level.

Questions regarding African cultural heritage cannot be treated in clinical isolation from fundamental questions regarding African states and societies. Such questions are often interrelated with the contestation of power and values within African states and the position of African states within the international and regional political, economic, and legal systems,[11] especially in the light of the burden of history, which includes the traumatic experience of colonialism and the Cold War in African societies.[12] At the same time, the broader context includes African countries' attempt to "Africanize" international economic law, that is, "to formulate a regional/continental African view on [foreign direct investment]" so that African states could "make up for their low economic and political clout in the face of non-African investors" and "approach the issue more aggressively at the national level and then further coordinate the initiatives at the ... continental level."[13] Specifically, one initiative in the field of cultural heritage law is the African Union (AU) Model Law on the Protection of Cultural Property and Heritage developed from 2015 to 2018.[14]

In the third decade of the twenty-first century, African states are beginning to assert their strategic autonomy both individually and collectively and participate more actively in international fora. Therefore, the time has come to prioritize the resolution of African cultural heritage disputes through arbitration to potentially facilitate the repatriation of African art objects.[15]

[8] See Perrot, 2022; Merigot, 2024. See also https://www.senat.fr/salle-de-presse/202112/circulation-et-retour-des-biens-culturels-appartenant-aux-collections-publiques.html

[9] Stahn, 2023, 486.

[10] https://www.globaltimes.cn/page/202406/1314543.shtml

[11] Clapham, 1996.

[12] See, e.g., Inge, 2020; Koskenniemi, 2001; Van Hulle, 2020.

[13] Andemariam, Berhe, and Gebrezgabiher, 2024, 453.

[14] See https://au.int/en/african-union-model-law

[15] See Plata, 2022. See also Stahn, 2023; cf. Pierrat, 2019.

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International State-to-State Arbitration

International state-to-state arbitration historically precedes the establishment of the International Court of Justice (ICJ),[16] the primary judicial organ of the United Nations, and its predecessor, the Permanent Court of International Justice, which was created in 1919.[17] Nonetheless, state-to-state arbitration is rarely used by states to settle cultural heritage–related disputes. The ICJ has dealt directly with cultural heritage issues in the famous dispute of Preah Vihear Temple between Cambodia and Thailand, and even in that case, questions of border delimitation were of primary importance compared to cultural heritage issues.[18]

Two similarities and two differences between (1) the ICJ (or, indeed, litigation between states before any standing international court or tribunal) and (2) international state-to-state arbitration are pertinent for present purposes.

The first similarity is the indispensable role of state consent. No state can be brought before an international court or arbitral tribunal unless and to the extent that it has given its consent. In the *Certain Property* case between Lichtenstein and Germany, which concerned the confiscation of a painting by the Flemish Pieter van Laer (1599–1642), the ICJ found that it lacked jurisdiction *ratione temporis*, thus highlighting the difficulties of bringing cultural heritage–related disputes before the World Court.[19] Consent can be given *before* the dispute has arisen in a compromissory clause included in an international treaty or (in the case of the ICJ) by accepting in advance the compulsory jurisdiction of the Court pursuant to Article 36 of the ICJ Statute. States can also provide its consent to litigate the matter before the ICJ (or before any other international court or arbitral tribunal) *after* the dispute erupts by concluding an ad hoc agreement for that purpose (*compromis*) or by accepting to participate in proceedings initiated by another state despite the fact that there is no consent and, therefore, no jurisdiction (before the state decides to participate [*forum prorogatum*]).[20]

The second similarity is that in both international state-to-state litigation and investment treaty arbitration the applicable law is public international law. In investment treaty arbitration domestic laws can be also applicable (as for example Article 42(1) of the ICSID Convention provides), but international law prevails.[21] In international commercial arbitration the applicable law is usually the domestic law of a specific jurisdiction, although international law and/or transnational legal principles sometimes are also applicable. Article 38(1) of the ICJ Statute provides the applicable law for the Court:

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
   a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
   b. international custom, as evidence of a general practice accepted as law;
   c. the general principles of law recognized by civilized nations;
   d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.[22]

[16] See, e.g., Espósito and Parlett, 2023.

[17] See the famous 1872 *CSS Alabama* arbitration between the United Kingdom and the United States; Park, 2021.

[18] *Case Concerning the Temple of Preah Vihear (Cambodia v Thailand)* (1962) ICJ Rep 6; *Request for Interpretation of the Judgment of 15 June 1962 in the Case Concerning the Temple of Preah Vihear (Cambodia v Thailand)* (2013) ICJ Rep 281.

[19] *Certain Property (Liechtenstein v Germany)*, Preliminary Objections, Judgment, (2005) lCJ Rep 6.

[20] In *forum prorogatum*, jurisdiction is established on the basis of the consent of the parties but after the initiation of proceedings; on the limitations of this principle, see Ayoub, 2020.

[21] See Gaillard and Banifatemi, 2003.

[22] ICJ Statute, Article 38(1).

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Article 59 of the ICJ Statute makes clear that "[t]he decision of the Court has no binding force except between the parties and in respect of that particular case," indicating that in the ICJ and international litigation and arbitration more generally there is no binding precedent system (*stare decisis*) as in common law jurisdictions. However, in what Hernández aptly describes as "a rare declaration which reveals its own claim to normative authority,"[23] the ICJ highlighted in the *Genocide* case between Croatia and Serbia:

> [t]o the extent that the [Court's] decisions contain findings of law, the Court will treat them as it treats all previous decisions: that is to say that, while those decisions are in no way binding on the Court, it will not depart from its settled jurisprudence unless it finds very particular reasons to do so.[24]

Both Articles 38 and 59 of the ICJ Statute concern proceedings before the ICJ, but it is generally accepted that they reflect the general norm in public international law (which is also applicable in state-to-state arbitration proceedings). As Judge Guillaume (the former president of the ICJ) wrote, "all the international jurisdictions distance themselves in principle from the rule of *stare decisis.*"[25]

The first major difference between litigation and arbitration is that while in the former the parties bring the matter before a standing international court (be it the World Court[26] or another international court or tribunal (such as the International Tribunal for the Law of the Sea [ITLOS] in Hamburg), in the latter the parties choose the arbitrators. In a sense, this is the *raison d'être* of arbitration. Selecting the arbitrators is significant for the resolution of African cultural heritage disputes for several reasons, including the underrepresentation of African jurists in international judicial posts[27] and the need for adjudicators to be familiar not only with public international law but also cultural heritage and the unique African cultural, political, historical, and social context.[28]

The second difference concerns the greater control that parties can exert over the arbitral proceedings both from a substantive and a procedural perspective. Procedurally, international arbitration was aptly characterized as "a microcosm of potential procedural reform."[29] In the instrument providing consent to arbitrate the dispute (e.g., in the compromissory clause or in the *compromis*), African states can (and should) calibrate the precise parameters of the law applicable to both substance and procedure to ensure that their interests are fairly taken into consideration. One possible approach is to place greater emphasis on equity and equitable principles.[30]

These two differences between international litigation and arbitration also constitute two powerful arguments in favor of using arbitration to resolve African cultural heritage disputes, as both highlight the greater flexibility of arbitration (as opposed to litigation before standing courts).

[23] Hernández, 2014, 156; see generally Venzke, 2012.

[24] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia)*, Preliminary Objections, Judgment, (2008) ICJ Rep 412, 428 para 53.

[25] Guillaume, 2011, 14. On precedent in international adjudication see also Ridi, 2019 and Devaney, 2022.

[26] The ICJ is composed of 15 permanent judges plus any judge(s) ad hoc. According to Article 4(1) of the ICJ Statute, "[t]he Members of the Court shall be elected by the General Assembly and by the Security Council from a list of persons nominated by the national groups in the Permanent Court of Arbitration."

[27] See Onyema, 2019.

[28] See Kidane, 2019, 420–23 and 432.

[29] Blackaby et al., 2022, para 3–263.

[30] Titi, 2021; Risvas, 2020.

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Article 25(3) of the UNESCO Convention on the Protection of the Underwater Cultural Heritage (2001 UNESCO Convention) provides that:

> [i]f mediation is not undertaken or if there is no settlement by mediation, the provisions relating to the settlement of disputes set out in Part XV of the United Nations Convention on the Law of the Sea apply mutatis mutandis to any dispute between States Parties to this Convention concerning the interpretation or application of this Convention, whether or not they are also Parties to the United Nations Convention on the Law of the Sea.[31]

Article 287(1) of the 1982 United Nations Convention on the Law of the Sea (UNCLOS), to which Article 25(3) of the 2001 UNESCO Convention partly refers, provides four different dispute settlement options comprising both *litigation* before the ICJ at the Hague or the International Tribunal for the Law of the Sea (ITLOS) in Hamburg and international *arbitration*:

> When signing, ratifying or acceding to this Convention or at any time thereafter, a State shall be free to choose, by means of a written declaration, one or more of the following means for the settlement of disputes concerning the interpretation or application of this Convention:
>
> (a) the International Tribunal for the Law of the Sea established in accordance with Annex VI;
> (b) the International Court of Justice;
> (c) an arbitral tribunal constituted in accordance with Annex VII;
> (d) a special arbitral tribunal constituted in accordance with Annex VIII for one or more of the categories of disputes specified therein.[32]

Annex VII state-to-state arbitration serves as the default dispute resolution mechanism under the UNCLOS.[33] Annex VIII arbitration is more technical and is available for specific categories of disputes concerning fisheries, navigation, marine scientific research, and the protection and preservation of the marine environment.[34] It is unclear whether disputes concerning underwater cultural heritage (UCH) would be considered as falling within the scope of Annex VIII arbitration as related to "marine scientific research" or "the protection and preservation of the marine environment." In general, and to the best of the author's knowledge, no state has had recourse to arbitration in relation to the 2001 UNESCO Convention.

Perhaps the most well-known example of international state-to-state arbitration dealing with cultural heritage issues in the African context is the settlement of border-related disputes between Eritrea and Ethiopia, by the Eritrea-Ethiopia Claims Commission (EECC). The EECC was set up to adjudicate all claims of loss, damage, or injury in relation to the armed conflict between Eritrea and Ethiopia (1998–2000) and was composed of five arbitrators.[35] In one of the claims, Eritrea successfully argued that during their occupation of Eritrean territory Ethiopian forces violated international law by destroying objects of historical and cultural significance.

[31] UNESCO Convention on the Protection of the Underwater Cultural Heritage (adopted 2 November 2001, entered in force 2 January 2009) 41 ILM 40, Article 25(3).

[32] United Nations Convention on the Law of the Sea (adopted 10 December 1982 and entered into force on 16 November 1994); see also Klein, 2005, 29–124.

[33] See *Chagos Marine Protected Area Arbitration (Mauritius v United Kingdom)*, Award, 18 March 2015.

[34] See Paine, 2024, Chapter 3.

[35] See Negm, 2023.

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These included the stele (obelisk) of Matara, once a major trading post of the Axumite Kingdom (from classical antiquity to the Middle Ages), now an archaeological site in Eritrea. The Commission held that:

> Eritrea has proved that the stela was felled on the night of May 30–31, 2000, that it was felled by an explosive of a military type fastened at its base, and that an encampment of Ethiopian soldiers was quite near the stela when this occurred. In these circumstances, the Commission concludes that Ethiopia, as the Occupying Power in the Matara area of Senafe Sub-Zoba, is responsible for the damage, even though there is no evidence that the decision to explode the stela was anything other than a decision by one or several soldiers.[36]

For the EECC, "the felling of the stela was a violation of customary international humanitarian law,"[37] and the Commission held that:

> [c]onsequently, Ethiopia is liable for the unlawful damage inflicted upon the Stela of Matara in May 2000. Eritrea's request that Ethiopia also be obligated to apologize for that damage is dismissed. As the Commission stated in its Decision No. 3, in principle, the appropriate remedy for valid claims should be monetary compensation, except where other remedies can be shown to be in accordance with international practice and the Commission determines that another remedy would be reasonable and appropriate. No such showing was made here.[38]

It should also be highlighted that "the Commission award[ed] Eritrea the amounts expended to attempt to restore the Stela, plus an additional amount to reflect, in part, the unique cultural significance of the Stela, for a total award of US$50,000."[39]

International arbitration pursuant to contracts

In state-to-state arbitration and investment treaty arbitration, the source (and the limit) of the arbitrators' power is the arbitration agreement contained in an international treaty; in commercial arbitration the arbitration agreement is included in a contract. The well accepted definition of a treaty provided in the Vienna Convention on the Law of the Treaties provides that "'treaty' means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation."[40] By contrast, international law does not contain a definition of contract; different domestic legal systems contain similar (but not identical) understandings of the concept of a contract.[41]

Most contractual arrangements are between nonstate parties. Typically, commercial arbitration proceedings involve private entities. Having said that, international commercial

[36] Partial Award, Central Front, Eritrea's Claims 2, 4, 6, 7, 8, and 22, 28 April 2004, (2004) ILM 1270, para 112, but also see more generally paras 107–14.

[37] Partial Award, Central Front, Eritrea's Claims 2, 4, 6, 7, 8, and 22, 28 April 2004, (2004) ILM 1270, para 113.

[38] Partial Award, Central Front, Eritrea's Claims 2, 4, 6, 7, 8, and 22, 28 April 2004, (2004) ILM 1270, para 114.

[39] Final Award, Eritrea's Damages Claims between the State of Eritrea and the Federal Democratic Republic of Ethiopia, 17 August 2009, para 223, available at https://pcacases.com/web/sendAttach/766%3E

[40] Vienna Convention on the Law of Treaties (adopted 22 May 1969, entered into force 27 January 1980) 1155 UNTS 331, Article 2(1)(a).

[41] *Case concerning the payment of various Serbian loans issued in France*, Judgment (12 July 1929) Series A, No 14, 41: "[a]ny contract which is not a contract between States in their capacity as subjects of international law is based on the municipal law of some country. The question as to which this law is forms the subject of that branch of law which is at the present day usually described as private international law or the 'doctrine of the conflict of laws'."

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arbitration involving states and/or state entities is on the rise. According to the International Court of Arbitration of the International Chamber of Commerce (ICC), one of the oldest and most popular international arbitration institutions, "[i]n 2023, 16% of the new cases involved a state or state entity. The total number of state and state entities (162) comprised 40 states and 122 state-owned parties from all parts of the world."[42] Although the origins of international arbitration can be traced back to antiquity,[43] in its current form international arbitration is largely the product of the nineteenth and twentieth centuries.[44]

Apart from the Convention for the Protection of Cultural Property in the Event of Armed Conflict (the 1954 Hague Convention),[45] which deals with the specific situation of armed conflict and military occupation, the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (the 1970 UNESCO Convention)[46] is the first major international cultural heritage convention. Currently it has 147 state parties, out of which 38 are African.[47] The 1970 UNESCO Convention provides a legal framework aiming at combating illicit trade in cultural property, fostering international cooperation, supporting national initiatives, promoting awareness, and developing import and export controls.[48] In particular, "[t]he Convention essentially attempts to balance the duties of importing States to limit the illicit trade with those of countries of origin to protect their cultural property within their borders and to prevent its illegal export."[49] The 1970 UNESCO Convention constituted a major step in the protection of cultural heritage at the global level; however, it also had inherent limits, which include the lack of self-executing provisions (as the treaty itself requires implementation at the domestic legal level through state action), the lack of uniformity in its implementation, its limited scope of application (only to objects specifically designated as cultural property by the states parties), and its focus on public law rather than private law. From a dispute resolution perspective, the 1970 UNESCO Convention does not contain a proper dispute resolution mechanism, although Article 17(5) provides that "[a]t the request of at least two States Parties to this Convention which are engaged in a dispute over its implementation, UNESCO may extend its good offices to reach a settlement between them."[50] Although good offices could be useful in certain cases, they constitute a nonbinding diplomatic, rather than a binding and formal legal, dispute resolution mechanism.

The pitfalls of the 1970 UNESCO Convention led to the negotiation and adoption of the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (the 1995 UNIDROIT

[42] ICC Dispute Resolution 2023 Statistics, at p 6, available at https://iccwbo.org/wp-content/uploads/sites/3/2024/06/2023-Statistics_ICC_Dispute-Resolution_991.pdf.

[43] See Ager, 1996; Ralston, 1929; Hammond, 1985; Paschalidis, 2023.

[44] See Schinazi, 2022.

[45] Convention for the Protection of Cultural Property in the Event of Armed Conflict (adopted 14 May 1954, entered into force 7 August 1956) 249 UNTS 215.

[46] UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (adopted 14 November 1970, entered into force 24 April 1972) 823 UNTS 231.

[47] Algeria, Angola, Botswana, Burkina Faso, Cameroon, Central African Republic, Chad, Comoros, Côte d'Ivoire, Democratic Republic of the Congo, Djibouti, Equatorial Guinea, Eswatini, Ethiopia, Gabon, Gambia, Ghana, Guinea, Kenya, Lesotho, Libya, Madagascar, Malawi, Mali, Mauritania, Mauritius, Morocco, Niger, Nigeria, Rwanda, Senegal, Seychelles, South Africa, Togo, Tunisia, United Republic of Tanzania, Zambia, Zimbabwe. See https://www.unesco.org/en/legal-affairs/convention-means-prohibiting-and-preventing-illicit-import-export-and-transfer-ownership-cultural?hub=416#item-1.

[48] See Blake, 2015, 39.

[49] Blake, 2015, 39.

[50] 1970 UNESCO Convention, Article 17.

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Convention[51]).[52] Essentially, "[t]he UNIDROIT Convention was ... conceived, from the beginning, as an international tool that would supplement the existing conventions – mainly the UNESCO Convention – filling the gap resulting from the absence of private international law or uniform law rules concerning the circulation of movables and the transfer of ownership of cultural property."[53] Before the adoption of the 1995 UNIDROIT Convention, there was no binding international instrument that specifically addressed private law mechanisms for restitution and compensation in cases of stolen or illegally exported cultural property. Existing frameworks, such as the 1970 UNESCO Convention, focused on public law obligations between states and did not directly govern private ownership disputes or compensation for good-faith purchasers. The 1995 UNIDROIT Convention currently has 56 state parties, 14 of which are African states.[54] Regarding arbitration as a dispute resolution method, Articles 8 (1) and 8(2) of the 1995 UNIDROIT Convention read as follows:

(1) A claim under Chapter II and a request under Chapter III may be brought before the courts or other competent authorities of the Contracting State where the cultural object is located, in addition to the courts or other competent authorities otherwise having jurisdiction under the rules in force in Contracting States.
(2) The parties may agree to submit the dispute to any court or other competent authority or to arbitration.[55]

Despite the reference to litigation and arbitration, the 1995 UNIDROIT Convention does not contain a dispute resolution clause providing for a single forum or, at least, a single method of dispute settlement.

The inclusion of (and encouragement toward) arbitration in the UNIDROIT Convention was largely due to the participation of Pierre Lalive (one of the leading arbitration figures of the twentieth century), who chaired the four meetings of governmental experts on the draft Convention and the Committee of the Whole at the Diplomatic Conference.[56] As one author persuasively argues:

> [a]rbitration may offer a more attractive option in contractual matters in comparison to restitution of stolen cultural objects or the return of illegally exported cultural objects that fall within the ambit of the UNIDROIT Convention. An arbitration clause can be favoured by the parties in relation to transactions on works of art, such as sales, loan, and insurance contracts. Arbitration clauses inserted into such contracts provide a dispute settlement mechanism for future disputes between the parties.[57]

Recourse to international arbitration has been suggested by various scholars to resolve art disputes in general[58] or specifically in relation to African cultural heritage disputes.

[51] UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (adopted 24 June 1995, entered into force 1 July 1998).
[52] Song, 2016, 732–34.
[53] Frigo, 2015, 628; Giardini, 2023, 31.
[54] Algeria, Angola, Benin, Botswana, Burkina Faso, Côte d'Ivoire, Gabon, Ghana, Madagascar, Morocco, Nigeria, South Africa, Togo, and Tunisia. See https://www.unidroit.org/instruments/cultural-property/1995-convention/status/.
[55] 1995 UNIDROIT Convention, Articles 8(1) and 8(2).
[56] Shyllon, 2000, 225.
[57] Szabados, 2024, 642.
[58] Gegas, 1998; Sidorsky, 1996.

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First, arbitral tribunals by design constitute a neutral forum compared to the domestic courts of one of the parties to the dispute.[59] As Chechi explains, "arbitration may provide significant advantages in disputes concerning objects requested by the State of origin because arbitrators are in a neutral position to decide questions of sovereignty, cultural policy, national and international law, as well as moral and ethical arguments."[60] One key example of the role that arbitration can play in resolving cultural heritage disputes is the agreement of 21 February 2006 between the Italian Ministry of Cultural Heritage and Activities and the Commission for Cultural Assets of the Region of Sicily on the one hand, and the Metropolitan Museum of Art of New York on the other, which contains a clause according to which "[i]f the Parties are unable to reach a mutually satisfactory resolution to their dispute, the disputed issues shall be settled in private by arbitration on the basis of the Rules of Arbitration and Conciliation of the International Chamber of Commerce by three arbitrators appointed in accordance with said Rules."[61] Recourse to arbitration avoids legal difficulties related to the jurisdiction of foreign domestic courts, which "for political, historical, or other reasons" may not be "favourable to the claim in question."[62]

Second, the applicable law could include one or more domestic laws as well as international law or international or transnational legal principles,[63] which could lead to a fairer and more equitable result in favor of African states or entities, especially in cases where the legal issue is rather complex.

Third, due to the confidential nature of arbitral proceedings, arbitration is particularly useful "to solve cases concerning contractual claims over authenticity and attribution," given that confidentiality "is important for the professionals involved as well as the work of art itself."[64] By contrast, "[c]ourt proceedings may have considerable detrimental effects on the reputation and on the business of the traders and experts who may have been asked to give an estimation of the object."[65]

Fourth, arbitration avoids (1) complex issues of jurisdiction and admissibility, including questions of conflict of laws (private international law); (2) "diplomatic and political ramifications" of litigation involving states before foreign domestic courts; and (3) "the significant expense of having to fund the legal costs of complex interlocutory hearings pertaining to jurisdiction and state immunity – hearings that whilst a state is well placed to afford, individuals are not."[66] This does not mean that arbitral proceedings will always constitute the most cost-effective dispute resolution process; in certain cases, litigation could be preferable, and any decision should be taken on an ad hoc basis.

Last but not least, enforcement of arbitral awards is easier due to the Convention on Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention),[67] which has quasi-universal acceptance (with 172 state parties). Essentially, an arbitral award could be enforced in all these jurisdictions, as enforcement can be denied only on a limited set of grounds contained in Article V of the New York Convention.[68]

[59] Shyllon, 2000.
[60] Chechi, 2014, 177.
[61] Chechi, 2014, 177.
[62] Chechi, 2014, 177.
[63] See also Nazzini, 2016; Risvas, 2022, 191–2. For example, on cultural heritage and Islamic law, see Polymenopoulou, 2022.
[64] Chechi, 2014, 177.
[65] Chechi, 2014, 177.
[66] Tattershall, 2019, 192.
[67] Convention on Recognition and Enforcement of Foreign Arbitral Awards (adopted 10 June 1958, entered into force 7 June 1959) 330 UNTS 3.
[68] Ferrari, Rosenfeld, and Kotuby, 2023.

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Although arbitration is not a panacea for the settlement of cultural heritage-related disputes, several authors have recognized that its benefits outweigh its shortcomings. Already in 1998 Gegas argued that "[u]ndoubtedly, arbitration is a superior forum to resolve the legal questions raised in a cultural property dispute under the current international framework."[69] This view is also shared by Varner, who concludes that "[a]rbitration is better suited for the art world and cultural property disputes than litigation."[70]

Should an arbitral institution be established to settle cultural heritage–related disputes? Gegas argues that "in order for cultural property disputes to be resolved efficiently under the best possible conditions, it is essential that these disputes be submitted to a single arbitral body."[71] This single arbitral body, the same author suggests, should be modeled after the Permanent Court of Arbitration.[72] While this article is not categorically against the designation of an existing[73] (or the creation of a new) *single* institution to administer and/or support arbitration proceedings regarding cultural heritage disputes, it would perhaps be better to tap into the great diversity and pluralism of the world of international arbitration. The subject of diversity in international arbitration cannot be fully explored here, but some (limited) progress is currently being made.[74]

At the end of the day, using arbitration (which is open to both states and private actors in the same manner) to resolve cultural heritage–related disputes could also create more opportunities for broader participation (e.g., through the submission of amicus curiae briefs). The need for broader participation was recently highlighted in the Final Report of the International Law Association's Committee on Participation in Global Cultural Heritage Governance.[75] Specifically, the Final Report recommended "additional work on the creation of uniform rules on the legal standing of non-state actors for the safeguarding of cultural heritage by non-state actors" and "further guidance on the status and role of minorities or Indigenous peoples in controlling their heritage, particularly in relation to substantive and procedural rules about cultural objects."[76] It is also noteworthy that the Final Report specifically referred to the African Charter for Cultural Renaissance and highlighted the specific difficulties arising in the African context:

> For instance, the Charter for African Cultural Renaissance, under Article 15, calls on states to 'create an enabling environment to enhance the access and participation of all in culture, including marginalized and underprivileged communities'. It therefore frames participation on the basis of the right of 'all' to take part in cultural life. In this guise, participatory cultural justice can be understood as a means and goal for settling and reconciling ethno-cultural conflicts by recognizing and enabling assertions of or claims to power by marginalized groups, particularly Indigenous peoples; but it is also framed in much broader terms that do not shed particular light on the threshold for, and terms of, participation. In relation to the African context, but also applicable to other regions of the world, it is worth noting that poverty and conflict are key obstacles to bringing the mandate of the Charter for African Cultural Renaissance to life.[77]

[69] Gegas, 1998, 154.
[70] Varner, 2012, 480.
[71] Gegas, 1998, 154.
[72] Gegas, 1998, 158–64.
[73] See, for example, the Court of Arbitration for Art (CAfA) of the Netherlands Arbitration Institute (NAI). (The author is included in the CAfA's pool of arbitrators.)
[74] Kidane, 2017; Franck et al., 2015.
[75] See also Starrenburg, 2023. The Final Report is available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4220401.
[76] https://www.ila-hq.org/en_GB/documents/resolu-1-1.
[77] Final Report, para 37.

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The African Charter for Cultural Renaissance was adopted by the sixth Ordinary Session of the Assembly of the African Union in Khartoum on 24 January 2006 and, in Article 15, provides inter alia that "African States should create an enabling environment to enhance the access and participation of all in culture, including marginalized and underprivileged communities."[78]

In the light of the unique features of international arbitration set out previously, and in particular its procedural flexibility, substantive law pluralism, and the potential to put in place a diverse (and African or culturally-sensitive to African perspectives) tribunal to adjudicate African cultural heritage disputes, African policy and decision makers should consider adopting arbitration as their preferred dispute resolution mechanism. This can be done by introducing arbitration clauses in the relevant contracts or persuading the other party to the existing, unresolved disputes to conclude ad hoc arbitration agreements for the resolution of such disputes.

Arbitration pursuant to international investment treaties

Since the 1960s, and in particular during the 1990s, the proliferation of (mostly bilateral) investment treaties with similar content from a substantive and procedural perspective led to the "multilateralisation" of international investment law[79] and to the rise of "arbitration without privity."[80] Unlike arbitration pursuant to arbitration agreements contained in contracts between two parties, in investment treaty arbitration, consent to arbitrate, and thereby the jurisdiction of the arbitral tribunal, stems from a treaty provision. In addition to substantive protection standards offering protection against unlawful expropriation,[81] discrimination,[82] and arbitrary,[83] unfair, or inequitable treatment,[84] investment treaties contain standing offers to arbitrate which the investors of the other state party can accept by initiating arbitration.[85]

Investment treaty tribunals have taken into consideration cultural heritage issues when determining questions of expropriation (as in *Glamis Gold v USA*[86]), calculation of the quantum of compensation (*SPP v Egypt*[87]), as well as fair and equitable treatment and discrimination (*Parkerings v Lithuania*[88]).[89] Investment tribunals have also dealt – and continue to deal – with issues of underwater cultural heritage.[90] The ongoing dispute between investors and Colombia regarding the shipwreck of *San José* (a galleon that sank in 1708 off the coast of Cartagena carrying an extremely valuable cargo) is a case in point[91]

[78] Available at https://au.int/sites/default/files/treaties/37305-treaty-Charter_for_African_Renissance_ENGLISH_digital_0.pdf.

[79] Schill, 2009.

[80] Paulsson, 1995.

[81] See Kammerhofer, 2021; Reinisch and Schreuer, 2020, 1–250.

[82] See Risvas, 2023; Reinisch and Schreuer, 2020, 587–812.

[83] Reinisch and Schreuer, 2020, 831–54.

[84] See Paparinskis, 2013; Reinisch and Schreuer, 2020, 251–535.

[85] Douglas, 2009, 1–38 and 151–61.

[86] *Glamis Gold Ltd v United States of America*, ICSID Award, 8 June 2009.

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

[88] *Parkerings-Compagniet AS v Republic of Lithuania*, ICSID Case No ARB/05/08, Award, 11 September 2007.

[89] See generally Vadi, 2014, 113–131. See also *Gabriel Resources Ltd and Gabriel Resources (Jersey) v Romania*, ICSID Case No ARB/15/31, Award, 8 March 2024, paras 1281–307.

[90] See Vadi, 2009; Vadi, 2014, 137–60.

[91] Sea *Search-Armada, LLC v Republic of Colombia*, PCA Case No 2023-37; see also R Blakely, 'Who owns the San José, the world's richest shipwreck?', The Times, 11 June 2025, https://www.thetimes.com/uk/history/article/who-owns-caribbean-shipwreck-treasure-san-jose-rqlb3gdhc and D Blair, 'Found! But now the battle begins over who

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and remains ongoing. In 2024 the arbitral tribunal dismissed Colombia's jurisdictional objections, clearing the way for the hearing on the merits, which is currently scheduled for later 2025.[92]

In *Gosling v Mauritius*, one of the key points of disagreement between the foreign investors and the state was the government's refusal to give a building permission due to the inscription of the Le Morne site on the UNESCO World Heritage List.[93] The majority of the arbitral tribunal found no breach of international law on the part of Mauritius.[94]

African countries' role has now come to the forefront of legal debate as they are proactively changing the system from within, and this can change not only the African international investment regime but international investment law as a whole.[95] Now, the momentum is clearly here and is also fueled by the increasing confidence with which African states act in the international arena (as evidenced, inter alia, by robust and ambitious integration efforts such as the African Continental Free Trade Agreement.[96]

Vadi accurately observes that "[a]s international cultural heritage law instruments often do not include a dispute settlement mechanism, cultural heritage-related investment disputes have gravitated toward a number of national, regional, and international courts and tribunals."[97] As a result, the analysis of:

> a number of heritage-related investment disputes, show[s] that while international investment law has not developed any institutional machinery for the protection of cultural heritage through investment dispute settlement (after all, international investment law is not intended to protect cultural heritage as such), in recent years, a jurisprudential trend has emerged that takes cultural heritage into consideration. Arbitral tribunals have paid increasing attention to cultural concerns and have often referred to international law principles in their reasoning in order to reconcile the different interests at stake.[98]

Conclusion

While it was not possible to provide a comprehensive overview of the various types of international arbitration or the full scope of African-related cultural heritage disputes, this article argued for increased use of international arbitration to address both current and future African cultural heritage disputes, including disputes over management, ownership, and restitution.

In her monograph *Cultural Property Disputes: The Role of Arbitration in Resolving Non-Contractual Disputes*, Gazzini, while recognizing the advantages of arbitration for resolving cultural heritage disputes, ultimately takes a more cautionary approach:

owns this £16bn treasure trove', 12 June 2025, The Telegraph, https://www.telegraph.co.uk/news/2025/06/12/san-jose-shipwreck-treasure-caribbean/

[92] *Search-Armada, LLC v Republic of Colombia*, PCA Case No 2023-37, Decision on Respondent's Preliminary Objections, 16 February 2024, and Revised Procedural Calendar – Phase III, 12 February 2025.

[93] See *Thomas Gosling and others v Republic of Mauritius*, ICSID Case No ARB/16/32, Award, 18 February 2020, para 42: "Le Morne is a peninsula of outstanding beauty, and cultural and historical significance. It had been a place of refuge for escaped slaves, known as 'maroons.' Because of its natural beauty and significance, Mauritius was interested in inscription of Le Morne in UNESCO's World Heritage List."

[94] *Thomas Gosling and others v Republic of Mauritius*, ICSID Case No ARB/16/32, Award, 18 February 2020; cf. Dissenting Opinion of Stanimir Alexandrov.

[95] Onyema, 2019; Akinkugbe 2019 (introducing the concept of "reverse contribution").

[96] See Kidane, 2024; Kebe, 2023; Kufuor, 2024; El-Kady and De Gama, 2019; Mbengue, 2019.

[97] Vadi, 2023, 229.

[98] Vadi, 2023, 229.

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> [f]or want of a clear and decisive argument in favour of arbitration to resolve cultural property disputes, the choice to resort to arbitration rather than ordinary courts is, ultimately, a tactical one taken in the light of the respective pros and cons of arbitration and litigation applied to the particular circumstances of the case.[99]

Quoting Palmer, she further argues that viewing efforts aimed at "changing the mode of dispute resolution" as "a universal cure" is a fallacy and "[f]or many art disputes there is no universal substitute for court proceedings."[100]

While no dispute resolution mechanism constitutes a panacea, especially in relation to culturally, legally, ethically, and politically complex disputes such as the disputes revolving around African cultural heritage, this article argues that bringing such disputes before arbitral tribunals in state-to-state, ISDS, or contract-based arbitral proceedings would be a decisive step toward the resolution of African cultural heritage disputes in a manner grounded in law, fairness, and equality.

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[99] Gazzini, 2004, 211.

[100] Gazzini, 2004, 211; Palmer, 2001, 480.

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