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JMWP 17/14

Valentina Vadi

*Toward a Lex Administrativa Culturalis?*  
**The Adjudication of Cultural Disputes  
Before Investment Arbitral Tribunals**

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**TOWARD A *LEX ADMINISTRATIVA CULTURALIS*?  
THE ADJUDICATION OF CULTURAL DISPUTES  
BEFORE INVESTMENT ARBITRAL TRIBUNALS**

By Valentina Vadi\*

**Abstract**

Cultural phenomena are governed at national, regional and international levels; and a multiplicity of courts and tribunals adjudicate disputes with cultural elements. Against this background, this study addresses the key question as to whether a *lex administrativa culturalis* or cultural administrative law has emerged, characterized by the coalescence of consistent narratives, emerging rules and patterns of behaviors by relevant intra-national, national, supranational administrative bodies and private actors. In particular, this study hypothesizes the emergence of a *lex administrativa culturalis* investigating the distinct interplay between the protection of cultural heritage and the promotion of economic activities in investment treaty arbitration.

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## INTRODUCTION

Cultural governance has come of age. Once the domain of elitist practitioners and scholars, cultural governance – meant as an analytical model including the multi-level, multi-polar approaches toward the management of cultural resources – has emerged as a new frontier of study and has come to the forefront of legal debate.<sup>1</sup> The rise of cultural governance as a distinct field of study reflects the *Zeitgeist* characterized by an increased globalization and stratification or network of legal regimes governing global phenomena. Cultural governance constitutes a good example of legal pluralism and multilevel governance; cultural phenomena are governed at national, regional and international levels; and a multiplicity of courts and tribunals adjudicate disputes with cultural elements. While national administrations remain vested with primary responsibilities in the cultural field, other actors have come to play an important role with regard to cultural phenomena, ranging from international administrative bodies – such as UNESCO Committees – to private actors, from national courts and tribunals to regional and international *fora*.

While the emergence of a body of international cultural law has been discussed by several authors,<sup>2</sup> and others have addressed the emergence of multilevel governance of cultural resources,<sup>3</sup> this study addresses the key question as to whether a *lex administrativa culturalis* or cultural administrative law has emerged, characterised by the coalescence of consistent narratives, emerging rules and patterns of behaviours by relevant intra-national, national, supranational administrative bodies and private actors. In particular, this study hypothesizes the emergence of a *lex administrativa culturalis* investigating the distinct interplay between the protection of cultural heritage and the promotion of economic activities in investment treaty arbitration.

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<sup>1</sup> The literature is burgeoning. See, among others, B.T. Hoffmann (ed.) *Art and Cultural Heritage- Law, Policy and Practice* (Cambridge, CUP 2006); L. Casini (ed.) *La globalizzazione dei beni culturali* (Bologna: Il Mulino 2010).

<sup>2</sup> J.A.R. Nafziger, R. Kirkwood Paterson, and A. Dundes Renteln (eds) *Cultural Law- International, Comparative and Indigenous* (Cambridge: CUP, 2010); J. Nafziger, 'The Development of Right of International Cultural Law', 100 *American Society of International Law. Proceedings of the Annual Meeting* (2006) 317; V. Vadi, 'The Cultural Wealth of Nations in International Law', 21 *Tulane Journal of International and Comparative Law* (2012) 87-133.

<sup>3</sup> S. Cassese, 'I beni culturali: sviluppi recenti' in M.P. Chiti (ed.) *Beni Culturali e Comunità Europea* (Milano: Giuffrè 1994); S. Battini, 'The Procedural Side of Legal Globalization: The Case of the World Heritage Convention', 9 *International Journal of Constitutional Law* (2011) 340-68; D. Zacharias, *The International Regime for the Protection of World Cultural and Natural Heritage – A Contribution to International Administrative Law* (Aachen 2007).

The culture clash between the legal protection of cultural phenomena and the regulation of economic globalization is by no means new. However, most scholars and practitioners have examined this linkage from an international trade law perspective.<sup>4</sup> Much less is known about the parallel clash between the regulation of foreign direct investment and the protection of cultural resources.<sup>5</sup> The privileged regime created by international investment law within the boundaries of the host state has increasingly determined a tension between the promotion of foreign direct investment and the regulatory autonomy of the host state in the cultural field. Under most investment treaties, states have waived their sovereign immunity, and have agreed to give arbitrators a comprehensive jurisdiction over what are essentially regulatory disputes. Modern investment treaties do not require the intervention of the home state in the furtherance of a dispute. In practice, this means that foreign investors have access to arbitration against the host state if there is a bilateral investment treaty (BIT) between the home state and the host state.

Arbitral tribunals, like administrative courts, are given the power to review the exercise of public authority and settle disputes determining the appropriate boundary between two conflicting values: the legitimate sphere for state regulation for protecting cultural resources on the one hand, and the protection of foreign private property from state interference on the other. Some have argued that this framework gives substance to the concept of global administrative law or *lex administrativa communis*,<sup>6</sup> which can be defined as the coalescence of general principles of administrative, comparative and international law.<sup>7</sup> More importantly, are they an appropriate forum for adjudicating cultural heritage related disputes?

Against this background, this study focuses on the specific ‘clash of cultures’ between international cultural law and international investment law, and hypothesizes the emergence of a *lex administrativa culturalis* or *cultural administrative law*.

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<sup>4</sup> See generally T. Voon, *Cultural Products and the World Trade Organization* (New York: CUP, 2007).

<sup>5</sup> See however A. Froelich, ‘L’enjeu de la culture dans son contexte économique international’ in P. Meerts (ed) *Culture and International Law* (The Hague: Hague Academic Coalition 2008) 83-93; V. Vadi, ‘Culture Clash? World Heritage and Investors’ Rights in International Investment Law and Arbitration’, 28 *ICSID Foreign Investment Law Review* (2013) 1-21 and V. Vadi, *Cultural Heritage in International Investment Law and Arbitration* (Cambridge: Cambridge University Press forthcoming 2014)

<sup>6</sup> J. Robalino-Orellana and J. Rodríguez-Arana Muñoz (Eds) *Global Administrative Law Towards a Lex Administrativa* (London: Cameron & May, 2010).

<sup>7</sup> *Ibid.*

Foreign investors have increasingly claimed before investment treaty arbitral tribunals that alleged cultural policies violate international investment law. The interplay between investors' rights and cultural heritage protection raises a number of questions. Have arbitral tribunals paid any attention to cultural heritage? Are they imposing standards of good cultural governance, by adopting general administrative law principles, such as proportionality, due process, reasonableness and others? Are they contributing to the emergence of a *lex administrativa culturalis* or cultural administrative law?

This study aims to address these questions and proceeds as follows. *First*, it highlights the main features of the World Heritage Convention, exploring the dilemmas posed by the conservation of world heritage sites. *Second*, it briefly examines the conceptualization of investment treaty arbitration as a form of global administrative review. *Third*, the question as to whether investment treaty tribunals are contributing to the emergence of a *lex administrativa culturalis* or cultural administrative law will be addressed. *Finally* some conclusions will be drawn.

1. THE WORLD HERITAGE CONVENTION AS A MODEL OF MULTIVEL CULTURAL GOVERNANCE  
The 1972 World Heritage Convention (hereinafter WHC)<sup>8</sup> has proven to be the jewel in the crown of UNESCO's conventions and constitutes a turning point in the history of cultural governance, as it represents the first effort to govern world heritage in a comprehensive manner at the international level.<sup>9</sup> Throughout the years, the WHC has progressively attained almost universal recognition by the international community. The 'soft character' of the convention, *i.e.* 'the clear prevalence of rights and advantages over legal obligations that states parties derive from the Convention' has contributed to its success.<sup>10</sup> The convention establishes a system of identification and registration in an international list of cultural properties and natural sites of outstanding universal value and provides for international assistance with regard to the protection and conservation of world heritage.<sup>11</sup>

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<sup>8</sup> Convention concerning the Protection of the World Cultural and Natural Heritage (World Heritage Convention or WHC), adopted by the General Conference of UNESCO at its 17<sup>th</sup> session, Paris, 16 November 1972, in force 17 December 1975. 11 ILM 13.

<sup>9</sup> F. Francioni and F. Lenzerini, 'The Future of the World Heritage Convention: Problems and Prospects' in *The 1972 World Heritage Convention* (Oxford: OUP 2008) 401-410, 409.

<sup>10</sup> *Ibid.*, 402.

<sup>11</sup> WHC, Article 13.

The World Heritage Convention offers states parties a range of benefits in return for compliance, including cultural, economic, social and political benefits.<sup>12</sup> Cultural benefits include public access to world heritage sites and the stimulation of cultural life. Economic benefits derive from the inclusion of a site in the World Heritage List as the latter entails a process of ‘cultural capitalization’.<sup>13</sup> Through listing, the cultural heritage is converted in economic capital: the world heritage ‘brand’ confers listed sites increased visibility, catalyzing tourism and related economic activities.<sup>14</sup> In addition, the world heritage sites become ‘a magnet for international cooperation’<sup>15</sup> which in turn creates opportunities for receiving funding from the World Heritage Fund<sup>16</sup> and other sources such as the United Nations Development Program.<sup>17</sup> At a more political level, the listing may help national authorities to prioritize the management of listed sites: as Goodwin points out, ‘in development-versus-nature protection debates, international listing...may tip the balance in favor of protection’ to avoid the exposure of the government to critical comment from the international community.<sup>18</sup> In fact, as the WHC adopts a conservationist approach rather than a preservationist one,<sup>19</sup> the World Heritage sites may sustain a variety of compatible uses.

The WHC does not ‘expropriate’ the states and their public administrations of their cultural sovereignty;<sup>20</sup> rather it ‘shor[es] up and back[s] up states ...in their regulatory responsibilities’,<sup>21</sup> contributing to multilevel governance.<sup>22</sup> In a preliminary way, states do not abandon, but rather, exercise their sovereignty when they enter into a

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<sup>12</sup> E.J. Goodwin, ‘The World Heritage Convention, the Environment, and Compliance’, 20 *Colorado J. Int’l Env’t L. & Policy* (2009) 157, 167.

<sup>13</sup> A. Kowalski, ‘When Cultural Capitalization Became Global Practice’ in N. Bandelj and F.F. Wherry (eds) *The Cultural Wealth of Nations* (Stanford: Stanford University Press 2011) 73-89, at 87.

<sup>14</sup> *Ibid.*, 87.

<sup>15</sup> T. Kono and S. Wrбка, ‘General Report’, in T. Kono, *The Impact of Uniform Laws on the Protection of Cultural Heritage and the Preservation of Cultural Heritage in the 21<sup>st</sup> Century* (Leiden/Boston: Martinus Nijhoff 2010).

<sup>16</sup> F. Lenzerini, ‘Articles 15-16 World Heritage Fund’ in F. Francioni (ed.) *The World Heritage Convention: A Commentary* (Oxford: OUP 2008) 269-287.

<sup>17</sup> J. Phares and C. Guttman, *Investing in World Heritage: Past Achievements, Future Ambitions, A Guide to International Assistance* (Paris: UNESCO 2002) p. 39.

<sup>18</sup> Goodwin, ‘The World Heritage Convention, the Environment, and Compliance’, 170.

<sup>19</sup> C. Redgwell, ‘The World Heritage Convention and Other Conventions Relating to the Protection of Natural Heritage’ in F. Francioni (ed.) *The World Heritage Convention* (Oxford: OUP 2008) 380.

<sup>20</sup> See N. Affolder, ‘Mining and the World Heritage Convention: Democratic Legitimacy and Treaty Compliance’, 24 *Pace Environmental L. Rev.* (2007) 35, 36.

<sup>21</sup> J.K. Cogan, ‘The Regulatory Turn in International Law’, 52 *Harvard Int’l L. J.* 321 (2011) 330.

<sup>22</sup> *Ibid.*, 331.

treaty,<sup>23</sup> thereby triggering the basic rule of *pacta sunt servanda*.<sup>24</sup> According to general international law, a state must fulfill its obligations resulting from treaties but it is, in principle, free to select the means of implementing the treaty.<sup>25</sup> Furthermore, under the WHC, states remain uniquely placed in protecting world heritage. The WHC recognizes that ‘the duty of ensuring the identification, protection, conservation, presentation and transmission to future generations of the [world heritage] ... situated on its territory belongs primarily to that state’.<sup>26</sup> The achievement of World Heritage status neither implies the direct management of the site by UNESCO, nor the imposition of a single regulatory framework. The broadly stated obligations allow states to adopt a range of conduct which can be deemed compatible with the convention.<sup>27</sup> The ultimate control always remains with the state party in which the site is located, even if the site is on the World Heritage List.

On the other hand, cultural heritage implies the connotation of legacy and expresses a public interest to be protected.<sup>28</sup> Furthermore, the protection of world heritage no longer falls within the domestic jurisdiction of the states which are parties to the WHC; rather the WHC sets out ‘the duty of the international community to cooperate’ in order to achieve this goal.<sup>29</sup> This paradigm shift affects the traditional assumption that cultural objects fall within the *domaine réservé*.<sup>30</sup> In conclusion, each world heritage site has cultural national roots and an international profile<sup>31</sup> in which ‘cultural internationalism merely constitutes a broader perspective that encompasses cultural nationalism’.<sup>32</sup>

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<sup>23</sup> See generally *S.S. Wimbledon* (U.K. v. Japan), 1923 P.C.I.J. (ser. A) No. 1 (17 August) (stating that the right to enter into international engagements is an act of state sovereignty).

<sup>24</sup> See Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 18232, art. 26.

<sup>25</sup> ICJ, *LaGrand Case* (Germany v. United States) 2001 ICJ 466, 516 (27 June 2001) (referring to means of [the state’s] own choosing’).

<sup>26</sup> WHC, Article 4.

<sup>27</sup> Affolder, ‘Mining and the World Heritage Convention’, 37.

<sup>28</sup> See F. Francioni, ‘Culture, Heritage and Human Rights: An Introduction’, in F. Francioni and M. Scheinin (eds) *Cultural Human Rights*, (Leiden: Martinus Nijhoff Publishers 2008) 5.

<sup>29</sup> WHC, Article 6, ¶ 2.

<sup>30</sup> F. Francioni, ‘The 1972 World Heritage Convention: An Introduction’ in F. Francioni and F. Lenzerini (eds) *The 1972 World Heritage Convention- A Commentary* (Oxford: OUP 2008) 3-7, 3.

<sup>31</sup> R. Anglin, ‘The World Heritage List: Bridging the Cultural Property Nationalism-Internationalism Divide’, 20 *Yale J. L. & the Humanities* (2008) 241, 270.

<sup>32</sup> D.N. Chang, ‘Stealing Beauty: Stopping the Madness of Illicit Art Trafficking’, 28 *Houston JIL* (2006) 829, 847.

Although the convention constitutes a significant step toward the international protection of cultural heritage, it does have certain drawbacks. For instance, as the WHC has a listing approach; it protects only those sites expressly designated by the member states and selected by the World Heritage Committee. Therefore, some authors critically describe the UNESCO approach as elitist, making artificial distinctions between local and universal value.<sup>33</sup> With regard to cultural heritage, it is extremely difficult to draw a line between what has universal value and what has only a mere local value. Furthermore, whether or not a site is listed may depend on the political sensibility of governmental institutions to submit a given area for listing.<sup>34</sup> Next, while Article 12 of the WHC demands the protection of those cultural properties that, although not included in the list, objectively satisfy the requirements for being considered to be of outstanding and universal value, to date this provision has been concretely ineffective.<sup>35</sup> Only rarely has the committee called upon states parties to respect their responsibilities under the convention with respect to properties not inscribed in the list and even when it has done so, its action has been unproductive.<sup>36</sup> Finally, the WHC lacks a dispute settlement mechanism.<sup>37</sup>

Notwithstanding the drawbacks mentioned above, the WHC has reinforced the traditional authority of states in the cultural sector and their top-down capacity to regulate individuals in the cultural domain.<sup>38</sup> This approach differs from a human rights approach to cultural heritage protection in that it imposes an apparently neutral agenda that is detached from the controversies related to cultural rights and their legal value.<sup>39</sup>

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<sup>33</sup> P. Fowler, 'Cultural Landscape: Great Concept, Pity about the Phrase' in Kelly et. al. (eds.) *The Cultural Landscape. Planning for a Sustainable Partnership between People and Place* (London: ICOMOS UK 2001) 17.

<sup>34</sup> A. Galis, 'UNESCO Documents and Procedure: The Need to Account for Political Conflict When Designating World Heritage Sites', 38 *GA. J. Int'l & Comp. L.* (2009) 205-235.

<sup>35</sup> F. Lenzerini, 'Article 12' in F. Francioni (ed.), *The 1972 World Heritage Convention- A Commentary* (Oxford: OUP 2008) 208.

<sup>36</sup> *Ibid.*, 208.

<sup>37</sup> S. Von Schorlemer, 'UNESCO Dispute Settlement', in A.A. Yusuf (ed) *Standard-Setting in UNESCO-Normative Action in Education, Science and Culture Essays in Commemoration of the Sixtieth Anniversary of UNESCO* (Martinus Nijhoff: Leiden/Boston 2007) 73-103, at 78.

<sup>38</sup> J. Morijn, 'The Place of Cultural Rights in the WTO System' in F. Francioni and M. Scheinin (eds) *Cultural Human Rights*, (Leiden: Martinus Nijhoff Publishers 2008), 285-316.

<sup>39</sup> *Ibid.*

## 2. MAPPING CONTEMPORARY HERITAGE POLICY DISCOURSE

Like a number of other areas of administrative law, cultural governance is a ‘battlefield’, *i.e.* a place of conflict where the conflicting political, economic and institutional interests of multiple players clash<sup>40</sup> and this is particularly the case when world heritage is involved. Given that ‘it is the duty of governments to ensure the protection and the preservation of the cultural heritage of mankind, as much as to promote social and economic development’,<sup>41</sup> it may be difficult to identify the most appropriate management of cultural heritage sites. Governing cultural phenomena in accordance with national, regional and international law may constitute a daunting task for national administrations and conflicts of a political, institutional and economic character often arise. This section examines these different types of heritage conflicts.

Heritage related conflicts of a political type may arise at the national level when different political actors compete for taking key decisions with regard to world heritage sites. For instance, in Sicily, notwithstanding the obligations under the World Heritage Convention to protect and preserve the Noto Valley site – a fine example of Baroque art – local authorities granted a Texan investor, Panther Oil, a concession to drill gas in the Valley.<sup>42</sup> Because the site is considered to be in permanent danger of earthquakes and Etna’s eruptions, drilling is risky in that it could cause an environmental collapse.<sup>43</sup> Because a regional administrative court had confirmed the permission, the Italian government declared its willingness to override Sicily’s autonomy and to stop the project. However, such intervention was not needed; Panther Oil decided to reduce the number of wells planned in the region from 21 to 8, and to avoid the Val di Noto.<sup>44</sup>

Heritage related conflicts of an institutional type are due to the emergence of supranational public administrations, such as the World Heritage Committee. Conflicts may arise between these supranational organs and local administrations concerning the most appropriate way to govern world heritage sites. Heritage policy discourse is varied; preservation policies are not uniform and rely on different assumptions as to what is

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<sup>40</sup> G. Napolitano, ‘Conflicts in Administrative Law: Struggles, Games and Negotiations between Political, Institutional and Economic Actors’, paper presented at NYU, 9-10 September 2012, on file with the author, 4.

<sup>41</sup> See WHC, Article 4.

<sup>42</sup> T.J. Puleo, ‘Baroque Disruptions in Val di Noto’, 100 *Geographical Review* (2010) 476-493.

<sup>43</sup> S. Aloisi, ‘Gas War Rages in Sicilian Baroque Valley’, *Reuters*, 7 June 2007.

<sup>44</sup> ‘Sicilian Valley Wins Battle against Gas Wells,’ *Reuters*, 17 June 2007.

worth being protected, why and how. For instance, preservationists have long discussed whether a site is more important for reasons intrinsic to that site or because of its associative value and role in the formation of the cultural identity of a given population.<sup>45</sup> While the identity-focused ‘populists’ hold that the value of specific sites lies in their role in the formation of cultural identity (‘the heritage people want’), essentialists deem that cultural goods present an inherent value (‘Heritage is heritage’).<sup>46</sup> These positions have led to tensions among heritage scholars as to the identification of what is worth being protected, why and how to protect it. For instance, the Georgian Government has been admonished by the World Heritage Committee for rebuilding the Bagrati Cathedral, a world-renowned masterpiece of medieval Georgian architecture.<sup>47</sup> While architecture conservationists fear the loss of authenticity and integrity, locals seem happy to see it restored, as the cathedral is seen as a symbol of the unity of the Georgian state.<sup>48</sup> In the meantime, however, Bagrati has been put on the list of world heritage in danger and state authorities and the World Heritage Committee are discussing a more appropriate rehabilitation plan.<sup>49</sup>

The different approaches to the conservation of cultural sites are well reflected in the traditional debate between nationalists and internationalists in international cultural law.<sup>50</sup> While internationalists perceive cultural goods as expressing a common human culture, wherever their place and location, nationalists perceive cultural property as part of the national cultural wealth.<sup>51</sup> Even assuming that the WHC incorporates a mixture of both approaches, as it has been persuasively argued,<sup>52</sup> questions remain in those cases in which the two interests – internationalist and nationalist – diverge. Which interest should prevail in the management of cultural heritage sites: the interest of the locals or the interests of the international community? Oftentimes the two interests coincide. Both communities have an interest in the

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<sup>45</sup> C. Koziol, ‘Historic Preservation Ideology: A Critical Mapping of Contemporary Heritage Policy Discourse’, 1 *Preservation Education and Research* (2008) 41-50, at 42.

<sup>46</sup> *Ibid.*

<sup>47</sup> V. Gotsiridze, ‘Restoration Threatens Georgian Medieval Masterpiece’, *Georgian Daily*, 2 January 2012.

<sup>48</sup> *Ibid.*

<sup>49</sup> *Ibid.*

<sup>50</sup> See J.H. Merryman, ‘Two Ways of Thinking about Cultural Property Law’, 80 *AJIL* (1986) 831-853.

<sup>51</sup> *Ibid.*, 831-2.

<sup>52</sup> R. Anglin, ‘The World Heritage List: Bridging the Cultural Property Nationalism- Internationalism Divide’, *Yale J. of Law & the Humanities* (2008) 241.

conservation of a world heritage site. However, when interests collide, the relevant authorities (and adjudicators) face the dilemma as to whether to comply with the WHC or to fulfill their mandate according to the preferences of their constituencies.

For instance, in 2004 the Cologne Cathedral in Germany was listed on the Red List because of plans to erect several skyscrapers on the bank of the Rhine river.<sup>53</sup> The local authorities initially contested the legitimacy of the expansive interpretation of cultural heritage protection which was endorsed by the World Heritage Committee: reportedly, the Mayor declared that 'it was impossible that a city should stop all further development because it had a cathedral'<sup>54</sup> and that 'city planning did not fall into the foreign Ministry's competences'.<sup>55</sup> At the end of the day, however, the city of Cologne rescaled the projects and the World Heritage Committee removed the site from the Red List.<sup>56</sup> Things did not go this way however, in the case regarding the Dresden Elbe Valley which was delisted from the World Heritage List because of plans to build a bridge which could impact the integrity of the site. The conflict that arose was analogized to a 'holy war' and the federal authorities preferred to accept the deletion of Dresden from the World Heritage List, respecting the will of the local demos.<sup>57</sup> More recently, the World Heritage Committee has expressed concern about the elevation of a skyscraper in the world heritage site of Seville as negatively affecting the pre-eminence of several historic buildings in the city's skyline.<sup>58</sup>

Finally, heritage related conflicts of an economic type may arise when the relevant state authorities need to strike a reasonable balance between an effective world heritage protection, as mandated by the WHC, and other interests including economic development. This is necessarily a case by case assessment. What are the general principles which should guide public administrations in protecting world heritage? The WHC does not provide details on management; the establishment of management plans is left to the member states.

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<sup>53</sup> See D. Zacharias, 'Cologne Cathedral versus Skyscrapers – World Cultural Heritage Protection as Archetype of a Multilevel System', *Max Planck Yearbook of United Nations Law* 10 (2006) 273-366.

<sup>54</sup> *Ibid.*, 277.

<sup>55</sup> *Ibid.*, 279.

<sup>56</sup> *Ibid.*, 280.

<sup>57</sup> See generally S. von Schorlemer, 'Compliance with the UNESCO World Heritage Convention: Reflections on the Elbe Valley and the Dresden Waldschlösschen Bridge', *GYIL* 51 (2009) 321-90.

<sup>58</sup> G. Tremlett, 'Seville's UNESCO Status Threatened by 600ft Pelli Tower', *Guardian*, 20 January 2012.

Arguably, the conservation of heritage sites has a relatively stable nucleus which requires core protection, and forbids and or limits categories of economic activities which can be deemed easily and *ipso facto* in conflict with heritage management as they could alter the physical integrity of the given site.<sup>59</sup> For instance, mining or oil and gas development are activities estimated to threaten more than one-quarter of cultural heritage sites.<sup>60</sup> Mining can also be prohibited in places outside the perimeter of a world heritage site, if such activity could damage the site itself by way of pollution or other noxious interferences. In scrutinizing national case law, for instance, in the U.K. case *Coal Contractors Limited v. Secretary of State*, which involved an application to extract coal near Hadrian's Wall World Heritage Site, the Deputy Judge upheld the decision of the Secretary of State to refuse the application because insufficient weight had been given to cultural heritage protection.<sup>61</sup> In the *Bulankulama* case, a Sri Lankan court disallowed the mining of phosphate by a joint venture between the government and the local subsidiary of a transnational corporation in an area of extreme historical and archaeological value,<sup>62</sup> thus interfering with a world heritage site. The Court stated: 'We use the terms "money", "capital", "assets" and "wealth" interchangeably – leaving no simple means to differentiate money from real wealth. Money is a number. Real wealth is food, fertile land, buildings or other things that sustain us. Lacking language to see this difference, we accept the speculator's claim to create wealth, when they expropriate it...'<sup>63</sup>

However, moving from the core of cultural heritage protection to its periphery, conservation policies may become more nuanced and contested. In the Australian *Friends of Hinchinbrook Society Inc. v. Minister of Environment* case,<sup>64</sup> the applicant Society challenged the consent of the Commonwealth Minister for the Environment to carrying out various works associated with the building of a resort and a marina within

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<sup>59</sup> *Recommendation concerning the Preservation of Cultural Property Endangered by Public or Private Works*, adopted by the UNESCO General Conference at its 15<sup>th</sup> sess., Paris, 19 November 1968, ¶ 8(d)(e)(f) and (h).

<sup>60</sup> N. Affolder, 'The Private Life of Environmental Treaties', 103 AJIL (2009) 510.

<sup>61</sup> *Coal Contractors Limited v. Secretary of State for the Environment and Northumberland County Council* High Court, Queen's Bench Division, 9 Dec. 1993, 68 P & C R 285.

<sup>62</sup> *Tikiri Banda Bulankulama v. Secretary, Ministry of Industrial Development*, S.C. Application No. 884/99 (F/R), (2000) SAELR 7 (2) 1.

<sup>63</sup> *Ibid.*

<sup>64</sup> *Friends of Hinchinbrook Society Inc. v. Minister of Environment & Others* (1997) 142 ALR 632.

the Great Barrier Reef World heritage site. However, the Court found that the WHC ‘does not envisage that natural or cultural heritage is to be locked away from sight and made inaccessible to the public ...What is required in a particular case will be a balancing of the obligations of ‘protection’ and ‘conservation’, as well as ‘presentation’; each given equal weight’.<sup>65</sup>

In conclusion, as Battini puts it, world heritage sites are ‘geographical places’ which ‘escape the rest of the national territory in which they are situated.’<sup>66</sup> They are not extra-territorial in a strict legal sense, as the WHC expressly respects sovereign rights and territorial integrity; at the same time *world* heritage sites are located in a ‘global legal space’ and thus matter to the international community in addition to the local communities.<sup>67</sup> For this reason, decisions having an impact on these sites need to take into account both local and global interests, and tension may arise between such interests. While local interests tend to be taken into account at the national level at least in democratic systems, the WHC requires the relevant authorities to consider the interests of the entire international community.<sup>68</sup> While each state party retains the right to regulate within its own territory, the WHC and investment treaties pose vertical constraints on such right, ‘introducing global interests into the decision-making processes of domestic authorities [...]’.<sup>69</sup> Adherence to these international regimes ‘add[s] a circuit of external accountability, forcing domestic authorities to consider the interests of the wider global constituency affected by their decisions.’<sup>70</sup> At the same time, the internal accountability of state authorities to their own domestic constituencies does not cease to exist.<sup>71</sup>

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<sup>65</sup> (1997) 147 ALR 637 per Hill. J.

<sup>66</sup> S. Battini, ‘The Procedural Side of Legal Globalization: The Case of the World Heritage Convention’, 9(2) International Journal of Constitutional Law (2011) 340-68, at 342.

<sup>67</sup> *Ibid.*

<sup>68</sup> *Ibid.*

<sup>69</sup> *Ibid.*, 343.

<sup>70</sup> *Ibid.*, 364.

<sup>71</sup> *Ibid.*

### 3. INVESTMENT TREATY ARBITRATION AS GLOBAL ADMINISTRATIVE REVIEW

In its multifaceted and protean aspects, the governance of a world heritage has affected the economic interests of a number of stakeholders, including foreign investors. Construction and similar economic activities can be delayed or forbidden because of archaeological excavations; some governments may have provisions for the acquisition, through purchase or expropriation, of important cultural property. In addition, an excessive heritage protection may determine an uneven burden on economic interests. In fact, foreign investors have brought a number of heritage related claims before investment treaty tribunals. This section scrutinizes some key features of investment treaty arbitration, and questions whether the adjudication of heritage related investment disputes can constitute an example of global administrative review articulating the idea of a multi-polar administrative law and thus requiring a consequent transformation of the methods used to study this branch of law. Lastly, it hypothesizes that arbitral tribunals are contributing to the emergence of a cultural administrative law, or *lex administrativa culturalis* – i.e., a branch of transnational law relating to the administration of cultural heritage.

According to some authors, investment treaty law may be conceptualized as a species of Global Administrative Law (GAL).<sup>72</sup> In parallel, since investment disputes arise from the exercise of public authority by the state and arbitral tribunals are given the power to review and control such an exercise of public authority settling what are in essence regulatory disputes, investment arbitration has been analogized to administrative review.<sup>73</sup>

The analogy is based on several arguments. *First*, arbitral tribunals have an *international/global* character, because their authority derives from a treaty. *Second*, arbitral tribunals, like *administrative* courts, settle disputes arising from the exercise of public authority.<sup>74</sup> *Third*, the jurisdiction of arbitral tribunals extends to *legal* disputes.<sup>75</sup> This framework would give substance to the concept of global administrative

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<sup>72</sup> G. Van Harten & M. Loughlin, 'Investment Treaty Arbitration as a Species of Global Administrative Law', *EJIL* 17 (2006) 121-150.

<sup>73</sup> *Ibid.*, 121-3. See also B. Kingsbury, N. Krisch & R.B. Stewart, 'The Emergence of Global Administrative Law', *Law & Contemporary Problems* 68 (2005) 15.

<sup>74</sup> S. Schill, 'Crafting the International Economic Order: The Public Function of Investment Treaty Arbitration and its Significance for the Role of the Arbitrator', *Leiden JIL* 23 (2010) 401-30.

<sup>75</sup> ICSID Convention, Article 25.

law or *lex administrativa communis*,<sup>76</sup> which can be defined as ‘[the] process of a global homologation of principles of administrative, comparative and international law under different legal systems’.<sup>77</sup> As Van Harten and Loughlin put it ‘[investment treaty arbitration] may in fact offer the only exemplar of global administrative law, strictly construed, yet to have emerged.’<sup>78</sup> Finally, the analogy with administrative law would allow arbitrators to borrow key administrative principles guiding the conduct of public administrations such as reasonableness, efficiency and others as useful parameters for evaluating the conduct of states and assessing their compliance with the relevant BITs.

However, the conceptualization of investment treaty arbitration as a form of global administrative law may prove to be fragile as ‘the defining features of global administrative law are rather fluid’.<sup>79</sup> Without a clear understanding of what is meant by GAL, any attempt to classify investment arbitration as a form of GAL remains a theoretical exercise. There is no such thing as a centralized system of administration in international law, rather states retain their administrative functions. Furthermore, foreign investments are usually governed by a series of norms which are not limited to (national) administrative law but include international treaties, customs, general principles of law etc. In addition, arbitral tribunals have expressly denied being administrative courts. For instance, in *Generation Ukraine v. Ukraine*, the arbitral tribunal clarified that it was an international tribunal, applying international law to a question of international responsibility.<sup>80</sup> As other cases confirm this distinction, this evidence questions the idea of a global administrative law.<sup>81</sup> Finally, the fact that international investment treaty arbitration nowadays addresses a diagonal relationship between the host state and foreign investors reflects an evolution which is present in other sectors of international law such as human rights law, and is not unique to administrative review. Therefore, if this mechanism parallels the local judicial review of the courts of the host state, it should not be conceived as a substitute of the same, but as

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<sup>76</sup> J. Robalino-Orellana and J. Rodríguez-Arana Muñoz (Eds) *Global Administrative Law Towards a Lex Administrativa* (London: Cameron & May, 2010).

<sup>77</sup> *Ibid.*

<sup>78</sup> Van Harten & Loughlin, ‘Investment Treaty Arbitration as a Species of Global Administrative Law’, 121.

<sup>79</sup> *Ibid.*, 121-2.

<sup>80</sup> *Generation Ukraine v. Ukraine*, (Merits) 16 September 2003, 44 ILM 404, ¶¶ 20.29-20.33.

<sup>81</sup> J.A. Barraguirre, ‘Los Tratados Bilaterales de inversion (TBIs) y el Convenio CIADI -La evaporación del derecho administrativo domestico?’, *Res Publica Argentina* 3 (2007) 114.

a different and additional venue expressly provided by international investment treaties. The use of the arbitration model is aimed at depoliticizing disputes, avoiding potential national court bias and ensuring the advantages of confidentiality and effectiveness.<sup>82</sup> Historically, foreigners have been amongst the vulnerable sectors of societies, easy objects of reprisal, without vote and voice in the local political affairs.<sup>83</sup> Fundamentally, investment treaties aim at establishing a level playing field for foreign investors and a sort of shield against their discrimination and mistreatment by the host state.<sup>84</sup>

#### 4. TOWARDS A LEX ADMINISTRATIVA CULTURALIS?

Drawing from the previous analysis, one might conclude that international investment arbitration presents some elements of global administrative review (*i.e.* review of administrative acts), but that it also lacks some of its features (at the end of the day the administrative acts which are under review belong to the national sphere).<sup>85</sup> In the specific context of cultural disputes, however, the boundaries between global and local become blurred; when adjudicating disputes relating to world heritage, arbitrators have to deal with a complex mixture of international investment law, national law *and* international cultural law. Recent arbitrations have shown that arbitrators are taking cultural elements into account when adjudicating such disputes. Therefore the theory that investment arbitration may constitute a form of global administrative review becomes more plausible.

If investment treaty arbitrations constitute a form of global administrative review, the existence of a discrete number of world heritage related arbitrations tests the hypothesis of the coalescence of a *lex administrativa culturalis* or cultural administrative law as an archetype of multipolar and multilevel administrative law. If one conceives cultural law as a species of administrative law, *i.e.* the body of law that governs the activities of administrative agencies of governments in the cultural sector, it is evident that international cultural law can be conceived as a form of global

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<sup>82</sup> See I.F.I. Shihata, 'Towards a Greater Depoliticization of Investment Disputes: The Role of ICSID and MIGA' (1986) 1 ICSID Review Foreign Investment Law Journal 1, 1-25, at 4.

<sup>83</sup> See generally J. Paulsson, *Denial of Justice in International Law* (Cambridge: CUP, 2005).

<sup>84</sup> G. Starner, 'Taking a Constitutional Look: NAFTA Chapter 11 as an Extension of Member States' Constitutional Protection of Property' *Law and Policy of Int'l Business* 33 (2002) 405.

<sup>85</sup> See A. Roberts, 'Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System' 102 *AJIL* (2013) 54-94.

administrative law; this conceptualization is supported by the existence the World Heritage Committee, which is an executive organ which recalls a centralized system of administration. While states retain control over administrative matters, cultural matters no longer lie within their *domain réservé*. World heritage sites are emblematic of regulatory pluralism in which public administrations need to comply with multiple international norms, i.e., the convention, its guidelines and the indications of the Committee. While arbitral tribunals have expressly (and correctly) denied being administrative courts, *de facto* they exercise administrative review when reviewing national measures adopted in alleged compliance with the World Heritage Convention to assess their compliance with the relevant BIT.

Like other international adjudicative bodies,<sup>86</sup> arbitral tribunals are not to undertake a *de novo* review of the evidence once brought before the national authorities, merely repeating the fact-finding conducted by the latter. It is not appropriate for arbitral tribunals to ‘second-guess the correctness of the ... decision-making of highly specialized national regulatory agencies’.<sup>87</sup> For instance, in the *Glamis Gold Case*, the arbitral tribunal adopted a high standard of review, according deference to the federal and state legislative measures aimed at protecting indigenous cultural heritage. The arbitral tribunal recognized that: ‘It is not the role of this Tribunal or any international tribunal, to supplant its own judgment of underlying factual material and support for that of a qualified domestic agency’<sup>88</sup> and that ‘governments must compromise between the interests of competing parties.’<sup>89</sup>

On the other hand, arbitral tribunals scrutinize the given national measures to ascertain their compliance with the host state investment law obligations. Thus, arbitral tribunals are not to pay a total deference before national cultural policies, simply accepting the determinations of the relevant national authorities as final. Rather, they must objectively assess whether the competent authorities complied with their international investment law obligations in making their determinations. At the same time they do take international cultural law into consideration. For instance, in the

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<sup>86</sup> See, e.g., DSU, Article 11. DSU 1994. Understanding on Rules and Procedures Governing the Settlement of Disputes, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 33 ILM 1125 (1994).

<sup>87</sup> *Chemtura Corporation (formerly Crompton Corporation) v Canada*, Award, 2 August 2010, ¶ 134.

<sup>88</sup> *Glamis Gold Ltd v. United States of America*, ICSID Award, 8 June 2009 ¶ 779.

<sup>89</sup> *Ibid.*, ¶ 803.

Pyramids case, which involved the denial of a construction project in front of the Pyramids for understandable cultural reasons, loss of profits was not awarded because of the unlawfulness of the proposed economic activity under cultural heritage law.<sup>90</sup> The *Pyramids case* centered on the unearthing of artefacts of archaeological importance during the construction of a tourist village at the pyramids of Giza. Notwithstanding the previous approval of the investment at stake, Egypt cancelled the contract and the area was added to the World Heritage List. The ICSID Tribunal noted that it had been added on the List *after* the cancellation of the project. Therefore, it found contractual liability and sustained the claimant's argument that the particular public purpose of the expropriation could not change the obligation to pay fair compensation. However, it reduced the amount of such award (or payment), stating that only the actual damage (*damnum emergens*) and not the loss of profit (*lucrum cessans*) could be compensated.<sup>91</sup> Indeed, it stated: 'sales in the areas registered with the World Heritage Committee under the UNESCO Convention would have been illegal under [...] international law [...] [T]he allowance of *lucrum cessans* may only involve those profits which are legitimate.'<sup>92</sup>

Therefore, it will be important for the states to show that their regulations are aimed at achieving legitimate public goals and that they follow due process of law. As an arbitral tribunal held, '[...] "public interest" requires some genuine interest of the public. If mere reference to "public interest" c[ould] magically [create] such interest and therefore satisfy this requirement, then this requirement would be rendered meaningless since the Tribunal can imagine no situation where this requirement would not have been met.'<sup>93</sup> Similarly Wälde and Kolo caution against 'not so holy alliances between protectionist interest and environmental idealism'.<sup>94</sup> In this sense, not only do arbitral tribunals contribute to 'good governance in international economic relations',<sup>95</sup> but they may contribute to good *cultural governance* expressing the need to govern

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<sup>90</sup> *Southern Pacific Properties (Middle East) Limited v Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Award on the Merits, 20 May 1992, reprinted in 8 ICSID Rev.-FILJ (1993) p 328.

<sup>91</sup> *Southern Pacific Properties*, ¶ 157.

<sup>92</sup> *Southern Pacific Properties*, ¶ 190.

<sup>93</sup> *ADC Affiliate Limited and ADC & ADMC Management Limited v Republic of Hungary*, ICSID Case ARB/03/16, Award 2 October 2006, ¶ 432.

<sup>94</sup> T. Wälde and A. Kolo, 'Environmental Regulation, Investment Protection and "Regulatory Taking" in International Law', *ICLQ* 50 (2001) 820.

<sup>95</sup> *Ibid.*, 846.

cultural phenomena exercising state authority according to due process and the rule of law. Yet concerns remain as to whether arbitral tribunals are the most suitable here for settling cultural heritage related disputes due to their limited mandate and specific expertise.

#### CONCLUSIONS

Cultural governance has come of age, and constitutes a good example of legal pluralism and multilevel governance. The governance of world heritage raises political, institutional and economic conflicts among different actors at different levels. The linkage between international cultural law and international investment law has increasingly come to the fore. At the substantive level, investment treaties provide an extensive protection to investors' rights in order to encourage foreign direct investment. Thus, a potential tension exists when a state adopts cultural policies interfering with foreign investments as this may breach investment treaty provisions. At the procedural level, investment treaties offer investors direct access to an international arbitral tribunal. Therefore, foreign investors can directly seek compensation for the impact on their business of such regulation.

A series of arbitrations involving elements of cultural heritage have shown the increasing interrelatedness of foreign investment and economic development on the one hand, and world heritage on the other. Culture-related investment arbitrations put cultural governance to a test in that they show its (lack of) dedicated heritage courts and tribunals and adequacy to address emerging issues in relation to other branches of international law. Concerns remain with regard to the effectiveness of cultural governance, as arbitral tribunals have a limited mandate and cannot adjudicate on the eventual violation of international cultural law.

On the other hand, arbitral tribunals are imposing schemes of good governance, by requiring the respect of investment treaty provisions –including the prohibition of discrimination and the fair and equitable treatment standard–, and by adopting general administrative law principles, such as due process, reasonableness and others. While not every breach of local administrative law and practice amounts to a violation of investment treaty provisions, relevant violations will undergo the scrutiny of arbitral tribunals. Such an assessment can be in line with good cultural governance as

demanded by the relevant UNESCO instruments: unrestricted state sovereignty may –in some cases– jeopardize the protection of world heritage.

In conclusion, one could argue that ‘administrative law is colonizing ...the legal space traditionally occupied by international law’,<sup>96</sup> or vice versa that international law is colonizing the legal space traditionally occupied by administrative law. Certainly, administrative law and international law have gone beyond their traditional respective boundaries; and the intermingling of local and global, private and public, national and international dimensions defines and characterises a complex, multi-polar and multilevel legal system, which requires novel forward-looking approaches and multidisciplinary methodologies. Whether these developments have given rise to a multipolar *lex administrativa culturalis* or cultural administrative law is open to debate.

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<sup>96</sup> Battini ‘The Procedural Side of Legal Globalization’, op. cit., p. 368.

