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Obligations Undertaken by States under International Conventions for the Protection of Cultural Rights and the Environment, to What Extent they Constitute a Limitation to Investor's Rights under Bilateral or Multilateral Investment Treaties and Investment Contracts?

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LIST OF ABBREVIATIONS

BIT	Bilateral Investment Treaty
EU	European Union
FET	Fair and Equitable Treatment
GATT	General Agreement on Tariffs and Trade
MFN	Most-favoured-Nation Treatment
MIA	Multilateral Investment Agreement
ICSID	International Centre for the Settlement of Investment Disputes
IIA	International Investment Agreement
NAFTA	North American Free Trade Agreement
NGO	Non-Governmental Organization
NT	National Treatment
TPP	Trans-Pacific Strategic Economic Partnership Agreement (2005)
UN Charter	Charter of the United Nations of 26 June 1945
UNCLOS	United Nations Convention on the Law of the Sea of 1982
UNCTAD	United Nations Centre for Trade and Development
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNESCO Conventions	• Convention on the Protection of the Underwater Cultural Heritage (2001) • Convention concerning the Protection of the World Cultural and Natural Heritage (1972)
UWCH	Convention on the Protection of the Underwater Cultural Heritage
VCLT	Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations 1986
WHC	Convention concerning the Protection of the World Cultural and Natural Heritage (1972)
WH Committee	World Heritage Committee established under the Convention concerning the Protection of the World Cultural and Natural Heritage (1972)
WHC Operational Guidelines	Operational Guidelines for the Implementation of the World Heritage Convention as amended on 28 November 2011

1 EXECUTIVE SUMMARY

This memorandum was prepared by students of the Trade and Investment Law Clinic at the Graduate Institute of International and Development Studies as a response to a request by the Office of International Standards and Legal Affairs of the UNESCO. The aim of this memo is to analyse the interactions between investment and non-investment treaties, in particular the extent to which obligations undertaken by States under international conventions for the protection of cultural and natural heritage constitute a limitation to investor's rights under bilateral or multilateral investment treaties and investment contracts.

There has been an intensive debate on the links between international investment law and international law aimed at protection of human rights and environment over the last ten years and the main recent scholarly writings are summarized in the Bibliography section. As requested, this paper focuses on two UNESCO Conventions that deal with tangible cultural and natural heritage, including underwater, namely the Convention Concerning the Protection of the World Cultural and Natural Heritage and the Convention on the Protection of the Underwater Cultural Heritage.

After defining the two fields of international law, the analysis outlines possible interactions and overlaps between States' commitments at the international level to protect cultural and natural heritage on the one hand and States' commitments undertaken in bilateral and multilateral investment treaties to ensure agreed standards of protection to foreign investors on the other. Some scenarios under which investors' rights may be affected negatively or positively by a governmental measure concerning the protection of cultural and natural heritage are suggested. The section concludes that the two different policy objectives may compete.

In the following Chapter 3, obligations of the State Parties to the UNESCO Conventions as well as their enforcement mechanisms are briefly described. A focus is put on the obligations that could limit investors' rights. The analysis of the WHC and the UWCH concludes that cultural and natural heritage is a shared interest of humankind. This memo is based on this premise.

Chapter 4 is devoted to ways of reconciling conflicts between UNESCO Conventions' obligations and investors' rights. Several possibilities are regarded in order to achieve a balance between the two types of obligations: the inclusion of cultural exceptions in IIAs, the

consideration of UNESCO Conventions by investment tribunals as an (i) applicable law, (ii) interpretative means of IIA obligations, or (iii) as a fact (*datum*) in the course of interpreting the investment protection standards. The impact and specificities of an investment contract is also analysed.

The aim of the fifth Chapter is to demonstrate how, in practice, the full realization of foreign investors' rights and the protection of natural and cultural heritage may come into conflict, and what tools investment tribunals have used when considering UNESCO or other non-investment treaties. References to available case law and the actual approach of relevant arbitral tribunals were made. Outside the NAFTA framework, three investor-state cases have directly involved the WHC, namely *SPP v Egypt*, *Santa Elena v Costa Rica* and *Parkerings v Lithuania*. Under the NAFTA, the WHC was partly dealt with in the *Glamis Gold* case. A detailed description of these cases is included in Annex 1. Analogies will also be drawn from cases in which investment tribunals considered environmental and human rights obligations arising from other domains of international law.

Obligations under UNESCO Conventions may impact differently depending on the stage of the case. At the jurisdictional stage, this paper suggests that if investment tribunals applied UWCH provisions, or if they adopted a systemic interpretation of the host state obligations, such obligations could preclude a tribunal to have jurisdiction over a case regarding underwater heritage. At the merits, UNESCO Conventions may have three different impacts on when it comes to expropriation: (i) they can legitimate governmental measures, (ii) help to distinguish between an indirect expropriation and a legitimate governmental regulation, and (iii) influence the legitimate expectations of an investor. With regards to the MFN and national treatment principles, cultural heritage obligations may impact the assessment of the existence of 'like circumstances'. Also, they may play a role in the analysis of the legitimate expectations of an investor as well as the governmental intentions that are related to the FET.

Finally, the paper describes the three positions taken by investment tribunals with regard to the question whether provisions of the UNESCO Conventions may impact on the assessment of compensation. The first one is that non-investment obligations of the host State must not be taken into consideration. The second approach is that relevance of the non-investment obligation is not excluded *in abstracto*, but it is refused *in concreto* by the tribunal. The final position is to consider UNESCO Conventions obligations as fully relevant in assessing the level of compensation.

WHC OBLIGATIONS FOR STATES LIMITING INVESTORS' RIGHTS	INVESTORS' RIGHTS IN IIAS	POSSIBLE INTERFERENCE	CONSEQUENCES ESTABLISHED BY TRIBUNALS
Duty of ensuring the identification, protection, conservation, presentation and transmission to future generations of the cultural and natural heritage of universal value Duty to conserve and protect cultural properties even if these are not inscribed in the World Heritage List	Fair and equitable treatment	Legitimate expectations Principle of good faith	Where the non-investment treaty entered into force after the investment obligation was made, and the investor did not have the information regarding the future international obligation and could not reasonably forecast the future obligation at that time, tribunals will be inclined to protect the investor's legitimate expectations at this critical period. Ex. *SPP v Egypt* Where the investor knew about existing non-investment obligations, or could reasonably expect the emergence of future obligations, tribunals will be inclined to protect host state's interest to comply with international obligations. Ex. *Methanex* case, *Glamis Gold Ltd v United States of America*
	Expropriation	Expropriation would be lawful Legitimate non-compensable regulatory measure	UNESCO obligations can serve as : 1. Legitimacy for governmental measures Ex : *SPP v Egypt* 2. Distinguishing between an indirect expropriation and a legitimate governmental expropriation Ex : *Methanex* case 3. Influence the legitimate expectations of investors Ex : *Methanex* case
	MFN and national treatment	Like circumstances	Legitimacy of discrimination between two investors Ex. *Parkerings v Lithuania*
	Compensation	Level of compensation Method of calculation Date of compensation	Three approaches : 1. Non-investment obligations are not taken into consideration Ex : *Santa Elena SA v. Costa Rica* 2. Investment tribunal does not exclude the relevance of the non-investment obligation *in abstracto*, but refuses it *in concreto* Ex : *Siemens v. Argentina* 3. UNESCO Conventions' obligations as fully relevant Ex : *SPP v. Egypt (exclusion of lucrum cessans)*

2 INTERNATIONAL INVESTMENT LAW AND CULTURAL AND NATURAL HERITAGE: DEFINING AND CONNECTING THE TWO FIELDS

Cultural and natural heritage is today viewed as a shared common interest of humanity to be protected under the auspices of international law.[2] The first interest of the international community in protecting cultural properties during wars expanded to protection of a broader category of cultural heritage in peaceful times, to intangible cultural heritage, cultural heritage underwater, and the campaign against the illicit trade of cultural objects. Moreover, other cultural values have come into play, such as the protection of natural heritage, or the respect for human dignity and the human rights of individuals and communities, including indigenous peoples and minority groups.[3]

This memo will only deal with the rights and obligations arising from UNESCO Conventions aimed at the protection of tangible, movable, and immovable cultural and natural heritage, both on and underground and underwater.

Given the almost universal character of the WHC[4] which imposes a general obligation of preserving cultural and natural heritage, and the ever-increasing number of properties included in the list[5] it is inevitable that investment projects may clash with the WHC system. These may include not only archaeological and natural conservation areas, but also city historic centres.

Before turning to discuss possible investors' rights limitations due to states' commitments under the UNESCO Conventions, it is useful to recall what investment law protection is. International investment law provides an extensive protection to investors' rights to encourage foreign direct investment towards economic development. At the substantive level, IIAs broadly define the notion of investment (generally covering both tangible and intangible property) and extensively construe the notion of compensable expropriation, including direct expropriation, indirect expropriation and measures tantamount to expropriation. Further, they include, in one form or another, the principle of non-discrimination on the basis of the nationality of the investor (national treatment and most-

[2] See Toshiyuki Kono, Stefan Wrbka, "General Report". In *The Impact of Uniform Laws on the Protection of Cultural Heritage and the Preservation of Cultural Heritage in the 21st Century*, Toshiyuki Kono (ed), Leiden, Boston, Martinus Nijhoff Publishers, 2010, at 4.
[3] *Id*. at 5.
[4] 189 States ratified the WHC as of March 2012. See http://whc.unesco.org/en/list.
[5] 963 properties in 153 states are inscribed on the WH List. More detailed information is available at: http://whc.unesco.org/en/list.

favoured nation treatment standards, prohibition of arbitrary and discriminatory treatment) and absolute standards of treatment (e.g. principle of fair and equitable treatment and full protection and security).[6] The investment law remains unique by granting private foreign investors direct access to arbitral tribunals, often without prior exhaustion of local remedies, where investors can challenge governmental restrictions of their rights, and claim damages for state's breaches of investment law.[7]

Consequently, scenarios under which investor's rights may be affected by government policy that is motivated by the protection of cultural and natural heritage can easily occur:[8]

(i) Investor's acquisition of land contemplated for commercial development, such as hotel-tourism, can be frustrated by classification of the relevant land as a cultural or natural heritage and can amount to the breach of the relevant IIA. Once granted the status of protected cultural heritage, the owner of such an object is usually not deprived of his ownership rights *per se*, but the classification often leads to a number of restrictions of his property rights, e.g. with regard to planned refurbishment or changes of his property (special planning and building permits) or cases of sale of his property (pre-emptive and expropriation rights of the state). The mere process of designating a potential immovable cultural heritage object can also limit the investor's rights. Consequently, the investor's project may be rendered totally impossible or considerably difficult and more costly due to the cultural heritage protection motives.[9]

(ii) A foreign investor can be deprived of the enjoyment of his investment in open-pit mining by a government's decision to change the designation of the forest where the mining takes place from a 'productive' to a 'protected' forest. The government's decision could have been motivated by imposing a more sensitive way of mining in the forest as opposed to a mining in an open field.[10]

[6] For detailed information on international investment law, see e.g., Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law*, (Oxford: Oxford University Press, 2008).
[7] Some authors refer to the possibility of private companies, not subject to international law, having a direct access to an international dispute settlement mechanism as to a silent revolution in foreign investment law and to an innovative development in international law. See Surya P. Subedi, *International Investment Law: Reconciling Policy and Principle*, (Oxford and Portland: Hart Publishing, 2008), 32.
[8] The list is not exhaustive; other situations may also occur.
[9] For a relevant example from case law, please refer to *SPP v Egypt* (Section 7.1) and *Santa Elena v Costa Rica* (Section 7.2).
[10] For a relevant example from case law, please refer to NAFTA case *Glamis Gold* (Section 7.4).

(iii) Historic city centres are very often subject to UNESCO protection and to a number of limitations arising from such protection regarding changes of the appearance of the buildings, construction limits or environmental concerns. Two investors competing in the same industry, e.g. construction of parking facilities, might be treated differently, if doing business in or outside of such protected city centres. Strict conditions imposed on an investor constructing parking facilities within the protected area may be justified by the historical and archaeological protection. The investors would not be found to be in 'like circumstances' given the UNESCO protection of the relevant area and no breach of IIA would be established. Similarly, investors owning hotels in the same city might be subject to different treatment with regard to the refurbishment of the buildings depending on the degree of cultural protection of the relevant hotel. A measure aimed at the protection of one hotel and limiting ownership rights of the investor-owner of the hotel might not be discriminatory due to the fact that only one of the hotels qualifies for UNESCO protection.[11]

(iv) With respect to the underwater cultural heritage, the new regime of the UWCH excludes, except for limited exceptions, the laws of salvage and finds, and prohibits the freedom of economical fishing for archaeological objects. Salvage activities of foreign investors that were formerly authorized by the relevant State could easily violate the State's newly undertaken obligations to prohibit economical exploitation of the underwater cultural heritage under the UWCH.[12]

On the other hand, in a particular case, a State Party to UNESCO Conventions can decide to favour commercial development of a certain area, for example enabling mining in a natural heritage site, over the UNESCO protection and let the property deteriorate to the point where it has irretrievably lost those characteristics which determined its inscription on the Word Heritage List and subsequently attempt to delist such an area from the World Heritage List.

If the State Party proceeds to delist the object or the area from the UNESCO protection[13] before it enters into the relevant investment project, such scenario will not likely affect

[11] For a relevant example from case law, please refer to *Parkerings-Compagniet v Lithuania* (Section 6.1.2.2).
[12] For an example from case law regarding salvage activities, please refer to *Malaysian Historical Salvors and others v. Malaysia* (Section 5.1.1).
[13] According to UNESCO data, there have been two cases in which a State Party to the WHC decided to pursue an investment project on a protected site leading to the delisting of the properties from the World Heritage List. In 2007, the Oman's government decided to reduce the size of protected Arabian Oryx Sanctuary by 90% in

investor's rights and, thus, will not be subject to investor-state arbitration. The state's conduct violating the WHC could only be subject to enforcement mechanisms under the WHC (including the inscription of the world heritage on the List of World Heritage in Danger as exercised by the WH Committee without the consent of the respective State Party)[14] and may ultimately lead to alerting the international community to the need to respond to the threats and to join in international efforts to protect and safeguard endangered sites.[15]

However, under the above scenario already existing investment projects in the proximity of the site being delisted could also be affected. Whereas the WHC does not prohibit 'economic exploitation' of natural and cultural heritage as long as it respects the principles included in the conventions, foreign investors may get certain benefits from this protection. For example, a leisure-time facility, eco-tourism, or a cultural-tourism industry directly relying on the WHC protection of the neighbouring site (e.g. a protected castle as a tourist attraction) may suffer substantial losses due to such delisting. The potential owner of the leisure-time facility might theoretically invoke investment protection rights should his legitimate expectations be breached, or invoke State's obligations under the WHC. In the

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order to conduct oil exploration. In 2009, the Dresden authorities decided to construct a four-lane bridge over *Dresden Elbe Valley*, which thus lost its outstanding universal value.

[14] The World Heritage Committee can condemn the threat or actual deliberate destruction of cultural heritage. It has already done so in several cases, just to mention few: the 1997 Resolution on the *Buddhas of Bamiyan*, *ex officio* inscription of the city of Dubrovnik on the World Heritage List in Danger, and the declaration adopted at the 1993 Cartagena meeting condemning the wilful destruction of the historical *Mostar Bridge* in the course of the Yugoslav civil war. For details, see also: Francesco Francioni & Federico Lenzerini, "The Destruction of the Buddhas of Bamiyan and International Law" *European Journal of International Law* 619, 650 (September 2003): 643.

[15] The most significant international protection mission has so far concerned the case of the *Kakadu National Park* in the Northern Territory of Australia regarding adverse effects of the exploitation of uranium enclaves on the Aboriginal sacred sites. Following the government's approval of three uranium enclaves inside the *Kakadu Park*, an Australian company (under control of a British corporation) start the exploitation of the first of the enclaves with the consent of the local indigenous communities. In 1981, the *Kakadu Park* was inscribed on the World Heritage List. In the following 20 years a dispute arose among the investor, the Australian government (supporting the investment), local Aboriginal people, UNESCO and a number of international NGOs regarding the effects of the exploitation of the uranium enclaves on Aboriginal sacred sites. Under the auspices of UNESCO, an agreement was reached in 1999 based on which the commencement of the exploitation process of the second enclave had to be postponed until 2001 and could only become operative once the extraction works in the first enclave were terminated. This solution was, however, unsatisfactory for the indigenous community. In 2002, due to international pressure, the investor decided to withdraw from the project and the second enclave was backfilled. In response to this case, the International Council on Mining and Metals (an industry organization representing the world's leading companies in the mining sector) issued a statement in which it expressed the commitment of the most important international mining companies to respect legally designated protected areas as well as not to explore or mine in World Heritage properties (ICMM Position Statement on Mining and Protected Areas of 20 August 2003 is available at: http://www.goodpracticemining.org/uploads/497ICMMPositionStatementonMiningandProtectedAreas.pdf). For details on the *Kakadu Park* case, please refer to the Report on the Mission to Kakadu National Park, Australia, 26 October to 1 November *1998* UNESCO Doc WHC-98/CONF.203/INF.18 of 29 November 1998 (available at: http://unesdoc.unesco.org/images/0011/001175/117512e.pdf).

latter case, the WHC would, however, not work as a limitation of investors' rights but the investor might actually support the state commitments arising from the WHC.

There is another important aspect of the relationship between the protection of cultural and natural heritage and investors' rights. It is often seen, especially in developing countries, that the mere possibility of a dispute with a powerful foreign investor can cause a chilling effect on government decisions to regulate in the public interest, including safeguarding of the cultural and natural heritage. In addition, developing countries may find it attractive to 'race to the bottom' by lowering their cultural and environmental protection standards in order to attract foreign investment.

States' commitments to the protection of cultural and natural heritage under the UNESCO Conventions can thus compete with states' commitments to secure standards of protection agreed in the IIAs. The competition of the two values, i.e. the protection of cultural heritage and the protection of a right to property, can be translated in legal terms into the relationship between UNESCO Conventions and international investment legal rules.

3 Obligations of UNESCO Conventions Relating to Cultural and Natural Heritage with Potential Effects for IIAs

In order to fully evaluate the nature and extent of the limitation of investors' rights due to the protection of cultural and natural heritage, it is important to briefly review the UNESCO Conventions which represent the international standard for safeguarding cultural and natural heritage, including underwater, in particular those rules that could be in conflict with investors' rights under IIAs.

3.1 Convention concerning the Protection of the World Cultural and Natural Heritage

The WHC combines the safeguarding of man-built cultural heritage and the preservation of natural heritage.[16]

It covers natural and cultural heritage sharing two characteristics: it must be an immovable good and having an 'outstanding universal value'. Article 11 gives the

[16] As Whahid Ferchichi underlines, UNESCO Convention of 1972 established a link between nature and culture, but it was not the only novelty: « *Il en est de même de l'idée de reconnaitre le droit des générations futures à un héritage culturel, qui constitue aujourd'hui l'idée de base à tout développement durable* ». See Wahid Ferchichi, « La Convention de l'UNESCO concernant la protection du patrimoine mondial culturel et naturel » In *Le patrimoine culturel de l'Humanité,* sous la direction de James A. R. Nafziger et Tullio Scovazzi, (Leiden, Martinus Nijhoff Publishers, 2008) p 455.

competence of defining the term 'outstanding universal value' to the WH Committee. The WH Committee has elaborated over the past decades a complex set of criteria in the form of WHC Operational Guidelines, which are revised regularly in order to reflect on new developments in the field.[17]

3.1.1 State Parties' obligations

The WHC neither aims at unifying its State Parties' national legal provisions nor stipulates a framework that regulates matters of ownership of the respective objects. The State Parties' obligations are basically twofold:

(i) Firstly, State Parties have to take every necessary step to guarantee the protection of World Heritage situated in their territories and are encouraged to protect their national heritage in general on a national level; and

(ii) Secondly, the WHC incorporates several obligations for the State Parties on an international level (e.g. contributions to the WH Fund, duty of cooperation).

From the perspective of limitation of investor's rights, the obligation under letter (i) above is relevant. This obligation comprises various aspects, such as the implementation of a national legal framework, carrying out studies to identify possible dangers to the cultural and natural heritage located in the territory of the respective State Party, establishing services for the preservation of that heritage, but most importantly, the State Parties' obligation to identify potential objects for the inscription on the World Heritage List.

Article 4 states that parties to the WHC:

> *"[…] recognize that the* ***duty of ensuring the identification, protection, conservation, presentation and transmission to future generations of the cultural and natural heritage*** *[…] belongs primarily to that State.* ***It will do all it can to this end****, to the utmost of its own resources and, where appropriate, with any international assistance and co-operation […] which it may be able to obtain."* (Emphasis added)

In the wording of the WHC, the State Parties are obligated to "*do all they can*" to ensure their duty to identify, protect and conserve the cultural and natural heritage.

[17] The current version of The Operational Guidelines for the Implementation of the World Heritage Convention, dated of 28 November 2011 is available at: http://whc.unesco.org/en/guidelines.

In accordance with Article 11 and the WHC Operational Guidelines, the process of inscription[18] can be divided into four stages:

(i) First, State Parties shall create, update, and submit inventories with the inclusion of potential heritage objects to the WH Committee and prepare a so called *tentative list* to be submitted at least one year prior to the submission of any nomination.[19]

(ii) Second, the State Parties can choose objects from their tentative lists and nominate them for inscription on the World Heritage List.

(iii) Third, the WH Committee and its advisory bodies evaluate the nominations and recommend the nomination or the rejection of the relevant object or the deference of the decision to the WH Centre once additional information is provided.

(iv) Fourth, the WH Committee has the decisive power to declare whether or not a nominated property will be inscribed on the World Heritage List. The inclusion of a property in the World Heritage List always requires the consent of the State concerned.

(v) Once inscribed on the World Heritage List, the cultural and natural heritage is subject to a centralized and collective protective regime.

Further, the membership in the WHC obliges state parties to conserve and protect their own cultural properties even if these are not inscribed in the World Heritage List.[20]

3.1.2 Sanctions and dispute resolution mechanism

The WHC confirms full respect for state sovereignty and for private property rights regulated by national legislation over the sites and objects to be protected under the WHC.[21]

[18] The process of inscription of the objects on the World Heritage List was touched upon in the *SPP v Egypt* case. For details please see Section 5.2.2.
[19] Article 65 of the WHC Operational Guidelines.
[20] Article 12 of the WHC stipulates: "The fact that a property belonging to the cultural or natural heritage has not been included in either of the two lists […] shall in no way be construed to mean that it does not have an outstanding universal value for purposes other than those resulting from inclusion in these lists."
[21] Article 6(1) of the WHC stipulates: "Whilst fully respecting the sovereignty of the States on whose territory the cultural and natural heritage mentioned in Articles 1 and 2 is situated, and without prejudice to property right provided by national legislation, the States Parties to this Convention recognize that such heritage constitutes a world heritage for whose protection it is the duty of the international community as a whole to co-operate."

The WHC cannot be categorized as a generally self-executing treaty, as it basically asks the State Parties to implement the often broadly formulated provisions into national law. The WHC sets the rules that should be followed by the national legislators.

Due to different national perceptions of cultural heritage and diverse legal systems, there are obviously differences in the implemented national legislations on cultural heritage.[22] In this context, the balancing of the interests of the state on protection of cultural heritage and the property rights of private owners will differ and will potentially affect the investors' rights to a different extent. This might give rise to different types of investment disputes depending on each State Party's national legislation implementing the UNESCO Conventions and the degree of its interference with investors' rights.

The WHC does not provide for a mechanism of settlement of disputes arising from the interpretation and application of the WHC between the State Parties.

3.2 Convention on the Protection of the Underwater Cultural Heritage

The UWCH was adopted in 2001 in order to provide protection for traces of human existence that lie or were lying under water for at least 100 years and have a cultural or historical character. It is based on two basic principles: *in situ* preservation of underwater cultural heritage and the prohibition of economic exploitation of such objects.

The UWCH does not regulate the ownership of a cultural property between the respective State Parties (it does not distinguish between abandoned and not abandoned objects).

3.2.1 State Parties' obligations

The obligations of the UWCH do not have the same level of strength nor precision. From the perspective of investor's rights limitation, the most important obligation is the duty to prevent commercial exploitation of underwater cultural heritage at least within the territory of the relevant State.[23] Fishing for archaeological and historical objects is, thus, prohibited. The laws of salvage and finds are excluded, unless an activity relating to underwater cultural heritage (a) is authorized by the competent authorities, (b) is in full conformity with the

[22] For a comparative analysis of domestic legislations implementing international provisions concerning cultural heritage protection, see e.g. Federico Lenzerini, "Property Protection and Protection of Cultural Heritage", In *International Investment Law and Comparative Public Law*, (Oxford: Oxford University Press, 2010) p 555 et seq., Toshiyuki Kono and Stefan Webka, *supra* note 2.
[23] Article 2(7) of the UWCH.

UWCH, and (c) ensures that any recovery of the underwater cultural heritage achieves its maximum protection.[24]

Article 2 imposes a general obligation on the State Parties to:

> *"[...],* ***take all appropriate measures*** *in conformity with this Convention and with international law that are necessary* ***to protect underwater cultural heritage****, using for this purpose the* ***best practicable means*** *at their disposal and in accordance with their capabilities."*(Emphasis was added)

The obligations of the State Parties under the UWCH differ based on the localization of the object. The UWCH basically classifies the maritime zones into two categories: (i) the first regarding exclusive rights of the coastal state covering internal waters, archipelagic waters, the territorial sea and the contiguous zone (if applicable), and (ii) the second covering the remaining economic exclusive zone, the continental shelf and the Area[25] with the newly established regime of international cooperation between the State Parties.

With respect to the first group, the coastal state has the exclusive right to regulate and authorize activities directed at underwater cultural heritage situated in waters of the first category. In exercising its right the State Party is bound by the principles of the protection and prevention regimes stipulated in the UWCH. The UWCH cannot, however, constitute an obstacle to bettering national regulations in relation to protection of underwater cultural heritage. In this sense, the UWCH creates an international minimum level of protection without reducing protection standards to the least common denominator.

The second category of waters beyond the contiguous zone relies on a system of reporting and consulting and taking urgent and necessary steps aimed at protection of underwater cultural heritage. Each State Party has the obligation to prohibit its nationals and vessels from engaging in activities contradicting the UWCH and harming underwater cultural heritage.

"Any activity directed at underwater cultural heritage" shall be authorized in a manner consistent with the protection of that heritage, and subject to that requirement may be authorized for the purpose of making a significant contribution to protection or knowledge or

[24] Article 4 of the UWCH.
[25] According to Article 1:5, 'Area' refers to the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction.

enhancement of underwater cultural heritage.[26] In this regulatory authority, the State Party can face opposing interests and commitments expressed in the UWCH and the IIAs.

Similarly, the UWCH, as in the WHC, contains a number of general 'shall endeavour' obligations diluting the commitments to be made by the State Parties. This is the case of Article 5 regarding "activities incidentally affecting underwater cultural heritage" since the essence of the obligation is to use the best practicable means at its disposal" to prevent or mitigate any adverse effects that might arise from activities under its jurisdiction incidentally affecting underwater cultural heritage. This type of obligation will be more difficult to invoke as a defence before the investment tribunals given the vague formulation of 'best efforts' clause and a broad degree of discretion in interpreting it.

3.2.2 Sanctions and dispute resolution mechanism

According to Article 17, the State Parties have an obligation to impose sanctions at national level for violations of measures it has taken to implement the UWCH.

As regards the disputes between the State Parties arising from the interpretation and application of the UWCH, Article 25 provides for a complex dispute resolution clause. If negotiations or mediation at UNESCO are unsuccessful, the dispute will ultimately be decided according to the provisions relating to the settlement of disputes set out in Part XV of the UNCLOS.[27]

3.3 Cultural and natural heritage as common heritage of humankind

It is undisputable that cultural and natural heritage is a shared interest of humanity. It does not involve only the interests of the parties but also the interests of the community as a whole.[28] In particular, international criminal tribunals when dealing with "cultural genocide"

[26] Rule 1 of the Annex to the UWCH.
[27] The text of the UNCLOS is available at:
http://www.un.org/depts/los/convention_agreements/texts/unclos/UNCLOS-TOC.htm
[28] The Preamble of the WHC Convention states that: "[…] deterioration or disappearance of any item of cultural heritage constitutes an harmful impoverishment of the heritage of all the nations of the world." See also Francesco Francioni & Federico Lenzerini, *supra* note 14, at 15. The authors state "[…] heritage constitutes part of the general interest of the international community as a whole. This principle has its theoretical foundation in the concept of *erga omnes* obligations formulated by the International Court of Justice in the well-known *Barcelona Traction* case. …… According to this case, where values are protected by *erga omnes* obligations, all states can be held to have a legal interest to their protection, and thus to react against violators." Further, the authors point out that "*[e]xtreme and discriminatory forms of intentional destruction of cultural heritage of significant value for humankind constitutes a breach of general international law applicable both in peacetime and in the event of armed conflicts, entailing international responsibility of the acting state and the possibility to*

have acknowledged the duty to protect cultural heritage as an *erga omnes* obligation under international law.[29]

The current development of international law, however, does not yet mirror the protection of the above values as a *jus cogens* norm:[30]

> *[T]he reassembly of dispersed heritage through restitution or return of objects which are of major importance for the cultural identity and history of countries having deprived thereof, is considered to be an ethical principle recognized and affirmed by the major international organizations and will soon become an element of jus cogens in international relations.*[31]

The memo will be, thus, based on this premise.

4 WAYS OF RECONCILING POSSIBLE CONFLICTS BETWEEN UNESCO CONVENTIONS OBLIGATIONS AND INTERNATIONAL INVESTMENT AGREEMENTS

As described above, in some situations interest in both safeguarding cultural heritage and protecting foreign investors' rights, in particular property rights can be difficult to achieve and full realization of one of the objectives might lead to limiting the other. The analysis of the interactions between investment law rules and UNESCO Conventions before arbitral tribunals will be the subject of this Chapter.

In general, the emerging tension between the law of foreign investment and other competing principles of international law has led to numerous discussions on the ways of achieving a balance between the desire and the need to protect the legitimate rights and expectations of foreign investors on the one hand, and the need not to unduly restrict the right of host governments to implement their public policy concerns (including the protection of

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make recourse to international sanctions against it, as well as criminal liability of the individuals who materially order and/or perform the acts of destruction."

[29] Valentina Sara Vadi, "When Cultures Collide: Foreign Direct Investment, Natural Resources, and Indigenous Heritage in International Investment Law" *Colombia Human Rights Law Review* 42: 3 (2011): 860-862. Vadi refers to cases of the International Criminal Tribunal for the Former Yugoslavia in which systematic destruction of cultural heritage has been accepted as evidence of the *mens rea* that is the *dolus specificus* of the crime of genocide (*Prosecutor v Krstic*, Case No. IT-98-33-T).

[30] Article 53 of the VCLT defines rules of *jus cogens* as follows: "For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." See also Bruno Simma and Theodore Kill "Harmonizing Investment Protection and International Human Rights: First Steps Towards a Methodology" In Christina Binder, Ursula Kriebaum, August Reinisch and Stephan Wittich, *International Investment Law for the 21st Century*, (Oxford: Oxford University Press, 2009), 989.

[31] James A. R. Nafziger, "Cultural Heritage Law: The International Regime" In *Le patrimoine culturel de l'Humanité.* Sous la direction de James A. R. Nafziger et Tullio Scovazzi. (Leiden, Martinus Nijhoff Publishers, 2008) p 212.

environment and human rights within the host state) on the other.[32] In broad terms, when dealing with questions regarding the conflict of rules of international law, including investment treaties and non-investment instruments, the interpretation principles developed in general international law should be taken into account. These principles will be described below together with own practice developed by investment tribunals.

In theory, rights and obligations arising from UNESCO Conventions could be invoked by (i) an investor, (ii) a host state, or (iii) non-party actors (*amicus curiae*). From the perspective of limiting investors' rights by obligations arising from the UNESCO Conventions, in the majority of these cases it would be the respondent state invoking the UNESCO Conventions and using them as a justification of a measure alleged to interfere with investors' rights (arguing that such measure was necessary to comply with UNESCO Conventions' obligations).

4.1 Cultural exceptions in IIAs

The majority of IIAs does not expressly address the interaction between cultural and natural heritage and the promotion and protection of foreign direct investment, save for few rare examples. Exceptions in IIAs are used to exclude particular sector or subject matter (e.g. cultural heritage) from the investment law obligations or to permit measures necessary to meet specific objectives (e.g. security interests, protection of environment, cultural rights). A very small number of IIAs contains a cultural exception. If so, it is typically modelled on the general exception provision of Article XX of the GATT.

For example, the recent Trans-Pacific Strategic Economic Partnership Agreement (TPP)[33] contains an exception from the general regulatory regime aimed at the protection of "items or specific sites of historical or archaeological value."[34] The investment chapter of the TPP is still to be negotiated and the above archaeological exception only applies to trade in goods and services. Nevertheless, the TPP has shown a sensible approach to the protection of archaeological values and hopefully it will provide an inspiration for the next convention

[32] For a debate over the tension in particular between human rights and investment law, please see Pierre-Marie Dupuy, Francesco Francioni and Ernst-Ulrich Petersmann, eds., *Human Rights in International Investment Law and Arbitration*, (Oxford University Press, Oxford. 2009).
[33] TPP establishes a free trade area in the Asia-Pacific region, originally between Brunei, Chile, Singapore and New Zealand. Recently, six additional countries – Australia, Malaysia, Peru, Japan, United States, and Vietnam – are negotiating to join the group. The text of the TPP is available at: http://www.sice.oas.org/Trade/CHL_Asia_e/mainAgreemt_e.pdf
[34] Article 19.1 on General Exceptions.

negotiators and drafters. For example, the archaeological exception in the TPP expressly states that New Zealand can provide more favourable treatment to Maori in fulfilment of New Zealand's obligations arising under the Treaty of Waitangi.

Also in the Annex of the US-Lithuania BIT, Lithuania already in 1998 reserved the right to make or maintain limited exceptions to national treatment, among others, as regards the ownership of national parks and reservations, land of recreational forests, land of resorts, and communal recreational territories, monuments of nature, history, archaeology and culture as well as the surrounding protective areas, land of the Curonian Spit, the fifteen-kilometre wide strip of coastal land of the Baltic Sea and the Curonian Lagoon, with the exception of towns that are not resorts, etc.

Canada is the only state that systematically includes GATT Article XX-like general exception in its IIAs. The general exception clause contained in the Model Canada BIT (2004) does not explicitly mention cultural sites, but it permits for measures that are necessary for protection of human, animal or plant life or health, or for the conservation of living or non-living exhaustible natural resources, provided that such measures are not used as a means of arbitrary or unjustified discrimination between investments or between investors, or a disguised restriction on international trade or investment.

Some authors[35] observe that the lack of careful drafting of the IIAs can undermine the police power of the host state to adopt measures aimed at promoting protection of cultural and natural values in broad terms, as such measures may run against the IIAs prohibition of discrimination, of unfair treatment or of expropriation without compensation.[36] The trend of inclusion of clauses into IIAs in order to create a shield for policies of particular cultural relevance should be encouraged. For the sake of completeness, with respect to expropriation, it has to be noted, that even if a measure (e.g. ban of an industrial use of a certain object) is necessary for the protection of the cultural value of the object, the question is whether the cultural exception would be interpreted as excluding the requirement to pay. In general, if the exception does not prevent a finding of expropriation, it probably cannot exclude payment of compensation.

[35] Valentina Sara Vadi, *supra* note 29, at 870.
[36] *Id.* at 870. Vadi refers to potential problematic implementation of affirmative actions aimed at promoting economic, cultural, and social opportunities for disadvantaged aboriginal groups as such programs may run afoul of the bans on discrimination and performance requirements included in investment treaties.

4.2 Direct application of the UNESCO Conventions

IIAs do not usually contain substantive provisions on cultural or natural heritage.[37] In the absence of the specific norms in the investment treaties and given the parties' autonomy to select the applicable law, UNESCO Conventions provisions will be applicable to the extent they will be covered by the parties' choice of law. Through the choice of law clause could, thus, be applicable the norms of international law or of domestic law aimed at the protection of cultural and natural heritage to the relevant case.

IIAs often contain a complex choice of law clauses, envisaging the application of the treaty rules, host state law and customary international law/applicable rules of international law/international law. In this way, provisions on protection of cultural heritage as a component of either international law or host state law would be part of the applicable law.

In the absence of a choice of law clause, ICSID Convention, which is one of the procedural frameworks for investor-state arbitration, provides for a default rule in Article 42(1). Under that rule, the tribunal shall apply the law of the host state (including its rules on the conflict of laws) and such rules of international law as may be applicable.

According to Professor Dupuy,[38] even in the absence of any reference to international law in the arbitration clause, there are two other ways for an international arbitrator to refer to international law and to the obligations incumbent on the host state arising from the international commitments: (i) through municipal law applicable to a investment contract (in most cases that of the host state) which provides for a monist system granting primacy to public international law over the domestic law, and (ii) through principles of the transnational public policy (*ordre public international*).

The latter includes fundamental rules of natural law, principles of universal justice possessing an absolute value or absolute truth[39] and according to Professor Dupuy, the transnational public policy can be invoked by the arbitrator himself. For example, the Swiss Supreme Court recognized the existence of an international public order in the field of

[37] Some IIAs contain specific provisions on environment, e.g. NAFTA (Article 1114) or Energy Charter Treaty (Article 19).
[38] Pierre-Marie Dupuy, "Unification Rather than Fragmentation of International Law? The Case of International Investment Law and Human Rights Law" In Pierre-Marie Dupuy, Francesco Francioni, and Ernst-Ulrich Petersmann, *Human Rights in International Investment Law and Arbitration,* (New-York: Oxford University Press, 2009) p 25.
[39] Pierre Mayer, *Droit International Privé*, 4th édition, (Montchrestien, 1991).

cultural property in a case regarding the traffic in cultural property.[40] Public policy is a dynamic concept that can be used as a corrective mechanism balancing complex and conflicting interests. It is not a case of direct application of non-investment treaties, such as UNESCO Conventions. It is a question of whether an arbitral tribunal should refer to international law in evaluating whether government policies are justified, even if such policies contradict with investment treaties.

To our knowledge, in none of the publicly available cases did an investment tribunal clearly and directly applied to the dispute other international treaties imposing on the host state non-investment obligations. Some authors conclude that in the *SPP v Egypt* award the tribunal attempted to directly apply the WHC and the case will be described in Section 5.2.2.

Further, assuming that a reference to the application of international law is established in a relevant case, what happens in the event of conflict between various rules of international law, e.g. UNESCO Convention and the IIA? The discussion on the regulatory principles developed in public international law is contained in Section 5.2.1.

4.2.1 Principles of public international law concerning conflicts between international legal rules

It should be noted that the rules contained in the IIAs and in UNESCO Conventions are not necessarily contradictory. In certain situations, they may complement each other.[41] Where the rules are contradictory, however, and there is no provision in the IIA governing relationship to other treaties or other sources of international law (which is a rule), it has to be determined which rule prevails.

Public international law has developed a body of rules that regulates inconsistencies among international legal rules:

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[40] The Swiss Supreme Court stated : « *Lorsque, comme l'espèce, la demande porte sur la restitution d'un bien culturel, le juge de l'entraide doit veiller à prendre en compte l'intérêt public international…lié à la protection de ces biens. Ces normes, qui relèvent d'une commune inspiration, constituent autant d'expressions d'un ordre public international en vigueur ou en formation ….ces normes, qui concrétisent l'impératif d'une lutte internationale efficace contre le trafic de biens culturels…* ». Arrêt du Tribunal Fédéral Suisse [ATF] 123 II 134, Apr. 1, 1997.

[41] Hirsch points out that legal rules deriving from investment and non-investment international fields can reinforce each other. International tribunals may in some cases interpret international investment treaties' obligations in the light of non-investment treaties. In Hirsch's view, even where investment and non-investment rules are clearly inconsistent, this conflict may lead not only to a normative determination of which rule prevails, but additional legal consequences of such incompatibility can be reflected in the remedies determination or the burden of proof. See Moshe Hirsch, "Interactions between Investment and Non-investment Obligations" In *The Oxford Handbook of International Investment Law*, (Oxford, Oxford University Press, 2008), 15-157.

(i) *Jus cogens* norms prevail over all other inconsistent rules of international law. As stated above, rules on the protection of cultural and natural heritage are not unanimously considered as *jus cogens* norms.[42]

(ii) UN Charter's provisions prevail over other incompatible treaties.[43] Some authors point out that this rule and the *jus cogens* rule might represent an avenue for invoking human rights in investment disputes in the future.[44] In particular, host states may try to justify the interference with investors' rights by raising their obligation to protect international human rights within their jurisdiction. Some fundamental human rights are protected by peremptory rules of international law and the UN Charter (e.g. prohibition of racial discrimination),[45] but it does not, so far, include the safeguarding of cultural and natural heritage.[46]

(iii) The IIA is obviously the primary source of the applicable substantive law in the investment dispute. The BITs usually contain only a basic set of state obligations[47] and do not aim to exhaustively define all aspects of the investor-state relationship. The question is how the IIAs interact with other sources of international law. In general, where incompatible rules derive from different sources of international law, embedded hierarchy is apparent: treaty and customary rules are regarded as primary sources of international law; general principles of law are viewed as complementary rules, and the judicial decisions and writing of authors are considered subsidiary sources of international law.[48] If there is a conflict between a BIT and customary law (e.g. rule in the BIT is

[42] James A. R. Nafziger, *supra* 31, at 212.
[43] Article 103 of the UN Charter.
[44] Hirsch concludes that although tribunals have extensively cited various provisions of the Vienna Convention, they have not yet resorted to Articles 30 and 53 regarding the primacy of the rules of *jus cogens* or the UN Charter provisions over investment treaties. See Moshe Hirsch, *supra* 41, at 159.
[45] Articles 55 and 56 of the UN Charter. Hirsch points out that recognizing the superior status of some human rights as peremptory rules might require future tribunals to subject some provisions included in the investment treaties to these higher principles of international law. Hirsch anticipates that it will not be only host state governments attempting to invoke the primacy of human rights over investment obligations but also NGOs and investors themselves (e.g. right to fair trial or right to property). *Id.*, at 158.
[46] James A. R. Nafziger, *supra* 31, at 212.
[47] BITs are remarkable in their brevity. They are framework documents, sometimes just of four or five pages, seldom more than 12, and containing just a handful of articles.
[48] Article 38(1) of the Statute of the International Court of Justice.

inconsistent with rule regarding the protection of environment), three interrelated principles apply:[49]

a. *Lex specialis derogat generali* (a specific rule prevails over a general one);

b. *Lex posterior derogat legi priori* (a later rule prevails over a prior rule); and

c. *Respecting the parties' intentions* (where the parties intend to replace a rule deriving from one source of international law with another rule included in another source of law, the rule preferred by the parties shall prevail).[50]

The same principles apply where the inconsistent rules are included in the same source of international law, e.g. two treaties. Additional rules regarding the relationship between two conflicting treaties addressing the *same subject matter of a comparable degree of generality* are contained in Article 30 of the VCLT. In this respect, for example NAFTA stipulates its relationship to the GATT or Energy Charter Treaty[51] and Canada Model BIT (2004)[52] sets out the relationship between investment agreements and other treaties. In the event that the State Parties to the two conflicting treaties are not identical, Article 30(4)(b) of the VCLT provides that the treaty to which both States are parties governs their mutual rights and obligations. This provision does not set an order between the incompatible treaties and it does not free the contracting party that undertook inconsistent treaty obligations from its obligation to comply with both treaties. The latter party is left with the choice regarding which treaty to honour and which to breach, without prejudice to incurring international responsibility *vis-à-vis* the injured party.

However useful the above principles can be for the assessment of relationship between non-investment instruments (conventional and customary international law) and the IIAs, arbitral tribunal do not refer to them in this context.[53] One reason might be that the above principles are only applied when it is determined that the rules deriving from different treaties

[49] Moshe Hirsch, *supra* 41, at 160.
[50] Report of the Study Group of the International Law Commission "Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law", Fifty-eighth session, 2006 (Available at: http://untreaty.un.org/ilc/documentation/english/a_cn4_l682.pdf).
[51] Article 16 with respect to prior or subsequent treaties regulating the same subject matter.
[52] For example, Article 9(1) or Annex III regarding the MFN.
[53] Moshe Hirsch, *supra* 41, at 172.

or sources of international law are inconsistent. In the majority of cases, the tribunals try to avoid reaching this conclusion and, at least with respect to treaties, they choose a softer approach of harmonious interpretation of the relevant treaties based on Article 31(3)(c) of the VCLT[54] (see Section 4.3 of this memo).

4.2.2 A practical example: *SPP v Egypt*

The award in *SPP v Egypt*[55] is one of the earliest arbitrations expressly mentioning the WHC. This arbitration attached the most far-reaching consequences to the significance of the WHC so far. Some authors derive from the *SPP v Egypt* award that the tribunal in that case was "going to *apply* the WHC to the investment dispute, rather than *interpreting* the latter in light of the former."[56]

Egypt argued that international law rules in accordance with Article 42 (1) of the ICSID Convention can be applied only in *"[…] an indirect manner, through those rules and principles incorporated into Egyptian law such as the provisions of treaties ratified by Egypt and, in particular, the 1972 UNESCO Convention for the Protection of the World Cultural and Natural Heritage."*[57]

The tribunal without any analysis declared the WHC relevant as applicable law: "[…] *nor is there any question that the* ***UNESCO Convention is relevant:*** *the Claimants themselves acknowledged during the proceedings before the French Cour d'Appel that the Convention obligated the Respondent to abstain from acts or contracts contrary to the Convention."*[58] (Emphasis added)

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[54] *Id.*, at 162. Hirsch points out that while the resort to harmonious interpretation of the international rules involved may often avoid the determination of non-reconcilability of the rules and of which rule overrules the other, the result is largely similar; in both cases one rule is applied to the particular disputed issue and the other is excluded.

[55] For information on the background of the case, please refer to Annex 1.

[56] See Riccardo Pavoni, "Environmental Rights, Sustainable Development, and Investor-State Case Law: A Critical Appraisal" in *Human Rights in International Investment Law and Arbitration*, (New-York: Oxford University Press, 2009), 535.

[57] *Southern Pacific Properties (Middle East) Ltd v Arab Republic of Egypt* ICSID Case No ARB/ 84/3, Award on the Merits, 20 May 1992, supra ¶ 76. We do not comment here on the incorrect interpretation of Article 42(1) giving international law only 'complementary' and 'corrective' function vis-à-vis the municipal law of the host state, as it does not have impact on our subject of analysis. For further reading on the subject, see eg. Zachary Douglas, *The International Law of Investment Claims*, (Cambridge: Cambridge University Press, 2009), 125 *et seq*., Emmanuel, Gaillard and Yas, Banifatemi. "The Meaning of 'and' in Article 42(1), Second Sentence, of the Washington Convention: The Role of International Law in the ICSID Choice of Law Process." *ICSID Review – Foreign Investment Law Journal*, 18, 375 (2003): 375-411.

[58] *Ibid.* supra ¶ 78.

Egypt claimed that "*[…] the entry into force on December 17, 1975 of the UNESCO Convention for the Protection of the World Cultural and Natural Heritage made it obligatory, on the international plane, to cancel the Pyramids Oasis Project.*"[59] The investor, on the other hand, claimed that Egypt had ratified the Convention already in 1974 and, thus, was aware of its terms when it approved the investment project. In addition, Egypt itself nominated the Pyramids Plateau for registration in the World Heritage List based on Article 11 of the UNESCO Convention only subsequently, i.e. nine months after the cancellation of the project.[60]

The tribunal analyzed the obligations arising from the WHC and noted that the WH Committee registers protected property only following a request of the contracting State.[61] In the tribunal's view, "*[…] the choice of sites to be protected is not imposed externally, but results instead from State's own voluntary nominations."*[62] In our view, the tribunal did not elaborate much on the nature of the WHC signatory's obligation to submit to the WH Committee "[…] *in so far as possible, an inventory of property forming part of the cultural and natural heritage, situated in its territory and suitable for inclusion in the list […]*"[63] nor on other obligations arising from the WHC. For example Article 6, under which the signatory states are bound to 'do all they can', to the utmost of their resources, in order to protect such properties. The tribunal interpreted obligations arising from the WHC as follows:

> *[T]he choice of sites is not imposed externally, but results instead from State's own voluntary nomination. Consequently, the date on which the Convention entered into force is not the date on which the Respondent became obligated by the Convention to protect and conserve antiquities on the Pyramids Plateau. It was only in 1979, after the Respondent nominated « the pyramids fields » and the World Heritage Committee accepted that nomination, that the relevant international obligations emanating from the Convention became binding on the Respondent. …it was only from the date on which the Respondent's nomination of the « pyramids fields » was accepted…..that a hypothetical continuation of the Claimants' activities… in the area could be considered as unlawful from the international point of view.*[64]

It interpreted the proposal of inscription as a 'voluntary' action without mentioning other obligations under the WHC.

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[59] *Southern Pacific Properties (Middle East) Ltd v Arab Republic of Egypt* ICSID Case No ARB/ 84/3, Award on the Merits, 20 May 1992, ¶ 150

[60] *Id.* ¶ 153. The whole area from the Pyramids of Giza to Dahshur was registered on the list of properties included in the World Heritage on 26 October 1979.

[61] *Id.* ¶ 157.

[62] *Id.* ¶ 154.

[63] Full text of Article 11 of the World Heritage Convention: "*Every State Party to this Convention shall, in so far as possible, submit to the World Heritage Committee an inventory of property forming part of the cultural and natural heritage, situated in its territory and suitable for inclusion in the list provided for in paragraph 2 of this Article. This inventory, which shall not be considered exhaustive, shall include documentation about the location of the property in question and its significance*."

[64] *Southern Pacific Properties (Middle East) Ltd v Arab Republic of Egypt* ICSID Case No ARB/ 84/3, Award on the Merits, 20 May 1992, ¶ 154.

Further, the tribunal rather focused on examining the time sequence of events and chronological order of the inconsistent non-investment obligations. The tribunal found that Egypt's obligations under the WHC entered into force after the investment agreements were signed and the various permits were issued. On the above considerations, the tribunal rejected Egypt's arguments regarding inconsistent obligations.

It can be concluded from the overall structure of reasoning in the *SPP v Egypt* that measures adopted to protect heritage sites already registered in the WHC list at the time of making an investment should override investor's protection and should not give rise to any compensable claim.

4.3 Systemic integration[65] of UNESCO Conventions by means of Article 31(3)(c) of the Vienna Convention on the Law of Treaties

Another way of considering UNESCO Conventions by an investment tribunal is by the means of treaty interpretation, namely by interpreting IIAs provisions, upon which the investors' claims are based, in the light of the UNESCO Conventions.[66]

Customary rules of treaty interpretation embodied in Article 31(3)(c) of the VCLT require systemic interpretation and that in the interpretation of a treaty

> "[t]here shall be taken into account, together with the context: […] any *relevant rules of international law* applicable *in the relations between the parties.*"

This approach ensures that the IIA provides the primary rule for the investment dispute which is, however, not regarded as a self-contained regime, but rather systematically integrated within the international legal system, thus eliminating the risk of fragmentation of international law.[67]

The above customary principle does not authorize the tribunal interpreting a treaty to place it in relation to any kind of other international law rule. First, the scope of what is

[65] Bruno Simma used the term 'systemic' to explain that normative environment cannot be ignored and when interpreting treaties, the principle of integration shall be borne in mind. Bruno Simma and Theodore Kill, *supra* note 30, at 985. See also Report of the Study Group of the International Law Commission "Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law", Fifty-eighth session, 2006, (Available at: http://untreaty.un.org/ilc/documentation/english/a_cn4_l682.pdf).
[66] Bruno Simma and Theodore Kill, *supra* note 30, at 970 et seq.
[67] Campbell McLachlan, "The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention" *ICLQ* 54 (2005): 280.

usually referred to as an 'external' obligation (i.e. the obligation external to the international investment law) has to be carefully assessed in order to determine the extent to which it should be taken into account when interpreting rules established by the IIA. Second, the external rule must bear a substantial legal relationship with the treaty provision being interpreted. The formulation of Article 31(3)(c) contains three elements that an external rule must meet in order to qualify for consideration: (i) the rule must be a 'rule', (ii) the rule must be 'relevant', and (iii) the rule must be "applicable in the relations between the parties".

UNESCO Conventions are treaties and obviously "rules of international law". 'Relevant' rules are not usually interpreted as meaning only rules addressing the same subject matter. Almost any rule of international law will be 'relevant' when considered with the proper degree of abstraction.[68] There is, thus, a degree of flexibility inherent in the term 'relevant'. The question of whether a rule is "applicable in the relations between State parties to a particular treaty" is more complex. Three categories of issues need to be considered. First, from time perspective the question is whether the external rule (e.g. UNESCO Conventions) in order to be considered in treaty interpretation must have been applicable in the relations between the parties when the treaty under interpretation (BIT) was drafted. The modern approach[69] is to look to all rules applicable between the parties at the date on which the treaty is being interpreted. Consequently, there should no problems should arise in this respect. Second issue relates to the term 'applicable' which has commonly been considered as that of 'in force' or 'binding' under general international law. In order for a treaty to be applicable for purposes of Article 31(3)(c) the parties must be bound by it. Again, no specific concerns can be raised with respect to the UNESCO Conventions.

The third issue is the most delicate one and concerns "applicable in the relations between the parties". It is still debated whether the term 'parties' refers to *all parties to the treaty* being interpreted, or whether it is sufficient that *the parties to a particular dispute* are bound by the external rule.[70] It was suggested that it is sufficient that the parties in dispute are both parties to the other treaty (external rule) if the treaty being interpreted is of a 'reciprocal',

[68] Bruno Simma, "Foreign Investment Arbitration: A Place for Human Rights?" *ICLQ* 60 (2011): 695.
[69] Bruno Simma and Theodore Kill, *supra* note 30, at 987.
[70] A WTO panel in *EC—Approval and Marketing of Biotech Products* has adopted the strict approach basing its reasoning on the principle of state sovereignty and of consent. Other authors express concerns that such a construction of the term 'parties' 'makes it practically impossible ever to find such a multilateral context. On the other hand, interpreting 'parties' to mean those involved in a particular dispute before a tribunal represents a risk of divergent interpretations of the same multilateral treaty, in particular of the law-making type. For details, see Bruno Simma and Theodore Kill, *supra* note 30.

'synallagmatic', or 'bipolar' type, as BITs are. Whereas the rule that all parties to the treaty being interpreted must be parties to the other treaty should apply if the treaty to be interpreted is of the 'integral' or 'interdependent' type.[71] This solution has yet to be applied in practice.

In the context of investment disputes, the situation is complicated by the fact that the parties to the dispute will never be identical with the parties to the treaty being interpreted (BIT), because one party to the dispute will always be a non-State actor, i.e. the investor instead of the home state which concluded the BIT. If the 'parties' are understood as 'parties to the dispute' instead of 'parties to the treaty', application of Article 31(3)(c) to an investor-State dispute would be precluded because the investor (being a party to the dispute) is not a party to the underlying treaty. With regard to BITs it has been, therefore, suggested[72] that the State parties to the underlying BIT (i.e. the host state and the home state) are the 'parties' for purposes of determining whether a rule applies under Article 31(3)(c). As a result, the UNESCO Conventions would be considered, provided both the host State and the home State that concluded the relevant BIT are State Parties to the UNESCO Conventions (assuming the above suggestion on bipolar type of BIT is applied).

This solution is, however, not fully satisfactory either. It would apply in disputes with certain states being parties to the UNESCO Conventions and not with the other. This could produce results in contradiction with the object and purpose of the UNESCO Conventions, i.e. the general protection of cultural and natural heritage. This potential difficulty could be overcome by the concept of obligations *erga omnes*. The Preamble and Article 6 of the WHC expressly refer to the "world heritage of mankind as a whole". What the recognition of the interest of the international community as a whole in the conservation of cultural and natural heritage actually entails is yet a matter of debate. As already mentioned, international criminal tribunals acknowledged the duty to protect cultural heritage as an *erga omnes* obligation under international law in the context of 'cultural genocide' cases.[73] The consequence of the qualification as *erga omnes* obligations under UNESCO Conventions would be that these obligations would apply to the 'relations of all States', independent of a treaty.

The next question is what weight should be assigned to the external treaty in the interpretation process. There are basically two interpretive relationships between external

[71] Bruno Simma, *supra* note 67, at 699-700.
[72] Bruno Simma and Theodore Kill, *supra* note 30, at 990.
[73] Valentina Sara Vadi, *supra* note 29, at 860-862.

rules and treaties being interpreted.[74] First, external rules can provide meaning for a specific treaty term.[75] Second, external rules can qualify the meaning of treaty provisions.[76]

Especially, the first method may be very useful in the context of protection of cultural and natural heritage. Reference to evolving international law, including UNESCO Conventions protection standards, can establish the meaning and content of certain concepts applied in international investment law, such as fair and equitable treatment, full protection and security, arbitrariness, and expropriation. For example, the investment standard of fair and equitable treatment which is the most difficult to interpret is linked to the concept of an investor's 'legitimate expectations'. A tribunal when interpreting what is and what is not a legitimate expectation of a foreign investor should have reference also to the host State's obligations under international law, including the UNESCO Conventions. Investor's expectations must have included an expectation that the State would honour its international non-investment obligations, including safeguarding of cultural and natural heritage.[77]

The principles of harmonious and consistent interpretation set out in Article 31(3)(c) of the VCLT could be one of the avenues by which investment tribunals could begin to develop a jurisprudence that protects investors as well as cultural and natural heritage.

4.4 UNESCO Conventions' objectives as a legal fact

As stated above, investment tribunals may reflect on non-investment instruments, including treaties on protection of cultural and natural heritage, and limit the investors' rights either through applicable law or through interpretative principles. There is another way in which the objectives of non-investment instruments can be invoked, that is as a matter of fact in the course of interpreting the concepts of investment law.

This method is linked to several aspects of the standards of protection: (i) to the test of 'like circumstances' of investors for the purposes of non-discrimination obligations displayed in the standards of protection of national treatment and most-favoured nation treatment, (ii) to the test of legitimate expectation of an investor under the fair and equitable treatment

[74] Bruno Simma and Theodore Kill, *supra* note 30, at 985.
[75] This is based upon a finding that the parties intended the term to refer to evolving international law for its definition.
[76] This has been based upon a finding that the parties did not intend to, or could not, contract out of the external rule in question.
[77] For details, see Bruno Simma and Theodore Kill, *supra* note 30, at 704.

standard, or (iii) to the assessment of compensation. These concepts will be described in Chapter 5.1.2.

4.5 Specificities with an investment contract in place

The question is whether the situation is different, if an investment contract exists between an investor and the state. In principle, there does not seem to be a difference. As both *SPP v Egypt* and *Parkerings v Lithuania* show, restrictions on investor's rights aimed at safeguarding cultural heritage are still legitimate in the presence of an investor contract that is breached by the state by adopting measures interfering with investors' property rights, provided that such restrictions respect the principle of proportionality and non-discrimination.

The situation can change if the relevant investment contract contains a so-called stabilization clause. The stabilization clause usually stipulates that the law prevailing at the time the decision was taken by foreign investors to invest in the host countries and the investment contract signed would be applicable to them, and such laws would not be altered to the detriment of the investors. The clause has the effect of preventing host states from enacting new legislation or undertaking new international obligations, including those concerning cultural heritage and especially environmental matters, which would affect the profitability of the relevant foreign investor's project.[78] The stabilization clause would not serve as a limitation of investors' rights, but contrarily it would exempt the investment project from the new laws aimed at protection of cultural heritage and it would limit the host state's action to implement its obligation under UNESCO Conventions.

5 Impact of UNESCO Conventions on Investor's Rights in the Practice of Investment Tribunals

As it has been already stated, in some cases, it is impossible for the host State to comply with both its investment related obligations as well as its obligations by virtue of UNESCO Conventions. Recent cases brought before investment tribunals have shown that the issue is far from being theoretical.

The aim of this Chapter is to demonstrate how, in practice, the full realization of foreign investors' rights and the protection of natural and cultural heritage may come into conflict and what tools investment tribunals use (and have developed) when considering UNESCO or

[78] Surya P. Subedi, *supra* note 7, at 103-104.

other non-investment treaties. To do so, the section will first discuss the impact of heritage law on the jurisdiction of an investment tribunal. Secondly, the focus will move to the practice of investment tribunal of how investment law principles can be affected by the application of governmental measures which objective is the respect of UNESCO Conventions obligations.

5.1.1 Jurisdiction stage

The scope of jurisdiction of an investment tribunal is based and limited to the IIA. The clause establishing jurisdiction is, thus, decisive in order to determine whether an investment tribunal is actually competent to decide on cultural heritage or other non-investment matters. Bilateral or multilateral investment protection treaties do not mention human rights or other social values explicitly. The jurisdiction clauses in the investment treaties are usually limited to 'investment disputes', "alleged violations of substantive rights in the investment treaty" or, like in case of NAFTA, "to breaches of NAFTA obligations". The restrictions of jurisdiction to disputes arising from the breach of a treaty obligation combined with the absence of substantive human rights standards in the investment treaties may lead to the lack of tribunal's competence to rule on non-investment issues.[79] In general, while the tribunal need not have jurisdiction over a claim of violation of non-investment obligations *as an independent cause of action*, non-investment obligations violations shall not be *per se* excluded from the tribunal's jurisdiction to the extent they affect the investment.[80]

For an investment tribunal to have a jurisdiction, in addition to the parties' consent, three requirements have to be met: *ratione personae*, which deals with the nationality of the claimant, *ratione temporis*, which is related to the timeframe of the case, and finally, the *ratione materiae*, which means that the investment must fall within the definition of a protected investment under the treaty. Case law is very heterogeneous with regard to the definition of a protected investment. According to the 'objective approach' to the notion of investment, there are a certain number of requirements defining an investment (the so-called

[79] For example, in *Biloune v Ghana* the tribunal declared that it lacked jurisdiction to examine the allegations of human rights violations, arguing that the tribunal's competence was limited to commercial disputes in respect of the foreign investment. The tribunal held that "its competence is limited to disputes 'in respect of' the foreign investment and that the tribunal lacks jurisdiction to assess, as an independent cause of action, a claim of violation of human rights". *Biloune and Marine Drive Complex Ltd v Ghana Investments Centre and the Government of Ghana* (Award on Jurisdiction and Liability, 27 October 1989) UNCITRAL, ¶ 203.

[80] Carla Reiner and Christoph Schreuer, "Human Rights and International Investment Law" In Pierre-Marie Dupuy *et al., Human Rights in International Investment Law and Arbitration,* (New-York: Oxford University Press, 2009), 83.

Salini *test).*[81] In *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco,*[82] the tribunal ruled that to be considered as a protected investment, the alleged investment must be made to develop an economic activity in within the territory of the host State.

Cultural and natural heritage considerations may impact the decision of a tribunal as regards its jurisdiction when a tribunal is deciding the existence of a protected investment (*ratione materiae*). For example, the UWCH forbids commercial exploitation of underwater cultural heritage. Therefore, if a Party to the treaty concludes a contract for the salvage of a shipwreck with a private entity, its purpose must not be 'commercial'. In case of claim before an investment tribunal, the arbitrators could refer to the provisions of the UWCH in interpreting the salvage contract in order to decide whether there is a 'protected investment'.

In a recent case involving the salvage of a wreck of 'historical heritage', namely *Malaysian Historical Salvors and others v. Malaysia,* the sole arbitrator had to decide the question whether a salvage contract may be considered as a "protected investment". Concluded in 1991, the contract between Malaysian Historical Salvors (MHS) and Malaysia provided that the salvor would locate and extract the porcelain from the shipwreck of the *Diana* vessel, sank in 1817 in the Straits of Malacca. The porcelain would then be partly sold and the benefits shared between the government and MHS while the rest would be kept in a national museum.

The corporation filed a claim after a dispute arose in relation to the proceeds of auction and the quantity of items sold. The host State was in the view that the contract concluded with the claimant is not a protected investment in the sense of Article 25(1) of ICSID since it is "for the sole purpose of archaeological interest and the study of historical heritage"[83] and thus it does not "contribute significantly to Malaysia's economic development."[84] Consequently, the contract concluded between the salvor and the government does not fall within the definition of an 'investment'. In response, the claimant attempted to demonstrate that the contract generated some benefit to the local economy. Nevertheless, the tribunal ruled that "[t]he benefits which the Contract brought to the Respondent are largely

[81] Crina Baltag, "Precedent on Notion of Investment: ICSID Award in MHS v. Malaysia" *Transnational Dispute Management* 4, 5 (2007): 3.
[82] *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco,* ICSID Case No. ARB/00/4, Award on Jurisdiction, 23 July 2001, ¶ 52.
[83] *Malaysian Historical Salvors SDN, BHD v Government of Malaysia* ICSID Case No. ARB/05/10, Award on Jurisdiction, 17 May 2007, ¶ 47.
[84] *Id.* at ¶ 137.

cultural and historical. These benefits, and any other direct financial benefits to the Respondent, have not been shown to have led to significant contributions to the Respondent's economy in the sense envisaged in ICSID jurisprudence."[85]

The sole arbitrator might have considered cultural concerns regarding the investment, but no explicit considerations were mentioned in the award. We add that Malaysia is a Party to the WHC and shortly after the decision was adopted, in 2008 the Straits of Malacca where the shipwreck was located have been added to the World Heritage list.[86]

Nonetheless, a committee constituted of three arbitrators annulled the award in 2009.[87] The committee adopted the view that, according to the 'ordinary meaning' of the term investment and the *travaux préparatoires* of the ICSID Convention, the salvage contract was a 'protected investment'. The committee concluded that the previous tribunal manifestly failed to exercise its jurisdiction. However, in his dissenting opinion,[88] Judge Mohamed Shahabuddeen expressed his concordance with the view of the first tribunal saying that economic development of the host State is a condition of an ICSID investment.

Although this case is controversial, it is of interest since it addresses the question of whether a salvage contract is an investment and if it is consistent with the UWCH. According to Article 2(7) of the UWCH, the underwater cultural heritage shall not be commercially exploited. Even if Malaysia is not a Party to the UWCH, at first sight the contract between the salvor and the government of Malaysia would have been in conformity with the provisions of the UWCH since the contract provided that the host state "shall not commercially exploit such rights in relation to the finds except in so far as to propagate education, tourism, museums, culture and history […]"[89]

The tribunals seem to postulate that only a commercial exploitation may contribute, significantly or not, to the host State economy. Therefore, there are three possibilities of interpretation. First, a salvage contract does not contribute to the host State economy but is nevertheless considered as a 'protected investment'. That was the annulment committee's

[85] *Id.* at ¶ 132.
[86] UNESCO, "Eight new sites, from the Straits of Malacca, to Papua New Guinea and San Marino, added to UNESCO's World Heritage List", Available Online: <http://whc.unesco.org/en/news/450>
[87] *Malaysian Historical Salvors SDN, BHD v Government of Malaysia* ICSID Case No. ARB/05/10, Decision on the Application for Annulment, 16 April 2009.
[88] Dissenting opinion of Judge Mohamed Shahabuddeen dated 19 February 2009 is available at: http://italaw.com/documents/MalaysianHistoricalAnnulmentDissent_000.pdf.
[89] *Malaysian Historical Salvors SDN, BHD v Government of Malaysia* ICSID Case No. ARB/05/10, Award on Jurisdiction, 17 May 2007, ¶ 137.

approach, which rejected the Salini test for the definition of investment. Second, a salvage contract is considered as contributing to the host State economy and is considered as a commercial activity and thus, it is a protected investment. However, these two approaches breach the UWCH, which bans commercial exploitation of underwater cultural heritage.

Third, arbitral tribunal could conclude that a salvage contract does not contribute to the local economy and thus it is not a protected investment. The sole arbitrator deciding the dispute adopted this approach, which applies the Salini criteria. It would be consistent with the UWCH, if the convention were considered. Such an approach would reconcile the double objective of preserving cultural and natural heritage and the development in the sense that it confirms that underwater heritage destruction contributes to the impoverishment of the local social and economic development.[90] It is also the only approach that respects both the investment and non-investment obligations of the host State. Consequently, if investment tribunals applied the UWCH provisions, or if they adopted a systemic interpretation of the host state obligations, then the UWCH would constitute a major limitation of foreign investors' rights since they could not go before an investment tribunal due to the lack of jurisdiction.

5.1.2 Merits

5.1.2.1 Expropriation

Expropriation of a private property owned by a foreign investor is not prohibited under international law. It is a fundamental right of the sovereign State confirmed by state practice and investment tribunals. Nevertheless, to be lawful, an expropriation must meet some conditions: (1) it has to serve a 'public purpose', (2) the measure must not be 'arbitrary and discriminatory', (3) the procedure of expropriation must follow principles of due process and, (4) the expropriation must be accompanied by "prompt, adequate, and effective compensation."[91]

A distinction has to be made between 'direct expropriation' and 'indirect expropriation' or 'creeping expropriation'. The former is the classical taking of a private property by public power as for instance, the nationalisation of a private corporation. The two

[90] See e.g., Valentina Sara Vadi, "Cultural heritage and international investment law: a stormy relationship" *International Journal of Cultural Property* 15: 1 (2008): 1-24
[91] Rudolf Dolzer and Christoph Schreuer, *supra* note 6, at 90-91.

others do not require any transfer of the legal title of the property, but rather refer to a measure that have a similar effect to dispossessing foreign investors of their investment. A creeping expropriation could be defined as "[…] a slow and incremental encroachment on one or more of the ownership rights of a foreign investor that diminishes the value of its investment."[92]

Although cases of the traditional form of direct or outright expropriation are becoming rare, certain types of direct expropriation still take place especially for environmental and developmental purposes. For instance, Peru issued a decree of expropriation in 2001 on the grounds of public necessity concerning environmental and ecological protection. The adopted measures were regulatory measures designed to annul or revoke operating licences granted to foreign investors (mainly from Chile) in the Ecological Reserve of Pantanos de Ville of Peru, and to close the factories in the Reserve.[93] The tribunal unfortunately did not decide on the merits as it held that it had no jurisdiction, but a similar scenario can occur with the aim of cultural heritage protection.

In regards to indirect expropriation, or creeping expropriation, one can easily imagine how a series of new measures protecting a site, which is considered as having a cultural or natural heritage value, may be equivalent to an expropriation in the foreign investor's perspective. If a State restricts economic activities near the cultural site, these new regulations may have the effect of annulling all the possible benefits of an investment made in order to develop tourism or natural resources, for instance.

Therefore, the question is whether UNESCO Conventions may have a limiting impact on investors' rights when it comes to expropriation. In light of recent jurisprudence, we can conclude that obligations of the State vis-à-vis the preservation of cultural heritage, have an impact in three different ways.

First, UNESCO Conventions invocation before investment tribunals serves as ***legitimacy for the governmental measures.*** Thus, it fulfils the first requirement of a lawful expropriation, that a taking must be motivated by a public purpose. This was the case in *SPP v Egypt* in which the tribunal relied on cultural heritage concerns to decide the legitimacy of the measures enacted by the host State.

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[92] UNCTAD, Series on Issues in International Investment Agreements: 'Taking of a Property' (2000) 11-12, Available Online: http://www.unctad.org/en/docs//psiteiitd15.en.pdf.
[93] *Empresas Lucchetti v Peru* (Award of 7 February 2005), ICSID Case No ARB/04/4.

> *Clearly, as a matter of international law, the Respondent was entitled to cancel a tourist development project situated on its own territory for the purpose of protecting antiquities. This prerogative is an unquestionable attribute of sovereignty. The decision to cancel the project constituted a lawful exercise of the right of eminent domain.* ***The right was exercised for a public purpose, namely, the preservation and protection of antiquities in the area.***[94] (Emphasis was added)

Furthermore, although the arbitrators of the *Santa Elena v Costa Rica* case did not go as far as the ones in the *SPP v Egypt* case, their decision is coherent as regards the legitimacy of the expropriation. The tribunal acknowledged that:

> *[i]nternational law permits the Government of Costa Rica to expropriate foreign-owned property within its territory for a public purpose and against the prompt payment of adequate and effective compensation" and that "[…] an* ***expropriation or taking for environmental reasons may be classified as a taking for a public purpose, and thus may be legitimate*** *[…]*[95] (Emphasis added)

The last two cases show that UNESCO Conventions obligations to protect cultural heritage may help to characterize an expropriation as lawful.

Second, in general, regulatory measures enacted by a national government in order to protect cultural and natural heritage that restrict investors' rights without discrimination do not usually constitute an indirect expropriation if they do not arbitrarily and disproportionally interfere with foreign investors' rights.[96] In this context, non-investment obligations may help in ***distinguishing between an indirect expropriation and a legitimate governmental regulation***.[97] Although it was not a case about cultural heritage, *Methanex* is relevant since the tribunal had to deal with environmental concerns and allegations of indirect expropriation. In this case, the investment tribunal had to decide whether environmental measures were equivalent to an indirect expropriation. It ruled that:

> *[…] the California ban was made for a public purpose, was non-discriminatory and was accomplished with due process. Hence, Methanex's central claim under Article 1110(1) of expropriation under one of the three forms of action in that provision fails. From the standpoint of*

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[94] *Southern Pacific Properties (Middle East) Ltd v Arab Republic of Egypt* ICSID Case No ARB/ 84/3, Award on the Merits, 20 May 1992, ¶ 158.

[95] *Compañía del Desarrollo de Santa Elena SA v Republic of Costa Rica* ICSID Case No ARB/96/1, Final Award, 17 February 2000, ¶ 71.

[96] Federico Lenzerini, *supra* note 22, at 555.

[97] In broad terms, the following criteria have been identified by arbitral tribunals in order to distinguish between legitimate non-compensable regulations having an effect on the economic value of a foreign investment and indirect expropriation requiring compensation: (i) the degree of interference with the property right (for an indirect expropriation the measure must have severe economic impact on the investment), (ii) the character of the governmental measure, i.e. the purpose and the context of the measure, and (iii) the interference of the measure with reasonable and investors-backed expectations. For a basic overview of the main criteria please see OECD Working Papers on International Investments: 'Indirect Expropriation' and the 'Right to Regulate' in International Investment Law, September 2004. (Available Online at: http://www.oecd.org/dataoecd/22/54/33776546.pdf).

> *international law, the* ***California ban was a lawful regulation and not an expropriation***.[98] (Emphasis added)

In short, cultural heritage obligations are considered legitimate public welfare objectives and may help arbitrators to draw the line between legitimate non-compensable regulations and compensable expropriations.

Third, UNESCO obligations as regards the protection of natural and cultural heritage may influence the expectations of an investor. Although the concept of '***legitimate expectations' of the investor*** mostly plays a role in the interpretation of the principle of fair and equitable treatment, it can find an entry in law governing indirect expropriations.[99] For instance, in *Methanex*, the tribunal found that certain new environmental regulations had been foreseeable by the foreign investor.[100] In the context of cultural heritage, a host State could arguably say that if a site is protected by the WHC, a foreign investor should have expected adoption of additional regulations in order to protect and preserve the site and its surroundings, even if such regulations limit future benefits of the site. If an investment tribunal accepted that argument, it would be more likely to consider the new measures affecting the investment as a legitimate regulation than an indirect expropriation.

However, the exact opposite may also happen. Whereas the WHC does not prohibit 'economic exploitation' of natural and cultural heritage as long as it respects the principles included in the conventions, foreign investors may get a certain benefit of this protection. For instance, a foreigner invests in the eco-tourism or cultural-tourism industry and this investment depends on the protection of a site included on the World Heritage List. In this case, the investor may have the legitimate expectations that the host State will protect adequately the site on which the investment is economically dependent. If the government decides to delist the site from the WHC List or it does not fulfil its obligations, one could arguably say that the investor may invoke the WHC in the context of investment arbitration. From this perspective, the obligations of States under conventions for the protection of natural and cultural heritage would not limit foreign investors' rights but might actually support them.

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[98] *Methanex v United States* UNCITRAL Case No. ARB/98/3, Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005, at Part IV, Chapter D, ¶ 15.
[99] Rudolf Dolzer and Christoph Schreuer, *supra* note 6, at 104.
[100] *Methanex v United States* UNCITRAL Case No. ARB/98/3, Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005, at Part IV, Chapter D, ¶15.

5.1.2.2 MFN clause and national treatment

The most-favoured-nation treatment (MFN) and national treatment clauses are fundamental principles of international investment law. Their purpose is to avoid discrimination: the former "ensure[s] that the relevant parties [to an investment treaty] treat each other in a manner at least as favourable as they treat third parties"[101] while the latter obliges "a host State to make no negative differentiation between foreign and national investors when enacting and applying its rules and regulations […]"[102]

The two principles share a common requirement: they need a basis of comparison in order to find whether a State has discriminated against a foreign investor. Although the choice of the comparator is still controversial, it is generally accepted that the two compared investors must be in 'like circumstances' to judge whether the foreigner is being subjected to discrimination. That is precisely where cultural heritage obligations may have an impact on investment tribunals' decision.

In *Parkerings v Lithuania*,[103] the international law on the protection of cultural heritage had a major impact on the tribunal decision as to whether the legislation modifications violated the MFN principle. The claimant argued that it had been less favourably treated than a Dutch enterprise in similar circumstances, more specifically in the domain of parking construction in the same city. The arbitrators rejected the claimant argument and ruled that it was impossible to conclude that the investor was discriminated against since the two situations were different.

> *Nonetheless, despite similarities in objective and venue, the Tribunal has concluded, on balance, that the differences of size of Pinus Proprius and BP's projects, as well as the significant extension of the latter into the Old Town near the Cathedral area, are important enough to determine that* ***the two investors were not in like circumstances****. Furthermore, the Municipality of Vilnius was faced with numerous and solid oppositions from various bodies that relied on archaeological and environmental concerns.* […] *Thus the* ***City of Vilnius did have legitimate grounds to distinguish between the two projects****. Indeed, the refusal by the Municipality of Vilnius to authorize BP's project in Gedimino was justified by* ***various concerns, especially in terms of historical and archaeological preservation and environmental protection***.[104] (Emphasis added)

[101] Rudolf Dolzer and Christoph Schreuer, *supra* note 6, at 186.
[102] *Id.* at 178.
[103] Detailed description of the case is provided in Annex 1 to the memo.
[104] *Parkerings-Compagniet AS v Republic of Lithuania* ICSID Case No ARB/05/8, Award, 11 September 2007, ¶ 396.

In other words, the fact that the site was protected by the WHC was 'decisive'[105] since it impacted on the arbitrators' perception of 'like circumstances'. In this case, the WHC avoided the finding of a breach of a bilateral investment treaty.

5.1.2.3 Fair and equitable treatment

The violation of the principle of fair and equitable treatment is the most alleged breach of IIAs before investment tribunals.[106] Although the concept itself is difficult to define clearly, most of the doctrinal writings and the jurisprudence agree that the concept of 'legitimate expectations' of the foreign investor is closely related to it. These expectations are based on many elements and have to be analysed on a case-by-case basis. Nevertheless, the national law plays a major role in the analysis of what could have been the legitimate expectations of an investor.

That is exactly where obligations related to cultural and natural heritage may come into play. If a State becomes party to a convention aimed at the protection of the common heritage of humanity, a foreign investor should make presumptions. For instance, a foreigner investing in a project within the territory of a State Party to the WHC should not expect a reduction of the protection accorded to sites of cultural heritage nature. On the contrary, he should expect even more regulations and restrictions to be undertaken in accordance with the commitments under the UNESCO Conventions.

Another element related to the FET standard is the principle of good faith. In many cases, investment tribunals concluded that a state acting in bad faith with a foreign investor is breaching its obligation of fair and equitable treatment. In a certain perspective, the requirement of good faith is related to the intentions of a government. Therefore, if the intention of the state is not to cause damage to a foreign investor and it acts in good faith, there should not be *a priori* a breach of the FET.

Glamis Gold Ltd v United States of America is a good illustration of how cultural heritage concerns may impact the decision of an arbitral tribunal as regards the FET. In this case, the State of California had enacted measures to preserve the Trail of Dreams, a site of natural and cultural heritage value by imposing restrictions on mining although the site as such was not inscribed on the World Heritage List. In fact, a local Native tribe was opposed to

[105] *Id.* at ¶ 392.
[106] Rudolf Dolzer and Christoph Schreuer, *supra* note 6, at 119.

the investment project because it would destroy a sacred path still used in ceremonial practices.[107] The investment tribunal had to decide whether the State of California had breached the FET clause in NAFTA. The arbitrators concluded that:

> *[…]* ***the government had a sufficient good faith belief that there was a reasonable connection between the harm and the proposed remedy*** *[…] Respondent points out that there are, in addition to pot shards, spirit circles, and the like, sight lines, teaching areas and viewsheds that must be protected and would be harmed by significant pits and waste piles in the near vicinity. The fact that SB 22 mitigates some, but not all, harm does not mean that it is manifestly without reason or arbitrary; it more likely means that it is a compromise between the conflicting desires and needs of the various affected parties.*[108] (Emphasis added)

Therefore, the arbitral tribunal focused on two factors in order to decide whether there was a breach of article 1105 of NAFTA: first, "the extent to which the measures interfered with reasonable and investment-backed expectations of a stable regulatory framework, and [second] the purpose and the character of the governmental actions taken."[109]

5.1.2.4 Assessing the compensation

The question that is examined here is whether and to what extent the provisions of the UNESCO Conventions could have an impact on the assessment of compensation by an investment tribunal. If the answer to the question is positive, would this constitute a limitation to investors' right to be compensated in the case of a violation by the host State of an IIA?

The study of the case law shows that investment tribunals have adopted at least three different positions in this regard.[110] First, some tribunals have clearly opted for the position that non-investment obligations of the host State must not be taken into consideration. For instance, in the *Santa Elena SA v. Costa Rica* case,[111] the host State argued that it took the measures affecting the investor in order to protect a natural site. In approaching the question of compensation, the tribunal acknowledged that international law permits Costa Rica to expropriate a foreign-owned property and that in this case, the taking was for 'public purpose'. Therefore, the tribunal considered the expropriation as lawful. Nevertheless,

> […] *the fact that the Property was taken for this reason does not affect either the nature or the measure of the compensation to be paid for the taking. That is,* ***the purpose of protecting the environment for which the Property was taken does not alter the legal character of the taking***

[107] *Glamis Gold Ltd v US* UNCITRAL/NAFTA, Award, 8 June 2009, ¶ 105-110. Valentina Sara Vadi, *supra* note 29, at 839.
[108] *Id.* ¶ 805.
[109] Valentina Sara Vadi, *supra* note 29, at 841.
[110] Lahra Liberti, "The relevance of non-investment treaty obligations in the assessment of compensation" *Transnational Dispute Management* 4, 6 (November 2007): 3.
[111] Detailed description of the case is provided in Annex 1 to the memo.

> ***for which adequate compensation must be paid***. *The international source of the obligation to protect the environment makes no difference.*"[112] (Emphasis added).

In other words, if the same tribunal was confronted with the UNESCO Conventions obligations in a similar situation, the most probable outcome would be that they would have no impact on the assessment of compensation. They would not constitute a limitation to the investor's rights.

The second possible approach is that the investment tribunal "does not exclude the relevance of the non-investment obligation *in abstracto*, but refuses it *in concreto*"[113] That was the case in *Siemens v. Argentina* in which the arbitrators had to deal with human rights law. In 2000, the newly elected Argentinean government suspended a contract that was concluded with the claimant in 1998 to establish a system of migration control and personal identification. As regards the calculation of the compensation, Argentina made an argument according to which "social policy reasons" may sometimes render the fair market value method inapplicable. "Argentina pleaded that, when a State expropriates for social or economic reasons, fair market value does not apply because otherwise this would limit the sovereignty of a country to introduce reforms, in particular of poor countries [...]"[114] The Tribunal observed that these considerations were part of that tribunal's determination of whether an expropriation had occurred and not of its determination of compensation. In other words, the tribunal did not go further than acknowledging the legitimacy of the non-investment obligations but nevertheless ruled (without providing reasons) that the Siemens approach had merit[115] and that the expropriation was unlawful.[116]

Thirdly, another approach would be to consider non-investment obligations, in our case the UNESCO Conventions obligations, as fully relevant in assessing the level of compensation. The most relevant example would certainly be the *SPP v Egypt* case in which the tribunal rejected the claimant's argument as regards the method of valuation to be applied and concluded:

> *Thus, even if the Tribunal were disposed to accept the validity of the Claimants' DCF calculations, it could only award* lucrum cessans *until 1979, when the obligations resulting from the UNESCO Convention with respect to the Pyramids Plateau became binding on the Respondent.* ***From that date forward, the Claimants' activities on the Pyramids Plateau would have been in, conflict***

[112] *Compañía del Desarrollo de Santa Elena SA v Republic of Costa Rica* ICSID Case No ARB/96/1, Final Award, 17 February 2000, ¶ 71.
[113] Lahra Liberti, *supra* note 110, at 4.
[114] *Siemens A.G. v The Argentine Republic* ICSID Case No. ARB/02/8, Arbitral Award, 6 February 2007, ¶ 354.
[115] *Id.* ¶ 357.
[116] *Id.* ¶ 273.

> ***with the Convention and therefore in violation of international law, and any profits that might have resulted from such activities are consequently non-compensable***.[117] (Emphasis added)

Hence, two elements must be underlined: first, the tribunal explicitly stated that the economic activities of the foreign investor would have been in a breach of international law after 1979. Second, the mere fact that the site was protected by the WHC has a direct and limiting effect on the investor's rights since the Claimants would have got a more important indemnity if the site was not on the WHC list. Finally, the arbitrators concluded that the expropriation was lawful and chose to grant 'out-of-pocket' expenses plus an amount to compensate the Claimants for what they have called "the loss of the opportunity to make a commercial success of the project" as the 'fair measure of compensation'.[118]

In conclusion, although they do not annul the obligation to pay compensation, UNESCO Conventions can be considered in the assessment of the amount of compensation to be granted to the foreign investor. This may happen especially when the tribunal considers an expropriation to be lawful. If arbitrators do so, they tend to limit the level of compensation as well as modifying the method of calculation. However, "to make a successful argument, States have to substantiate their allegations. A generic reference to competing international obligations, such as that made by Argentina in the *Siemens* case, would not be endorsed by arbitral tribunals."[119]

6 CONCLUSIONS

Many scholarly writings point to the emerging trend of investment tribunals to give increasing weight to public interests. According to Hirsch, it depends on the perception of the adjudicative bodies of the role they play.

> *Tribunals that emphasize their law-making role are more likely to take into account wider public policy considerations (including those relating to human rights and environmental protection), and seek a due balance between the competing principles. On the other hand, tribunals that perceive their role in settling the specific dispute between the particular parties (the inter-partes model) are less likely to grant significant weight to broader policy issues that are reflected in non-investment treaties.*[120]

Given the nearly universal acceptance of the WHC, many cultural and natural sites are likely to be the object of investments. In the real world, full realization of the investor's

[117] *Southern Pacific Properties (Middle East) Ltd v Arab Republic of Egypt* ICSID Case No ARB/ 84/3, Award on the Merits, 20 May 1992, ¶ 190.
[118] *Id.* ¶ 198.
[119] Lahra Liberti, *supra* note 110, at 4.
[120] Moshe Hirsch, *supra* 41, at 14.

interests might conflict with the interest to ensure the protection of the cultural site, and *vice versa.*

Many authors pointed out that the regime of foreign investment protection does not protect adequately the cultural and natural heritage,[121] but some tribunals demonstrated that it is possible to read the host state investment obligations in the light of preservation of cultural and natural heritage. Although there is no uniform tribunal practice as regards the role of cultural heritage law in investment arbitration, arbitrators seem generally to consider the protection of natural and cultural heritage as a legitimate objective, even if their practical consequences vary considerably.

In none of the publicly available cases an investment tribunal clearly and directly applied to the dispute other international treaties imposing on the host state non-investment obligations. The tribunal in the *SPP v Egypt* attached the most far-reaching consequences to the significance of the WHC so far. It proclaimed that the WHC was relevant from which some authors derived the direct applicability of the WHC by an investment tribunal. The tribunals, however, rather consider the non-investment treaties through treaty interpretation or concepts of 'legitimate expectations' or 'like circumstances' inherent to investment protection standards.

As regards the jurisdiction of investment arbitration, the *Malaysian Historical Salvors* case showed that the underwater cultural heritage obligations can be in contradiction with the standard definition of an 'investment'. If arbitrators adopted a systemic interpretation of the host state obligations, the most probable outcome would be that obligations under UWCH have a limiting effect on investors' rights since it makes their access to arbitration more difficult. That said, the annulment of the first decision and the doctrinal debate demonstrates that the question can be very controversial.

The study of recent cases also confirmed that cultural and natural heritage protection considerations may have an impact on arbitrators' decision as regards the merits of a case. Although, case-by-case consideration remains necessary, there are some common principles emerging from the examination of the IIAs and arbitral decisions. Obligations arising from UNESCO Conventions can help with characterising an expropriation as lawful as well as drawing the line between an indirect expropriation and a non-compensable regulation. As

[121] Valentina SaraVadi, "Investing in Culture: Underwater Cultural Heritage and Investment Law" *Vanderbilt Journal of Transnational Law* 42, (2009): 890.

other non-investment obligations, they may come into play in the analysis of the legitimate expectations of an investor both as regards expropriation and the FET principle. Moreover, international obligations related to world heritage protection were used in order to decide whether two investors were in 'like circumstances' in the context of an allegation of the violation of the MFN clause.

Finally, international law on cultural heritage has had a major impact in some cases when it comes to the assessment of compensation. It sometimes forced the arbitrators to limit the amount of compensation as well as to change the method of calculation.

Furthermore, general principles of international law may be asserted from case law analysis. The first and most important is the legitimacy of restrictions to private property rights aimed at safeguarding cultural heritage.[122] As it has been already pointed out, investment tribunals generally accept State arguments according to which the purpose of the protection of natural and cultural heritage is a legitimate one. The importance of restrictions may vary from a country to country but it must respect principles of proportionality and non-discrimination.[123] The second principle of importance is the right to compensation when a government takes the property of a private owner.[124] Even if the taking was for a legitimate 'public purpose' a State has the obligation to pay for the economic loss suffered by the foreign investor. Tribunal practice is not consistent when it comes to the method of assessment of compensation. This must be decided on a case-by-case basis.

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[122] Federico Lenzerini, *supra* note 22, at 564.
[123] *Id*, at 565.
[124] *Id.*

7 DESCRIPTION OF CASE LAW

Outside the NAFTA framework, three investor-state cases have directly involved the WHC. They are described below. The factors that played the ultimate role in assessing the weight of a relevant treaty/instrument and in formulating the final decision by the tribunal are underlined.

7.1 SPP v Egypt

Case	*SPP v Egypt*
General Remark	The award in *SPP v Egypt* is one of the earliest arbitrations expressly mentioning the World Heritage Convention. Egypt as the host state and defendant raised as a defence the objection of obligations undertaken by Egypt under the WHC. This arbitration attached the most far-reaching consequences to the significance of the World Heritage Convention so far.
Brief Summary of the Case	SPP, a Hong-Kong corporation, and its wholly owned subsidiary, SPP(ME), signed a number of agreements with Egyptian agencies between 1974 and 1975, under which SPP undertook to develop a tourist complex at the Pyramids area near Cairo and at Ras El Hekma on the Mediterranean coast ("**Pyramids Plateau**").[125] Egypt's authorities approved the development and construction of the projects by several decisions and letters during 1976 and 1977.[126] Construction began on the site in July 1977.[127] In late 1977, the project encountered political opposition and the opponents claimed that it posed a "*threat to undiscovered antiquities*."[128] In May 1978, the Egyptian government converted the land intended for the development to "public property", prohibited any private development and withdrew previous approvals of the project.[129] SPP did not challenge Egypt's right to cancel the project, but it claimed compensation for expropriation of its investment under both Egyptian and international law.[130]
Application of the UNESCO Convention	Egypt argued that international law rules in accordance with Article 42 (1) of the ICSID Convention can be applied only in "*an indirect manner, through those rules and principles incorporated into Egyptian law such as the provisions of treaties ratified by Egypt and, in particular, the 1972 UNESCO Convention for the Protection of the World Cultural and Natural Heritage.*"[131] In this respect **the tribunal** declared the WHC relevant **as applicable law**: "*nor is there any question that the **UNESCO Convention is relevant:** the Claimants themselves acknowledged during the proceedings before the French Cour d'Appel that the Convention*

[125] *Southern Pacific Properties (Middle East) Ltd v Arab Republic of Egypt* ICSID Case No ARB/ 84/3, Award on the Merits, 20 May 1992, ¶ 42-57.
[126] *Id.* ¶ 58-60.
[127] *Id.* ¶ 61.
[128] *Id.* ¶ 62.
[129] *Id.* ¶ 63-65.
[130] *Id.* ¶ 158.
[131] *Id.* ¶ 76. We do not comment here on the incorrect interpretation of Article 42(1) giving international law only 'complementary' and 'corrective' function vis-à-vis the municipal law of the host state, as it does not have impact on our subject of analysis. For further reading on the subject, see eg. Zachary Douglas, *supra* note 57, at 125 et seq.

	obligated the Respondent to abstain from acts or contracts contrary to the Convention."[132] Egypt claimed that "*the entry into force on 17 December 1975 of the World Heritage Convention made it obligatory, on the international plane, to cancel the project.*"[133] Egypt invoked, in particular, Articles 4, 5 and 11 of the World Heritage Convention.[134] The investor, on the other hand, claimed that Egypt had ratified the Convention already in 1974 and, thus, was aware of its terms when it approved the investment project. In addition, Egypt itself nominated the Pyramids Plateau for registration in the World Heritage List based on Article 11 of the UNESCO Convention only subsequently, i.e. nine months after the cancellation of the project.[135] **The tribunal analyzed the UNESCO Convention** and noted that the World Heritage Committee registers protected property only following a request of the contracting State.[136] In **tribunal's view, "*the choice of sites to be protected is not imposed externally, but results instead from State's own voluntary nominations.*"**[137] The tribunal did not much elaborate either on the nature of UNESCO Convention signatory's obligation to submit to the Heritage Committee "in so far as possible, an inventory of property forming part of the cultural and natural heritage, situated in its territory and suitable for inclusion in the list..."[138] or on other obligations arising from the Convention. For example Article 6, under which the signatory states are bound to "do all they can", to the utmost of their resources, in order to protect such properties. The tribunal interpreted obligations arising from the World Heritage Convention as follows: > ***the choice of sites is not imposed externally, but results instead from State's own voluntary nomination.*** *Consequently, the date on which the Convention entered into force is not the date on which the Respondent became obligated by the Convention to protect and conserve antiquities on the Pyramids Plateau. It was only in 1979, after the Respondent nominated « the pyramids fields » and the World Heritage Committee accepted that nomination, that the relevant international obligations emanating from the Convention became binding on the Respondent. ...it was only from the date on which the Respondent's nomination of the « pyramids fields » was accepted…..that a hypothetical continuation of the Claimants' activities …..in the area could be considered as unlawful from the international point of view.*[139] The tribunal also found it necessary to examine whether the government's actions that breached the investment agreements were genuinely motivated by the aim to comply with the non-investment treaty. Therefore, it examined the chronological order of events and concluded **that Egypt's international obligations under the Convention entered into force only after the investment agreements were concluded and the various permits were issued**. As a result, **the tribunal concluded that the cancellation of the project was not**

[132] *Id.* ¶ 78.
[133] *Id.* ¶ 150.
[134] For detailed description of the Articles please see Section 3.1.1.
[135] *Id.* ¶ 153. The whole area from the Pyramids of Giza to Dahshur was registered on the list of properties included in the World Heritage on 26 October 1979.
[136] *Id.* ¶ 157.
[137] *Id.* ¶ 154.
[138] Full text of Article 11 of the World Heritage Convention is: *"Every State Party to this Convention shall, in so far as possible, submit to the World Heritage Committee an inventory of property forming part of the cultural and natural heritage, situated in its territory and suitable for inclusion in the list provided for in paragraph 2 of this Article. This inventory, which shall not be considered exhaustive, shall include documentation about the location of the property in question and its significance*."
[139] *Southern Pacific Properties (Middle East) Ltd v Arab Republic of Egypt* ICSID Case No ARB/ 84/3, Award on the Merits, 20 May 1992, ¶ 154.

	externally imposed on Egypt but rather resulted from Egypt's voluntary actions and rejected Egypt's arguments regarding inconsistency between its obligations under the investment agreements and its obligations under the World Heritage Convention.
Determination of the quantum of compensation – refusal to grant lucrum cessans	The tribunal upheld SPP's expropriation claim. **However, it ruled that the SPP's activities on the Pyramids Plateau "*would have become international unlawful in 1979*"**[140] and therefore it ultimately **decided that "*any profits that might have resulted from such activities are consequently non-compensable*.**"[141] The tribunal, thus, took into account the registration of the site under the UNESCO Convention as a mitigating factor when assessing compensation. It did not award compensation based on profits that might have accrued to the investor after the date on which Pyramids Plateau was registered with UNESCO.

7.2 Santa Elena v Costa Rica

Case	*Santa Elena v Costa Rica*
General Remark	The award in *Santa Elena v Costa Rica* issued 8 years later than the award in *SPP v Egypt* shows a rather hostile approach to the WHC and other environmental obligations. The arbitration only focused on the determination of the quantum of compensation as the parties agreed that a lawful expropriation had taken place. Again there was no BIT invoked and the ICSID jurisdiction was based on an *ad hoc* consent of Costa Rica.[142]
Brief Summary of the Case	In 1970, a group of investors mainly from the US established a company in Costa Rica with the intention to purchase property "Santa Elena" for tourist-development purposes. After purchasing the property and having performed various financial and technical analyses relating to the land development, in 1978, the government of Costa Rica issued an expropriation decree for the property. As a reason the conservation objectives of the biodiversity in the region were stated.[143]
Determination of the quantum of compensation	With respect to the impact of the environmental motives of the expropriation on the duty to compensate, the tribunal ruled: *While an expropriation or taking for **environmental reasons** may be classified as a taking for a public purpose, and thus may be legitimate, the fact that the property was taken for this reason **does not affect either the nature of the measure of compensation** to be paid for the taking. That is, the purpose of protecting the environment for which the property was taken does not alter the legal character of the taking for which adequate compensation must be paid. **The international sourceof the obligation to protect the environment makes no difference.**[144]* **The tribunal refused to examine the evidence submitted by Costa Rica concerning its international obligations to preserve the expropriated property**. The award does not even mention the relevant treaties discussed as applicable law. [145] In his article, Pavoni indicates that Costa Rica invoked a number of environmental agreements (e.g. Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere), including the WHC which Costa Rica ratified in 1977 (a year before the adoption of the expropriation decree). [146] One of Costa Rica's witnesses also testified as to Costa Rica's efforts to have the area

[140] *Id.* ¶ 157.
[141] *Id.* ¶ 191.
[142] As a condition to obtain a loan from Inter-American Development Bank.
[143] Santa Elena v Costa Rica, supra ¶ ¶ 15-21.
[144] *Ibid.* supra ¶71.
[145] *Ibid.* supra ¶¶60-67.
[146] See Riccardo Pavoni, *supra* 56, at 537.

	designated as a World Heritage Site due to its biological and geological significance.[147] As follow-up information, we note that the Santa Elena area was finally registered to the WHC list in 2004. The tribunal concluded that Costa Rica's environmental obligations could have no bearing on the assessment of the quantum of compensation. In light of other investment tribunal decisions,[148] conclusion reached in *Santa Elena v Costa Rica* does not necessarily mirror the current law regarding expropriation of investor's property.

7.3 Parkerings v Lithunia

Case	*Parkerings v Lithunia*
Brief Summary of the Case	Parkerings, a Norwegian company, concluded with the Municipality of Vilnius an agreement on construction and management of a large parking area in the old part of the city of Vilnius in 1999. The Municipality of Vilnius decided to terminate the agreement after the adoption of a new state legislation which restricted the possibility for municipalities to enter into such agreements, and only after the environment protection authority had expressed its concerns with respect to the project, as no assessment of its potential impact with respect to cultural heritage of the area. The area of the city centre was been inscribed on the World Heritage List in 1994. After these events, the parties tried to renegotiate the contract, however, without success. Consequently, the municipality terminated the agreement in 2004.
Application of the UNESCO Convention	The claimant argued that it had been less favourably treated than a Dutch enterprise in similar circumstances, more precisely in the domain of parking construction in the same city. The tribunal stated that: > *Nonetheless, despite similarities in objective and venue, the Tribunal has concluded, on balance, that the differences of size of Pinus Proprius and BP's projects, as well as the significant extension of the latter into the Old Town near the Cathedral area, are* ***important enough to determine that the two investors were not in like circumstances****. Furthermore, the Municipality of Vilnius was faced with numerous and solid oppositions from various bodies that relied on archaeological and environmental concerns.* […] *Thus the* ***City of Vilnius did have legitimate grounds to distinguish between the two projects****. Indeed, the refusal by the Municipality of Vilnius to authorize BP's project in Gedimino was justified by various concerns, especially in terms of historical and archaeological preservation and environmental protection.*[149] In other words, the mere fact that the site was protected by UNESCO convention is 'decisive'[150] since it impacted on the arbitrators' perception of 'like circumstances'.

7.4 Glamis Gold

Case	*Glamis Gold v United States*
General Remark	This case was decided under the NAFTA framework and according to the UNCITRAL Rules.
Brief Summary of the Case	In 1994, Glamis Gold Ltd, a Canadian company, acquired ownership of mining claims and mill sites in the Southern California Imperial Desert through an American subsidiary. The Imperial Project would have generated a large open-pit with a cyanide heap and a leach gold mine. Glamis Gold claimed that certain US

[147] *Santa Elena v Costa Rica*, supra ¶ 46.
[148] *Saluka* and *Methanex* awards suggest that states are not bound to pay compensation to a foreign investor when, in the normal exercise of their regulatory powers, they adopt non-discriminatory regulations aimed to promote general welfare.
[149] Parakerings, para 396
[150] Parkerings, para 392

	federal actions and measures by the State of California concerning open-pit mining operations resulted in the expropriation of Glamis Gold's investment located in the California Desert Conservation Area and in the breach of fair and equitable treatment and full protection and security guaranteed by Articles 1105 and 1110 of NAFTA. The government's measures included backfilling and grading for mining operations and were taken in order to preserve the Trail of Dreams, a site of natural and cultural heritage value (although the site as such was not on the World Heritage List), including the right of the Indian tribe to practice their religion in sacred ancestral sites in the area.
Application of the UNESCO Convention	The investment tribunal had to decide whether the state of California had breached the FET clause of the NAFTA. The arbitrators concluded that: *"[…]* ***the government had a sufficient good faith belief that there was a reasonable connection between the harm and the proposed remedy*** *[…] Respondent points out that there are, in addition to pot shards, spirit circles, and the like, sight lines, teaching areas and viewsheds that must be protected and would be harmed by significant pits and waste piles in the near vicinity. The fact that SB 22 mitigates some, but not all, harm does not mean that it is manifestly without reason or arbitrary; it more likely means that it is a compromise between the conflicting desires and needs of the various affected parties[151]"*(Emphasis added) Therefore, the arbitral tribunal focused on two factors in order the make the distinction between a regulation and a compensable expropriation: first, "the extent to which the measures interfered with reasonable and investment-backed expectations of a stable regulatory framework, and [second] the purpose and the character of the governmental actions taken."[152] The tribunal dismissed investor's claim in full.

[151] *Glamis Gold Ltd v US* UNCITRAL/NAFTA, Award, 8 June 2009, para. 805.
[152] Valentina Sara Vadi, *supra* note 29, at 841.

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