GLOBAL CULTURAL GOVERNANCE BY INVESTMENT ARBITRAL TRIBUNALS: THE MAKING OF A *LEX ADMINISTRATIVA CULTURALIS*

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ABSTRACT

The protection of cultural heritage is a fundamental public interest, closely connected to fundamental human rights and deemed to be among the best guarantees of international peace and security. Economic globalization has spurred a more intense dialogue and interaction among nations, potentially promoting cultural diversity. However, this phenomenon may also jeopardize cultural heritage. Foreign direct investments in the extraction of natural resources have the ultimate capacity to change cultural landscapes and erase memories. Foreign investment in cultural industries can induce cultural homogenization. However, international investment law constitutes a legally binding and highly effective regime that requires that states promote and facilitate foreign direct investment. Does the existing legal framework adequately protect cultural heritage vis-à-vis economic globalization?

This Article investigates the distinct interplay between the promotion of foreign direct investment and the protection of cultural heritage in international law, addressing the question of whether a lex administrativa culturalis*, or cultural administrative law, has emerged. In particular, this Article questions whether international investment law and arbitration can be a tool for enforcing international cultural law and whether arbitral tribunals can promote good and effective cultural governance.*

INTRODUCTION

The historical town of Vilnius, Lithuania, figures in the *World Heritage List*[1] as a cultural heritage site of outstanding universal value. Not only is Vilnius one of the finest old towns in Central Europe, having preserved a number of "Gothic, Renaissance, Baroque and classical buildings," but its medieval structure also "exercised a profound influence on architectural and cultural developments in a wide area of Eastern Europe over several centuries."[2] A Norwegian investor participated in a bid to build a parking area under the historical center of the town.[3] The investor's project

[1] The *World Heritage List* includes 1,007 properties. U.N. Educ., Sci., and Cultural Org. [UNESCO], World Heritage List, http://whc.unesco.org/en/list (last visited Jan. 29, 2015). The Convention entered into force on December 17, 1975. UNESCO Convention for the Protection of the World Cultural and Natural Heritage, Nov. 19, 1972, 11 I.L.M. 1358.

[2] UNESCO, Vilnius Historic Centre, http://whc.unesco.org/en/list/541 (last visited Jan. 29, 2015).

[3] Parkerings-Compagniet AS v. Republic of Lith., ICSID Case No. ARB/05/8, ¶¶ 62-65 (Sept. 11, 2007), http://italaw.com/cases/812.

submission included an excavation under the Cathedral.[4] Cultural heritage impact assessments, which are required by law, revealed that the project could have jeopardized the cultural heritage of the town.[5] Nonetheless, when the Lithuanian government rejected the project on cultural heritage grounds and selected another project that did not include excavation under the Cathedral, the investor filed an investment treaty arbitration.[6] Was it legitimate for the Municipality of Vilnius to prefer another contractor in order to limit the perceived risk of damaging its cultural heritage?

In another recent dispute, a U.S. company filed an investment treaty arbitration against Ukraine because Ukraine required that fifty percent of each radio company's general broadcasting be Ukrainian music.[7] The claimant argued that the local music requirement breached the investment treaty provision prohibiting the state from obligating foreign companies to buy local goods.[8] The claimant contended, "We should allow the audience to determine what it wants and we think that since Ukraine is seeking the status of a country with a market-economy, it should not introduce Ukrainian culture by force. . . ."[9] Is the local music requirement justified on public policy grounds as part of the State's legitimate right to preserve cultural inheritance?[10] The arbitral tribunal held that the condition on the bidding process "was a legitimate decision, based on a public interest choice to extend the use of Ukrainian in the media," and arguably contributing to the diffusion of Ukrainian culture.[11] But the investor's argument was in fact supportive of cultural diversity and individual freedoms, was it not?

These cases could not be more different. They involve different

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[4] *Id.* ¶¶ 378, 380.

[5] *Id.* ¶ 388.

[6] *Id*. ¶¶ 280, 363.

[7] Lemire v. Ukr., ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, ¶ 218 (Jan. 14, 2010), http://www.italaw.com/sites/default/files/case-documents/ita0453.pdf.

[8] *Id.*

[9] *Id*. ¶ 406.

[10] Language is a controversial issue in Ukraine. Since its independence in 1991, and for almost two decades after, Ukrainian has been the only official language despite the presence of linguistic minorities. When a 2012 bill elevated languages spoken by at least ten percent of a region to the status of "regional language," there was uproar in the Parliament. Reuters, *Ukraine in Uproar Over Status of Russian Language*, MOSCOW TIMES, May 28, 2012, http://www.themoscowtimes.com/news/article/ukraine-in-uproar-over-status-of-russian-language/459335.html. On February 22, 2014, the Ukrainian Parliament repealed the 2012 bill. Palash R. Ghosh, *Watch Your Tongue: Language Controversy One of Fundamental Conflicts in Ukraine*, INT'L BUS. TIMES, Mar. 3, 2014, http://www.ibtimes.com/watch-your-tongue-language-controversy-one-fundamental-conflicts-ukraine-1559069.

[11] *Lemire*, ICSID Case No. ARB/06/18, ¶ 407.

claimants, different respondents, different treaties, and even different arbitral tribunals. Yet, they have an important commonality: the clash between the protection of foreign direct investment and the conservation of cultural heritage.[12]

Cultural heritage is a multifaceted concept that includes both tangible (e.g., monuments, sites, and cultural landscapes) and intangible cultural resources (e.g., music, cultural practices, and food preparation). While culture represents inherited values, ideas, and traditions, which characterize social groups and their behavior, heritage indicates something to be cherished and handed down from one generation to another. There is no single definition of cultural heritage in international law; rather, different legal instruments provide ad hoc definitions that often focus on distinct categories of cultural heritage (e.g., intangible cultural heritage or underwater cultural heritage) rather than approaching cultural heritage holistically.[13]

Although economic globalization and international economic governance have spurred a more intense dialogue and interaction among nations, potentially promoting cultural diversity and providing funds to recover and preserve cultural heritage, these phenomena may also jeopardize cultural heritage. Asymmetrical flows and exchanges of cultural goods may lead to cultural homogenization.[14] Similarly, foreign direct investment in the extractive industries has the capacity to change cultural landscapes.[15] At the same time, the privileged regime created by international investment law within the boundaries of the host state has increasingly displayed a tension between investors' rights and the regulatory autonomy of the host state in the cultural field.[16]

Under most investment treaties, states have "agreed to give arbitrators a comprehensive jurisdiction over what are essentially regulatory disputes."[17] Modern investment treaties do not require home-state intervention to further

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[12] *See generally id.*; Parkerings-Compagniet AS v. Republic of Lith., ICSID Case No. ARB/05/8 (Sept. 11, 2007), http://italaw.com/cases/812.

[13] *See* Francesco Francioni, *Culture, Heritage and Human Rights: An Introduction*, *in* CULTURAL HUMAN RIGHTS 1 (Francesco Francioni & Martin Scheinin eds., 2008); Manlio Frigo, *Cultural Property v. Cultural Heritage: A "Battle of Concepts" in International Law?*, 86 INT'L REV. RED CROSS 367 (2004).

[14] VALENTINA VADI, CULTURAL HERITAGE IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION 162 (2014) [hereinafter VADI, CULTURAL HERITAGE].

[15] *Id*. at 161-62.

[16] *See generally id*.

[17] VALENTINA VADI, PUBLIC HEALTH IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION 20 (2013) [hereinafter VADI, PUBLIC HEALTH].

a dispute.[18] In practice, this means that foreign investors have increasingly claimed that cultural policies violate international investment law before investment treaty arbitral tribunals.[19] Arbitral tribunals are given the power to review the exercise of public authority and determine the appropriate boundary between two conflicting values: the legitimate sphere for state cultural heritage protection on the one hand, and the protection of private property from state interference on the other.[20] Both cultural heritage protection and the promotion of economic activities are important public interests that can contribute to economic growth and the common good. Yet, arbitral tribunals do not have a specific mandate to ascertain the adequate protection of cultural heritage. Have these arbitrations accommodated the cultural values at stake?

The tension between the protection of cultural heritage and economic globalization constitutes but one paradigmatic example of the clash between the state regulatory power and international economic integration. Yet, despite its importance, it has remained underexplored. A survey of cases shows that international investment law has developed limited institutional machinery—such as exceptions—for the protection of cultural heritage through dispute settlement: there is no built-in requirement of expert opinions or consultation with other international bodies (e.g., the World Heritage Committee). Arbitral tribunals scrutinize cultural policies to determine whether they are enacted in the public interest or are a disguised means of protectionism, and whether the state has struck a proper balance between the means employed and the aim sought to be realized.[21] Given the significant and consistently increasing number of international disputes, which present cultural elements due to increasing economic integration, the interaction between the protection of cultural heritage and economic globalization deserves further scrutiny.

When should economic interests yield to the protection of cultural heritage? When should cultural arguments yield to the protection of economic freedoms? At their core, cultural heritage disputes involve a society's most cherished values that define a nation's identity. The protection of cultural heritage can be thought of as a public interest, but it also encapsulates the common interest of mankind, transcending borders and stressing the common bonds that link the international community as a

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[18] *Id*. at 19.

[19] Valentina Vadi, *Toward a* Lex Administrativa Culturalis*? The Adjudication of Cultural Disputes Before Investment Arbitral Tribunals* 4 (Jean Monnet Working Paper Program, Working Paper No. 17/14, 2014) [hereinafter Vadi, *Toward a* Lex Administrativa Culturalis*?*].

[20] *Id.* at 3.

[21] *Id*. at 16.

whole.[22] At the same time, economic freedoms can also promote the free flow of ideas, cultural diversity, and equality of opportunities, as well as social and economic welfare.[23]

There is no international court for cultural disputes. Yet, a notable unintended consequence of increased economic globalization is the adjudication of cultural heritage related disputes by investment treaty tribunals.[24] The international tribunals' review of domestic regulations in the cultural sector can improve good cultural governance and the transparent pursuit of legitimate cultural policies.[25] In fact, the growing importance of such tribunals shows that most governments will have to consider the impact of regulations (including cultural policies) on foreign investors and their investments before the enactment of such measures to avoid potential claims and subsequent liability.

Yet, global cultural governance by investment treaty arbitral tribunals is also a matter of great concern. The adjudication of cultural heritage related disputes by arbitral tribunals may cause a regulatory chill, as states may be wary of possible investment disputes and thus avoid adopting conservation measures. Moreover, arbitral tribunals are of limited jurisdiction and cannot adjudicate on the eventual violation of cultural heritage law. Furthermore, even if they could, there is no hierarchical relationship between different treaty systems.[26] Rather, contemporary international relations are conceptualized as a network system.[27] As it is difficult to foresee and govern the interaction of different legal regimes at the normative level, governance in this area is left to the adjudicators. Thus, there is a risk that investment treaty tribunals dilute or neglect significant cultural aspects, eventually emphasizing economic interests. Furthermore, international adjudicators may be perceived as detached from local

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[22] Valentina Vadi, *Public Goods, Foreign Investments and the International Protection of Cultural Heritage*, *in* INTERNATIONAL LAW FOR COMMON GOODS – NORMATIVE PERSPECTIVES ON HUMAN RIGHTS, CULTURE AND NATURE 231, 231 (Federico Lenzerini & Ana Filipa Vrdoljak eds., 2014) (considering cultural heritage as a public good that is worthy of protection).

[23] *See* Barnali Choudhury, *International Investment Law as a Global Public Good*, 17 LEWIS & CLARK L. REV. 481 (2013) (considering foreign direct investments as public goods that are worthy of protection).

[24] VADI, CULTURAL HERITAGE, *supra* note 14, at 48.

[25] Vadi, *Toward a* Lex Administrativa Culturalis*?*, *supra* note 19, at 17-18.

[26] *See, e.g.*, Convention on the Protection and Promotion of the Diversity of Cultural Expressions art. 20, Oct. 20, 2005, 45 I.L.M. 269, *available at* http://unesdoc.unesco.org/images/0014/001429/142919e.pdf.

[27] MICHEL VAN DEN KERCHOV & FRANÇOIS OST, DE LA PYRAMIDE AU RÉSEAU? POUR UNE THÉORIE DIALECTIQUE DU DROIT (2002).

communities and their cultural concerns. They may not have specific expertise in cultural heritage law as the criteria for their appointment emphasizes expertise in international investment law. Nevertheless, allegedly cultural measures may constitute a breach of relevant investment treaty provisions.

Have arbitral tribunals paid any attention to cultural heritage? Are they imposing standards of good cultural governance by adopting general administrative law principles, such as proportionality, due process, and reasonableness? Are they contributing to the emergence of a *lex administrativa culturalis*, a cultural administrative law? Or, rather, are they "expropriating" certain fundamental aspects of cultural governance from states?[28] The critical assessment of such jurisprudence may help in detecting common patterns, eventually leading to the coalescence of general principles of law and requiring a balance between the protection of cultural heritage and investors' entitlements. My previous book, *Cultural Heritage in International Investment Law and Arbitration*, surveyed virtually all of the reported awards that related to cultural heritage and classified them according to (1) the type of cultural heritage involved, such as world heritage or intangible cultural heritage; and (2) the substantive standards of investment law involved, such as fair and equitable treatment, full protection and security, and non-discrimination. The adoption of this double track highlighted the contribution of such awards to the development of international cultural law and international investment law respectively.[29] This Article will explore the implications of this jurisprudence for the eventual emergence of a global cultural law that will govern the interplay between private and public interests in cultural governance.

Part I of this Article highlights the main features of cultural heritage law. Part II discusses the different types of cultural heritage related disputes. Part III examines the conceptualization of investment treaty arbitration as a form of global administrative review. Finally, Part IV addresses whether investment treaty tribunals are contributing to the emergence of a *lex administrativa culturalis*.

I. TOWARDS A MULTIPOLAR CULTURAL LAW

Cultural governance has come of age. Once the domain of elitist scholars and practitioners, cultural governance—the multi-level and multi-polar regulation of cultural heritage—has emerged as a new frontier of study and

[28] This expression is borrowed from KYLA TIENHAARA, THE EXPROPRIATION OF ENVIRONMENTAL GOVERNANCE 3 (2009).

[29] *See* VADI, CULTURAL HERITAGE, *supra* note 14.

come to the forefront of legal debate.[30] Cultural governance provides a good example of legal pluralism because a multiplicity of different bodies govern cultural heritage at national, regional, and international levels.[31] While states maintain primary responsibilities in the cultural field, other actors now play an important role with regard to cultural heritage. The actors range from international administrative bodies to private actors and from national courts and tribunals to investment treaty arbitrators.

Two dualisms characterize current cultural heritage law: the distinction between public and private law and the division between domestic and international law. Most cultural heritage law scholars tend to approach cultural heritage law from a public or private international law perspective, or a public or private domestic law perspective.[32]

However, these traditional boundaries are blurry in contemporary cultural heritage law because both private and public traits and national and international dimensions constantly interact in several different ways. Private actors often file claims against state actors for the recovery of cultural property looted in times of war or for the violation of cultural entitlements before human rights courts and tribunals. Private actors may file admiralty claims to establish title to sunken vessels, upon which, in turn, states may assert public-property and sovereign-immunity defenses.[33] Foreign investors may also file claims against the host state alleging that the state's cultural policies amount to disguised discrimination or an indirect expropriation of an investment. On the other hand, art and heritage inter-state disputes are also adjudicated before the International Court of Justice ("ICJ")[34] and other international dispute settlement bodies. The cultural

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[30] *See, e.g.*, ART AND CULTURAL HERITAGE – LAW, POLICY AND PRACTICE (Barbara T. Hoffmann ed., 2006); CULTURAL HERITAGE ISSUES: THE LEGACY OF CONQUEST, COLONIZATION AND COMMERCE (James A.R. Nafziger & Ann M. Nicgorski eds., 2009).

[31] DIANA ZACHARIAS, THE INTERNATIONAL REGIME FOR THE PROTECTION OF WORLD CULTURAL AND NATURAL HERITAGE – A CONTRIBUTION TO INTERNATIONAL ADMINISTRATIVE LAW (2007).

[32] *See, e.g.*, John Henry Merryman & James A.R. Nafziger, *The Private International Law of Cultural Property in the United States*, 42 AM. J. COMP. L. SUPP. 221, 243 (1994) (adopting a private international law perspective). *But see* Wojciech W. Kowalski, *Restitution of Works of Art Pursuant to Private and Public International Law*, 288 RECUEIL DES COURS 9 (2001) (adopting both private and public international law perspectives).

[33] *See, e.g.*, James A.R. Nafziger, *The Evolving Role of Admiralty Courts in Litigation of Historic Wreck*, 44 HARV. INT'L L.J. 251 (2003).

[34] *See, e.g.*, Certain Property (Liech. v. Ger.), Judgment, 2005 I.C.J. 6 (Feb. 10); Temple of Preah Vihear (Cambodia v. Thai.), Judgment, 1962 I.C.J. 6 (June 15); Temple of Preah Vihear (Cambodia v. Thai.), Request for Interpretation of the Judgment of 15 June 1962, Request by the Kingdom of Cambodia for the Indication of Provisional Measures (Apr. 28, 2011), *available at* http://www.icj-cij.org/docket/files/151/16470.pdf.

interests at stake present a complexity that is nonexistent in other areas of the law: a mixture of private and public interests, which at times coincide (i.e., the protection of a cultural item), and at times conflict (i.e., the clash of private economic or cultural interests with collective cultural or economic entitlements).[35]

Public and private actors increasingly regulate cultural law at both the national and international levels. The United Nations Educational, Scientific and Cultural Organization ("UNESCO") plays a leading role in the making of cultural law at the international law level.[36] UNESCO gained momentum in the aftermath of World War II owing to the rising awareness "that a peace based exclusively upon the political and economic arrangements of governments" would not last long.[37] Thus, the diffusion of culture and education was deemed to be "indispensable to the dignity of man, and to constitute a sacred duty which all the nations must fulfil in a spirit of mutual assistance and concern."[38] More importantly, UNESCO aims to "advance[e], through the educational and scientific and cultural relations of the peoples of the world, the objectives of international peace and of the common welfare of mankind."[39]

UNESCO has produced an important *corpus juris culturalis*, including conventions, non-binding (but influential and morally persuasive) declarations, and guidelines which have gradually extended the scope of cultural heritage law.[40] UNESCO lawmaking has raised awareness of the importance of heritage protection and spurred the development of domestic cultural policies.[41] Such instruments provide a compelling case for the consideration of cultural concerns in policymaking and adjudication. International and national frameworks of cultural heritage law have complemented and reinforced one another. For instance, the 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property[42] inspired national

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[35] JOSEPH L. SAX, PLAYING DARTS WITH A REMBRANDT: PUBLIC AND PRIVATE RIGHTS IN CULTURAL TREASURES 197-98 (1999).

[36] Constitution of the United Nations Educational, Scientific and Cultural Organization, Nov. 16, 1945, 4 U.N.T.S. 275 (entered into force Nov. 4, 1946).

[37] *Id*. at 276.

[38] *Id*.

[39] *Id*.

[40] CRAIG FORREST, INTERNATIONAL LAW AND THE PROTECTION OF CULTURAL HERITAGE xx-xxi (2010).

[41] *See generally* 1 STANDARD-SETTING IN UNESCO: NORMATIVE ACTION IN EDUCATION, SCIENCE AND CULTURE (Abdulqawi A. Yusuf ed., 2007).

[42] Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Nov. 14, 1970, 823 U.N.T.S. 231.

legislation. On the other hand, the protection of indigenous artifacts at the national level inspired international instruments that concerned indigenous cultural heritage. Despite inevitable gaps and frequent conflicts between states and UNESCO bodies regarding the interpretation and application of UNESCO instruments, the interplay between the national and international bodies has been constant due to the almost global ratification of the UNESCO conventions.[43]

Private actors have also enacted elements of cultural law. Museums' associations at the national level, and the International Council of Museums ("ICOM")[44] at the international level, have produced self-regulatory instruments, guidelines, and texts which are now of crucial importance in grasping the complex features of certain areas of cultural law.[45] At the same time, the International Council on Monuments and Sites ("ICOMOS")[46] and other non-governmental organizations ("NGOs") have adopted a number of instruments on the protection of monuments.[47] Even regional NGOs have been active in the field of cultural law.[48]

A sort of mimesis and dialectic exists between the private and public dimensions of cultural law. There is an increasing awareness that cultural

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[43] FORREST, *supra* note 40, app. I.

[44] The International Council of Museums ("ICOM"), an organization established in 1946, "sets standards for museums in design, management and collections organization." *See ICOM Missions*, ICOM MUSEUM, http://icom.museum/the-organisation/icom-missions (last visited Aug. 18, 2014).

[45] For instance, the *ICOM Code of Ethics for Museums* is "a reference in the global museum community. It establishes minimum standards for professional practices and achievements for museums and their employees. By joining ICOM, each member is committed to respecting this code." *See ICOM Missions*, ICOM MUSEUM, http://icom.museum/the-organisation/icom-missions/ (last visited Aug. 18, 2014).

[46] ICOMOS is a non-governmental international organization dedicated to the conservation of the world's monuments and other cultural sites. Based in Paris, ICOMOS was founded in 1965. *See The Organisation*, ICOM MUSEUM, http://icom.museum/the-organisation (last visited Nov. 24, 2014).

[47] *See, e.g.*, International Council on Monuments and Sites [ICOMOS], Historic Gardens (The Florence Charter 1981), *available at* http://www.international.icomos.org/charters/gardens_e.pdf; The Venice Charter – International Charter for the Conservation and Restoration of Monuments (1964), *reprinted in* MICHAEL PETZET, INTERNATIONAL PRINCIPLES OF PRESENTATION 47 (2009), *available at* http://www.icomos.de/pdf/principles.pdf; The Athens Charter for the Restoration of Historic Monuments (1931), *reprinted in* INTERNATIONAL CHARTERS FOR CONSERVATION AND RESTORATION 31 (2d ed. 2004), *available at* http://openarchive.icomos.org/431/1/Monuments_and_Sites_1_Charters.pdf.

[48] *See, e.g.*, European Charter for the Conservation and Restoration of Traditional Ships in Operation (The Barcelona Charter) (2002), *available at* http://www.european-maritime-heritage.org/docs/Barcelona%20Charter.pdf.

resources require public intervention and the conservation and safeguarding of cultural heritage includes elements of intra- and inter-generational equity due to the existence of undeniable public interests. However, public law looks to private law to learn from its arguments and dispute-resolution mechanisms. Private funding is also needed to recover and protect cultural heritage. The privatization of some aspects of cultural heritage governance has been criticized by art historians because of the risk of overemphasizing the economic dimension of heritage.[49] Yet, the need for cooperation between the private and public sectors is particularly evident in times of economic crisis.[50]

A similar mimesis and dialectic emerges between the local and global dimensions of cultural governance. Global governance favors experts over non-experts; the relevant epistemic communities and networks consist of professionals and specialists.[51] Under global cultural governance, decision-making processes tend to be elitist and opaque and express top-down approaches.[52] Such approaches may not necessarily be responsive to local needs. Human rights bodies, which have condemned the forced eviction of local communities from heritage sites, have advocated for the need to humanize cultural heritage law.[53] Local governance may emphasize local needs that, in certain cases, may sensibly diverge from international standards.

The different approaches to the conservation of cultural heritage are reflected in the traditional debate between nationalists and internationalists in cultural heritage law.[54] While internationalists perceive cultural heritage as expressing a common human culture, wherever its place and location, nationalists perceive cultural property as part of the national cultural

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[49] *See* SALVATORE SETTIS, ITALIA S.P.A (2002).

[50] *See, e.g.*, Randy Kennedy, *Greek Antiquities, Long Fragile, Are Endangered by Austerity*, N.Y. TIMES, June 11, 2012, http://www.nytimes.com/2012/06/12/arts/design/archaeologists-say-greek-antiquities-threatened-by-austerity.html; *Italy PM Calls on Businesses to Fund Pompeii Repairs*, BBC NEWS, Mar. 4, 2014, http://www.bbc.com/news/world-europe-26457322?print=true.

[51] Martin Shapiro, *Administrative Law Unbounded: Reflections on Government and Governance*, 8 IND. J. GLOBAL LEGAL STUD. 369, 373 (2001).

[52] *Id.* at 374.

[53] Ctr. for Minority Rights Dev. (Kenya) & Minority Rights Grp. Int'l ex rel. Endorois Welfare Council v. Kenya (Endorois Decision), Afr. Comm'n Hum. & Peoples' Rights, Comm'n No. 276/03 (2009), *available at* http://www.achpr.org/communications/decision/276.03.

[54] *See* John Henry Merryman, *Two Ways of Thinking about Cultural Property Law*, 80 AM. J. INT'L L. 831, 831-32 (1986).

wealth.[55] Even assuming that relevant UNESCO conventions incorporate a mixture of both approaches, as has been persuasively argued,[56] questions remain in those cases where the two interests—internationalist and nationalist—diverge. Which interest should prevail in the management of cultural heritage sites: the interest of the locals or the interests of the international community? Oftentimes the two interests coincide. Both communities have an interest in the conservation of cultural heritage sites. However, when interests collide, national authorities (and adjudicators) face the dilemma of whether to comply with international cultural law or to fulfill their mandate according to the preferences of their constituencies. Of further concern is the question of how this collision of interests relates to foreign investments. Is there any difference between using the local public interest and a global interest as parameters in the interpretation of investment law?

II. CULTURAL GOVERNANCE AS A BATTLEFIELD

Cultural governance is a place of conflict where the political, economic, institutional, and legal interests of multiple players clash. Given that "it is the duty of governments to ensure the protection and the preservation of the cultural heritage of mankind, as much as to promote social and economic development,"[57] it may be difficult to identify the most appropriate management of cultural heritage and strike a balance between conservation goals and the practical burden that cultural policies place on some (well-meaning) owners.[58] Governing cultural phenomena in accordance with national, regional, and international law may be a daunting task for national administrations, and it may give rise to political, institutional, and economic conflicts.

Cultural heritage related conflicts of a political nature may arise at the national level when different political actors compete for making key decisions with regard to heritage sites. For instance, in Sicily, notwithstanding the obligations under the World Heritage Convention to protect and preserve the *Val di Noto* site—a fine example of Baroque art—

[55] *Id.* at 837 n.19.

[56] Raechel Anglin, Note, *The World Heritage List: Bridging the Cultural Property Nationalism-Internationalism Divide*, 20 YALE J.L. & HUMAN. 241, 243 (2008) (referencing the World Heritage Convention).

[57] UNESCO, Preservation of Cultural Property Endangered by Public or Private Works: Draft Recommendation, UNESCO Doc. 15 C/14, annex 1 (July 24, 1968).

[58] *See, e.g.*, Tad Heuer, *Living History: How Homeowners in a New Local Historic District Negotiate Their Legal Obligations*, 116 YALE L.J. 768, 819 (2007) (referring to the need of balancing "the preservation of the past, the needs of the present, and the inheritance of the future").

local authorities granted a Texan investor, Panther Oil, a concession to drill gas in the valley.[59] Because the site is considered to be in permanent danger of earthquakes and Mount Etna's eruptions, drilling is risky and could cause an environmental collapse.[60] Because a regional administrative court confirmed the mineral exploitation permits, the "Italian government declared its willingness to override Sicily's autonomy" and to terminate the project.[61] Voluntarily, Panther Oil decided to reduce the number of wells that it planned to drill in the region from twenty-one to eight and to avoid the *Val di Noto*.[62]

Cultural heritage conflicts of an economic type may arise when the relevant state authorities need to strike a reasonable balance between effective cultural heritage protections, as mandated by the relevant UNESCO conventions, and other interests, such as economic development. This necessarily requires a case-by-case assessment.[63] Arguably, the conservation of heritage sites has a relatively stable nucleus that requires core protection and limits economic activities deemed to be *ipso facto* in conflict with heritage management because those activities could alter the physical integrity of a given site.[64] For instance, mining or oil and gas development have been estimated to threaten more than one-quarter of all cultural heritage sites.[65] A prohibition against mining may also exist in places outside the perimeter of a world heritage site, if such activity could damage the site itself by way of pollution or other noxious interferences. However, moving from the core of cultural heritage protection to its periphery, conservation policies may become more nuanced and contested. When the then mayor of Florence, a world heritage site, announced a plan to forbid fast food in the historic center of the town,[66] questions arose as to

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[59] Thomas J. Puleo, *Baroque Disruptions in Val di Noto*, 100 GEOGRAPHICAL REV. 476, 487 (2010).

[60] Silvia Aloisi, *Gas War Rages in Sicilian Baroque Valley*, REUTERS, June 7, 2007, http://uk.reuters.com/assets/print?aid=UKL0713623020070607.

[61] VADI, CULTURAL HERITAGE, *supra* note 14, at 251.

[62] *Sicilian Valley Wins Battle against Gas Wells*, REUTERS, June 17, 2007, http://uk.reuters.com/assets/print?aid=UKL0713623020070607.

[63] UNESCO, Recommendation Concerning the Preservation of Cultural Property Endangered by Public or Private Works, 15th Sess., ¶ 6 (Nov. 19, 1968), http://portal.unesco.org/en/ev.php-URL_ID=13085&URL_DO=DO_TOPIC&URL_SECTION=201.html.

[64] *Id.* ¶ 8(d)-(f).

[65] Natasha Affolder, *The Private Life of Environmental Treaties*, 103 AM. J. INT'L L. 510, 513 (2009).

[66] *The Frenzy over Fast Food*, FLORENTINE (Feb. 12, 2009), http://www.theflorentine.net/articles/article-view.asp?issuetocId=4052.

the legitimacy of this regulatory change. Should world heritage sites be frozen in time or should they respond to international economic integration?

Institutional cultural heritage conflicts resulted from the emergence of supranational public administrations, such as the World Heritage Committee.[67] Conflicts may arise between these supranational organs and local administrations regarding the most appropriate way to govern world heritage sites. Heritage policy discourse is varied. Preservation policies are not uniform and rely on different assumptions as to what is worth being protected, why, and how. For instance, preservationists have long discussed whether a site is more important for reasons intrinsic to that site or because of its associative value and role in the formation of the cultural identity of a given population.[68] While the identity-focused "populists" hold that the value of specific sites lies in their role in the formation of cultural identity ("the heritage people wants"), essentialists argue that cultural goods have inherent value ("heritage is heritage").[69] These positions have created tensions among heritage scholars as to the identification of what is worth being protected, and how to protect it. For instance, in 2004, the Cologne Cathedral in Germany was on the *List of World Heritage in Danger* because of plans to erect several skyscrapers on the bank of the Rhine River.[70] The local authorities initially contested the legitimacy of the expansive interpretation of cultural heritage protection, which was endorsed by the World Heritage Committee. Reportedly, the mayor declared that "it was impossible that a city should stop all further development because it had a cathedral"[71] and that "city planning did not fall into the foreign Ministry's competences."[72] At the end of the day, however, the city of Cologne rescaled the projects and the World Heritage Committee removed the site from the *List of World Heritage in Danger*.[73] This was not the result, however, in the case of the Dresden Elbe Valley, which was taken off the *World Heritage List* because plans to build a bridge threatened the integrity of the site.[74] This conflict was analogized to a

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[67] Vadi, *Toward a* Lex Administrativa Culturalis*?*, *supra* note 19, at 8.

[68] Christopher Koziol, *Historic Preservation Ideology: A Critical Mapping of Contemporary Heritage Policy Discourse*, 1 PRESERVATION EDUC. & RES. 41, 42 (2008).

[69] *Id*.

[70] *See* Diana Zacharias, *Cologne Cathedral versus Skyscrapers – World Cultural Heritage Protection as Archetype of a Multilevel System*, 10 MAX PLANCK Y.B. U.N. L. 273, 276 (2006).

[71] *Id*. at 277.

[72] *Id*. at 279.

[73] *Id*. at 280-81.

[74] *See* Sabine von Schorlemer, *Compliance with the UNESCO World Heritage Convention: Reflections on the Elbe Valley and the Dresden Waldschlösschen Bridge*, 51

"holy war," and the federal authorities accepted the removal of Dresden from the *World Heritage List*, respecting the will of the local population.[75]

Legal cultural heritage related disputes have grown exponentially and may be classified along many different lines. First, analyzing the *dramatis personae* (the actor and defendant of a given dispute), cultural heritage disputes can be categorized as: (1) inter-state disputes; (2) private disputes; or (3) mixed disputes (involving a state and a private actor).[76] The third category, mixed disputes, reflects the fact that "individuals and non-governmental organizations (NGOs) primarily associated with . . . cultural heritage . . . play an essential role in the drama of cultural heritage law."[77]

Second, if one studies the *petitum* (object) and *causa petendi* (cause of action) of a given dispute, most cultural heritage disputes are polycentric, involving a number of legal, cultural, and political issues.[78] In most cases, such disputes involve many legitimate but conflicting interests. Cultural heritage disputes can be classified as cultural heritage disputes *stricto sensu* (in a narrow or strict sense), or cultural heritage disputes *lato sensu* (in the broad sense). Narrow cultural heritage disputes focus on the fate and authenticity of a given cultural artifact (e.g., a colonial object, or an allegedly looted artifact).[79] Other disputes deal with cultural heritage only tangentially. For instance, there are situations where the cultural object is not the *petitum* or the *causa petendi* of a given dispute, but rather an action against the cultural object is undertaken to enforce arbitral awards related to damages for dismissed foreign investments.[80] Although broad cultural heritage disputes relate to cultural heritage in an oblique or indirect fashion, due to their possible consequences for the relevant cultural item, such cases nonetheless deserve further scrutiny from a cultural law perspective as they tend to be investigated almost exclusively from the perspectives of other branches of law, such as international investment law.

GERMAN Y.B. INT'L L., 321, 327 (2008).

[75] *Id*. at 323.

[76] James A.R. Nafziger, *The Present State of Research Carried Out by the English-Speaking Section of the Centre for Studies and Research*, *in* 1 THE CULTURAL HERITAGE OF MANKIND 145, 147 (James A.R. Nafziger & Tullio Scovazzi eds., 2008).

[77] *Id.*

[78] *See generally* Alan Rau, *Mediation in Art-Related Disputes*, *in* RESOLUTION METHODS FOR ART-RELATED DISPUTES 171 (Quentin Byrne-Sutton & Marc-André Renold eds., 1999).

[79] *See, e.g.*, Republic of Austria v. Altmann, 541 U.S. 677 (2004) (involving the return of six of Gustav Klimt's paintings). For commentary, see NOUT VAN WOUDENBERG, STATE IMMUNITY AND CULTURAL OBJECTS ON LOAN (2012); Charles Brower II, Republic of Austria v. Altmann, 99 AM. J. INT'L L. 236 (2005).

[80] *See, e.g.*, VAN WOUDENBERG, *supra* note 79.

Third, concerning the *quomodo* (methods) of dispute settlement, cultural heritage disputes have been adjudicated through a variety of mechanisms, including diplomatic efforts, negotiations, mediation,[81] conciliation, arbitration,[82] and judicial proceedings.[83] Alternative dispute resolution ("ADR") mechanisms have played an increasingly important role in the settlement of art and heritage disputes. Mediation is an informal dispute settlement mechanism in which a neutral third party aids the parties in reaching an agreement.[84] Mediation can prove to be a particularly suitable mechanism in settling art and heritage related disputes. Mediation assists parties in uncovering their true interests, unbundling their concerns, and negotiating for mutual gain. Arbitration also benefits from the presence of a neutral third party, but differs from mediation in that the arbitrator has the power to impose a binding award on the parties.[85] Among the well-known advantages of arbitration in cultural heritage is its emphasis on party autonomy, which may include the possibility for the parties to delocalize the applicable substantive law (*lex causae*) and the procedural rules guiding the dispute (*lex arbitri*), to select and have expert arbitrators, and to avoid the (perceived) bias of national courts while also ensuring confidentiality.[86] ADR and judicial mechanisms are not mutually exclusive. They can reinforce one another's effectiveness. However, ADR allows for more flexible solutions, potentially preserving the parties' long-term relationship and their reputation, as well as saving costs.[87] A number of successful cases have been settled through these mechanisms.[88]

Finally, if one scrutinizes the *ubi consistam* (available fora) where disputes may be brought, it is evident that the lack of dedicated dispute settlement mechanisms at the international and regional level has caused a diaspora of the relevant disputes before a host of diverse fora ranging from the International Court of Justice to ad hoc international commissions,[89] and

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[81] *See generally* Rau, *supra* note 78.

[82] *See* Elizabeth Varner, *Arbitrating Cultural Property Disputes*, 13 CARDOZO J. CONFLICT RESOL. 477, 479 (2012).

[83] ALESSANDRO CHECHI, THE SETTLEMENT OF INTERNATIONAL CULTURAL HERITAGE DISPUTES 2 (2014).

[84] *Id.* at 169.

[85] *Id*. at 181.

[86] *Id*. at 139.

[87] *Id.* at 169.

[88] *See generally id*.

[89] See, for example, the Eritrea–Ethiopia Claims Commission, established by the Peace Agreement signed in Algiers on December 12, 2000 between the governments of the State of Eritrea and the Federal Democratic Republic of Ethiopia (determining, inter alia, Eritrea's claim concerning the alleged intentional destruction by the Ethiopian military of the *Stela of*

from national courts and tribunals to investment arbitral tribunals. There is a certain degree of forum shopping in the selection of a tribunal, as some litigants prefer to have their case heard in the court that they believe is most likely to provide a favorable outcome. Against this background, a number of culture-related cases have been adjudicated before international economic fora, including investment arbitral tribunals. International disputes relating to the interplay between cultural heritage and economic integration require balancing the legitimate cultural policies of a state and the legitimate economic interests of investors.

III. INVESTMENT TREATY ARBITRATION AS A FORM OF GLOBAL ADMINISTRATIVE REVIEW

Investment treaties grant foreign investors direct access to investment treaty arbitration.[90] Many investment disputes arise from the host state's exertion of public authority. Arbitral tribunals are given the power to review and control this exercise of public authority by settling essentially regulatory disputes.[91] Investors can claim that a regulatory measure by the host state has affected their investment in breach of the relevant investment treaty provisions.

According to some authors, the legal framework provided by the network of investment treaties gives substance to the concept of global administrative law, or *lex administrativa communis*,[92] defined as "[the] process of a global homologation of principles of administrative, comparative and international law under different legal systems."[93] International administrative law is an alternative "dualistic system of international law in which countries [may] agree on apolitical matters (e.g., international public health and epidemics, defense of international historical monuments, or artwork) while maintaining intellectual opposition on other issues."[94] International administrative law refers to the former category in which common agreement can be more easily reached.

As Gus Van Harten and Martin Loughlin explain, investment treaty

Matara). *Eritrea-Ethiopia Claims Commission*, PCA-CAP.ORG, http://www.pca-cpa.org/showpage.asp?pag_id=1151 (last visited Nov. 4, 2014).

[90] Barcelona Traction, Light and Power Co. (Belg. v. Spain), Judgment, 1970 I.C.J. 3, ¶¶ 78-79 (Feb. 5).

[91] Vadi, *Toward a* Lex Administrativa Culturalis*?*, *supra* note 19, at 3.

[92] *See generally* GLOBAL ADMINISTRATIVE LAW: TOWARDS A LEX ADMINISTRATIVA (Javier Robalino-Orellana & Jaime Rodríguez-Arana Muñoz eds., 2010).

[93] *Id*. at xvii.

[94] Boris N. Mamlyuk & Ugo Mattei, *Comparative International Law*, 36 BROOK. J. INT'L L. 385, 402 (2011) (referring to the work of E.A. KOROVIN, SOVREMENNOE MEZHDUNARODNOE PRAVO [CONTEMPORARY INTERNATIONAL PUBLIC LAW] (1926)).

arbitration "may in fact offer the only exemplar of global administrative law, strictly construed, yet to have emerged."[95] In fact, investment treaty arbitration may be conceptualized as a species of global administrative review.[96] First, arbitral tribunals have an international character because their authority derives from treaties. Second, arbitral tribunals, like administrative courts, settle disputes arising from the exercise of public authority.[97] Third, the jurisdiction of arbitral tribunals extends to legal disputes.[98] Finally, arbitrators borrow key administrative principles that guide the conduct of public administrations, such as reasonableness, proportionality, procedural fairness, and efficiency as useful parameters for evaluating the conduct of states and assessing their compliance with relevant investment treaties.[99]

However, the conceptualization of investment treaty arbitration as a form of global administrative law may prove to be fragile because "the defining features of global administrative law are rather fluid."[100] Without a clear understanding of what is meant by global administrative law, any attempt to classify investment arbitration as such remains a theoretical exercise. International law does not have a centralized system of administration; rather, states retain their administrative functions.[101] Furthermore, "foreign investments are usually governed by a series of norms which are not limited to (national) administrative law, but include international treaties, customs, [and] general principles of law. . . ."[102] Arbitral tribunals have also expressly rejected being characterized as administrative courts. For instance, in *Generation Ukraine v. Ukraine*, the arbitral tribunal clarified that it was an international tribunal, applying international law to a question of international responsibility.[103] Other cases that confirm this distinction

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[95] Gus Van Harten & Martin Loughlin, *Investment Treaty Arbitration as a Species of Global Administrative Law*, 17 EUR. J. INT'L L. 121, 122 (2006).

[96] *Id.* at 123.

[97] Stephan Schill, *Crafting the International Economic Order: The Public Function of Investment Treaty Arbitration and Its Significance for the Role of the Arbitrator*, 23 LEIDEN J. INT'L L. 401, 413 (2010).

[98] Convention on the Settlement of Investment Disputes between States and Nationals of Other States art. 25, Mar. 18, 1965, 17 U.S.T. 1270 (1966) [hereinafter ICSID Convention].

[99] Van Harten & Loughlinn, *supra* note 95, at 146.

[100] *Id*. at 122.

[101] *Id.* at 146.

[102] VADI, PUBLIC HEALTH, *supra* note 17, at 60.

[103] Generation Ukr., Inc. v. Ukr., ICSID Case No. ARB/00/09, ¶¶ 20.29-20.33, 24.6 (Sept. 16, 2003), 44 I.L.M. 404 (2005).

question the existence of a global administrative law.[104]

Finally, the fact that today international investment treaty arbitration addresses a diagonal relationship between the host state and foreign investors reflects an evolution which is present in other sectors of international law, such as human rights law, and not unique to administrative review. Therefore, if this mechanism parallels the local judicial review of the courts of the host state, it should not be perceived as a substitute of the same, but as a different and additional venue expressly provided for by international investment treaties. The use of the arbitration model is aimed at depoliticizing disputes, avoiding potential national court bias, and ensuring confidentiality and effective dispute resolution.[105] Historically, foreigners have been considered vulnerable in societies—easy objects of reprisal without vote or voice in local political affairs.[106] Against this background, investment treaties aim to establish a level playing field for foreign investors and shield against discrimination and mistreatment by the host state.[107] Yet, the question remains as to whether investment treaty arbitration has become a "sword," rather than a "shield," for protecting foreign investments.[108]

From the analysis in Part III, one might conclude that international investment arbitration incorporates some elements of global administrative review (i.e., the review of administrative acts), but lacks others.[109] The administrative acts that are under review in international investment arbitration, however, remain in the national sphere.[110]

IV. CULTURAL GOVERNANCE BY ARBITRAL TRIBUNALS: THE MAKING OF A *LEX ADMINISTRATIVA CULTURALIS*

In its multifaceted and protean aspects, the governance of cultural

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[104] Jorge A. Barraguirre, *Los Tratados Bilaterales de Inversión (TBIs) y el Convenio CIADI – La Evaporación del Derecho Administrativo Doméstico?*, 3 RES. PUBLICA ARG. 107, 114 (2007).

[105] *See* Ibrahim F.I. Shihata, *Towards a Greater Depoliticization of Investment Disputes: The Role of ICSID and MIGA*, 1 AM. U.J. INT'L L. & POL'Y 97, 103 (1986).

[106] *See* JAN PAULSSON, DENIAL OF JUSTICE IN INTERNATIONAL LAW 14 (2005); Francesco Francioni, *Access to Justice, Denial of Justice and International Investment Law*, 20 EUR. J. INT'L L. 729, 730 (2009).

[107] *See* Ray C. Jones, Commentary, *NAFTA Chapter 11 Investor-to-State Dispute Resolution: A Shield to Be Embraced or a Sword to Be Feared?*, 2002 BYU L. REV. 527, 546 (2002).

[108] *See id.* at 542.

[109] For a similar conclusion, see Anthea Roberts, *Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System*, 107 AM. J. INT'L L. 45, 63 (2013).

[110] *Id.*

heritage can (and has) affect(ed) the economic interests of a number of stakeholders, including foreign investors.[111] Construction, and similar economic activities, can be delayed or forbidden because of archaeological excavations.[112] Some governments may provide for the compulsory acquisition, through purchase or expropriation, of important cultural property, thus potentially affecting the economic interests of private actors, including foreign investors.[113] In addition, excessive heritage protection may put an uneven burden on the economic interests of private parties.[114] In fact, foreign investors have brought a number of heritage related claims before investment treaty tribunals.[115] This Part questions whether the adjudication of cultural heritage related to investment disputes contributes to the emergence of a *lex administrativa culturalis*, i.e., a branch of transnational law relating to the administration of cultural heritage and whether arbitral tribunals impinge on states' authority over cultural governance.

Over the past few decades, an increasing number of arbitral awards relating to cultural heritage have been rendered.[116] Have these awards contributed to the emergence of customary law or general principles of law, i.e., a *lex administrativa culturalis*? If so, has this *lex administrativa culturalis* progressively evolved into a transnational legal order that is completely autonomous from national and international legal orders, or is it intertwined with domestic and international law? Finally, how does this *lex administrativa culturalis*, a regulatory framework that is based on public law, interact with private autonomy?

Lex administrativa culturalis refers to adjudicator-made cultural law—a body of jurisprudence rendered by investment treaty arbitral tribunals that adjudicate some cultural heritage issues.[117] The argument could be made that the existence of a *lex administrativa culturalis* is a purely intellectual exercise that is of limited significance to local communities faced with cultural heritage conflicts and the international community in general.[118] At best, a *lex administrativa culturalis* may be distilled from relevant case

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[111] Valentina Vadi, *Culture Clash? World Heritage and Investors' Rights in International Investment Law and Arbitration*, 28 ICSID REV. – FOREIGN INVESTMENT L.J. 123, 123-24 (2013) [hereinafter Vadi, *Culture Clash?*].

[112] *See, e.g.*, S. Pac. Prop. (Middle East) Ltd. v. Arab Republic of Egypt, ICSID Case No. ARB/84/3, Award (May 20, 1992), 32 I.L.M. 933, 937 (1993).

[113] Vadi, *Culture Clash?*, *supra* note 111, at 130-31.

[114] *Id.* at 123-24.

[115] *Id.* at 133-36.

[116] VADI, CULTURAL HERITAGE, *supra* note 14, at 93.

[117] *Id.* at 294.

[118] *Id.*

law.[119] At worst, it is a theoretical construct with no practical impact.[120]

Because no apposite cultural heritage courts exist, the jurisprudence of investment arbitral tribunals can, and does, impact cultural heritage.[121] This jurisprudence may serve as an unexpected bridge between different legal regimes, and as an enforcement mechanism of international cultural law.[122] For instance, arbitral tribunals have settled disputes concerning investments near the pyramids in Egypt and other world heritage sites.[123] Arbitrators have also settled disputes relating to investments in lands that are sacred to indigenous peoples,[124] or in areas that are related to indigenous peoples' intangible cultural heritage.[125] This jurisprudence provides some elements from which customary law, and general principles of international law, may be drawn. These underemphasized cases open the door to further questions about the objectives and limits of international investment law, the unity or fragmentation of international law, and international cultural law's effectiveness.

Determining the existence of a *lex administrativa culturalis*, or the emergence of general principles of international law that require the protection of cultural heritage in times of peace, is a theoretical endeavor with significant practical implications.[126] Although a number of scholars have studied the protection of cultural heritage in wartime,[127] the existence of a *lex administrativa culturalis* in peacetime has not received similar attention. In international law, the distinction between wartime and peacetime is relevant to determining the applicability of certain legal norms.[128] Ascertaining the existence of general principles that require the protection of cultural heritage, even in peacetime, would be significant in

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[119] The choice whether or not to create an international cultural heritage court is a complex institutional choice that states confront. *See generally* Suzanne Katzenstein, *In the Shadow of Crisis: The Creation of International Courts in the Twentieth Century*, 55 HARV. INT'L L.J. 151 (2014) (discussing the creation of international courts and tribunals).

[120] *Id.*

[121] VADI, CULTURAL HERITAGE, *supra* note 14, at 240.

[122] *See, e.g.*, Vadi, *Culture Clash?*, *supra* note 111, at 126.

[123] *See id*. at 133-34.

[124] *See* Glamis Gold Ltd. v. United States, ICSID, Award, ¶ 834 (June 8, 2009), 48 I.L.M. 1035.

[125] *See* Grand River Enter. Six Nations Ltd. v. United States, UNCITRAL/NAFTA Chapter 11, Award, (Jan. 12, 2011).

[126] Vadi, *Toward a* Lex Administrativa Culturalis*?*, *supra* note 19, at 2.

[127] *See, e.g.*, ROGER O'KEEFE, THE PROTECTION OF CULTURAL PROPERTY IN ARMED CONFLICT (2006).

[128] Valentina Vadi, *War, Memory, and Culture: The Uncertain Legal Status of Historic Sunken Warships Under International Law*, 37 TUL. MAR. L.J. 333, 336 n.20 (2012-2013).

the development of customary international law. Such principles would bind states without regard to their adhesion to certain treaties,[129] facilitating the consideration of cultural heritage in the adjudication of international disputes.[130] This in turn would assist adjudicators in settling cultural heritage related disputes, thus enhancing the predictability of those adjudicators' decisions and reinforcing the perceived legitimacy of their rulings.[131] Additionally, the scrutiny of certain arbitrations may aid in ascertaining whether the current legal framework provides adequate protection to cultural heritage or whether amendments may be advisable. More importantly, the question remains as to whether arbitral tribunals are the best fora for balancing the public and private interests in cultural heritage governance as their mandate derives from investment treaties rather than cultural treaties.

This Part is divided into three sections. Part IV.A examines the ways in which a *lex administrativa culturalis* is distinct from or comparable to other legal frameworks (e.g., the *lex mercatoria*). Part IV.B investigates whether arbitrators contribute to the coalescence of a *lex administrativa culturalis*. Finally, Part IV.C illustrates how the concept of a *lex administrativa culturalis* assists in understanding the interplay between cultural interests and investor rights. Specifically, Part IV.C elaborates on the concepts of cultural governance and good cultural governance.

A. Merchants, Sailors, Investors, and Athletes: Commonalities and Differences

The term *lex administrativa culturalis* brings to mind other well-known formulations: *lex maritima*,[132] *lex mercatoria*,[133] *lex mercatoria publica*,[134]

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[129] VADI, CULTURAL HERITAGE, *supra* note 14, at 295.

[130] *See* Vadi, *Culture Clash?*, *supra* note 111, at 131.

[131] Valentina Vadi, *When Cultures Collide: Foreign Direct Investment, Natural Resources, Indigenous Heritage in International Investment Law*, 42 COLUM. HUM. RTS. L. REV. 797, 883 (2011) [hereinafter Vadi, *When Cultures Collide*].

[132] *See, e.g.*, William Tetley, *Maritime Law as a Mixed Legal System (With Particular Reference to the Distinctive Nature of American Maritime Law, Which Benefits from Both Its Civil and Common Law Heritages)*, 23 TUL. MAR. L.J. 317, 319-21 (1999); William Tetley, *The General Maritime Law – The* Lex Maritima, 20 SYRACUSE J. INT'L. L. & COM. 105, 109 (1994) [hereinafter Tetley, *The General Maritime Law*].

[133] *See, e.g.*, Philippe Kahn, *La* lex mercatoria *et son destin* [*The* lex mercatoria *and Its Fate*], *in* L'ACTUALITÉ DE LA PENSÉE DE BERTHOLD GOLDMAN, DROIT COMMERCIAL, INTERNATIONAL ET EUROPÉEN [THE CURRENT THOUGHT OF BERTHOLD GOLDMAN, INTERNATIONAL AND EUROPEAN COMMERCIAL LAW] 25 (Philippe Fouchard & Louis Vogel eds., 2004).

[134] Stephan Schill, *Transnational Private-Public Arbitration as Global Regulatory*

lex petrolea,[135] and *lex sportiva*.[136] This section briefly examines each of these concepts and compares them to the idea of a *lex administrativa culturalis*. Additionally, a number of formulations have been used to indicate additional emerging areas of law, including *lex pacificatoria*, *lex electronica*, and *lex constructionis*.[137] A more detailed description of these newer formulations is not within the scope of this Article.

1. *Lex Maritima*

The *lex maritima*, or general maritime law, has been defined as the "oldest form of *Jus Gentium* or the law of nations still substantially extant and practiced today."[138] The rules governing shipping and maritime trade have developed transnationally over a number of centuries.[139] Those rules were based on the practices and customs of merchants and were developed by admiralty or merchant courts set up along trade routes.[140] These courts, irrespective of nationality, "covered the same kinds of disputes and

Governance: Charting and Codifying the Lex Mercatoria Publica, MAX PLANCK INST. FOR COMPARATIVE PUB. LAW AND INT'L LAW, http://www.mpil.de/en/pub/organization/lex_mp.cfm (last visited Jan. 28, 2015).

[135] *See generally* R. Doak Bishop, *International Arbitration of Petroleum Disputes: The Development of a* Lex Petrolea, XXIII Y.B. COM. ARB. 1131 (1998); Thomas C.C. Childs, *Update on* Lex Petrolea*: The Continuing Development of Customary Law Relating to International Oil and Gas Exploration and Production*, 4 J. WORLD ENERGY L. & BUS. 214, 214, 259 (2011).

[136] *See, e.g.*, FRANCK LATTY, LA LEX SPORTIVA, RECHERCHE SUR LE DROIT TRANSNATIONAL [THE LEX SPORTIVA, RESEARCH ON TRANSNATIONAL LAW] (2007); LEX SPORTIVA. WHAT IS SPORTS LAW? (Robert C.R. Siekman & Janwillem Soek eds., 2012); Lorenzo Casini, *The Making of a* Lex Sportiva *by the Court of Arbitration for Sport*, 12 GER. L.J. 1317, 1319 (2011); Antoine Duval, Lex Sportiva*: A Playground for Transnational Law*, 19 EUR. L.J. 822, 822-42 (2013).

[137] The *lex pacificatoria* refers to the "dialectical interaction of international law and the practice of peacemakers." *See* Christine Bell, *Of* Jus Post Bellum *and* Lex Pacificatoria *– What's in a Name?*, *in* IUS POST BELLUM: MAPPING THE NORMATIVE FOUNDATIONS 181, 182 (Carsten Stahn, Jennifer S. Easterday & Jens Iverson eds., 2014). The *lex electronica* or cyber law governs Internet activities. *See* Pierre Trudel, *La* Lex Electronica, *in* LE DROIT SAISI PAR LA MONDIALISATION 1, 2 (Charles-Albert Morand ed., 2001). The *lex constructionis* includes the application of international rules of construction contracts in arbitration. *See, e.g.*, Camilo Armando Franco Leguízamo, *De la* Lex Mercatoria *a la* Lex Constructionis, 6 REVIST@ E–MERCATORIA 1, 17-19 (2007); Charles Molineaux, *Moving Toward a Construction* Lex Mercatoria*, A* Lex Constructionis 14 J. INT'L ARB. 55, 64 (1997).

[138] Kevin J. Christensen, *Of Comity: Aerospatiale as* Lex Maritima, 2 LOY. MAR. L.J. 1, 1 (2003).

[139] *Id.*

[140] *Id.* at 2-3.

exercised the same kind of international jurisdiction."[141] The judge-made *lex maritima*, which arguably developed parallel to the *lex mercatoria*, fused national law and current international conventions.[142] Today, maritime arbitration remains as the principal choice for settling shipping disputes and is developing an *ius commune* which is evident in a number of reported awards.[143] One common feature of the *lex maritima* and the *lex administrativa culturalis* is that they are both enforced by specialized bodies that were established to cope with the needs of traders and investors. Yet they differ in that *lex maritima* refers to a private law system that regulates shipping between private actors, and *lex administrativa culturalis* regulates the interplay between foreign investors and the host state.

2. *Lex Mercatoria*

Historically, the term *lex mercatoria*, or merchant law, refers to the body of commercial rules, customs, and best practices used by merchants during the medieval and Renaissance period, enforced through a system of merchant courts along important trade routes.[144] Some authors now contend that a new merchant law has arisen to facilitate the needs of international commercial actors.[145] The existence of a modern *lex mercatoria* has been challenged on the ground that private contracts remain governed by national laws.[146] Yet, some scholars contend that this "'new new lex mercatoria'" has moved "from an amorphous and flexible soft law to an established system of law with codified legal rules (first and foremost the UNIDROIT Principles of International and Commercial Law) and strongly institutionalized court-like international arbitration."[147] Whether the current *lex mercatoria* may truly be compared to the medieval *lex*

[141] *Id.* at 1 n.6.

[142] *See* Tetley, *The General Maritime Law*, *supra* note 132, 133-34.

[143] *See* Buffy D. Lord, *Dispute Resolution on the High Seas: Aspects of Maritime Arbitration*, 8 OCEAN & COASTAL L.J. 71, 72 (2002); Tetley, *The General Maritime Law*, *supra* note 132, at 107.

[144] Ralph Michaels, *The True* Lex Mercatoria*: Law beyond the State*, 14 IND. J. GLOBAL LEGAL STUD. 447, 448 (2007).

[145] Gilles Cuniberti, *Three Theories of* Lex Mercatoria, 52 COLUM. J. TRANSNAT'L. L. 369, 371 (2013). For pioneering work, see Berthold Goldman, *La* lex mercatoria *dans les contrats et l'arbitrage internationaux: réalité et perspectives* [*The* Lex Mercatoria *in International Contracts and Arbitration: Reality and Prospects*], 106 J. DROIT INT'L 475, 499 (1979).

[146] *See, e.g.*, Symeon Symeonides, *Party Autonomy and Private-Law Making in Private International Law: The* Lex Mercatoria *that Isn't*, *in* LIBER AMICORUM K. KERAMEUS 1379 (2009).

[147] Michaels, *supra* note 144, at 448 (citations omitted).

mercatoria remains disputed.[148] Much like the *lex maritima*, and the *lex administrativa culturalis*, the *lex mercatoria* in both its historical and current formulations is also enforced by specialized bodies that have been established for the benefit of traders and investors. The *lex mercatoria* differs from the *lex administrativa culturalis* in that the former represents a private legal system that regulates commerce between private actors. The *lex administrativa culturalis*, on the other hand, governs interactions between foreign investors and the host state.[149]

3. *Lex Mercatoria Publica*

The *lex mercatoria publica* is an innovative concept developed by Stephan Schill to examine "the rising phenomenon of transnational arbitrations between private economic actors and public law bodies (private-public arbitrations) as a mechanism of global regulatory governance."[150] Schill "hypothesizes that arbitrators themselves exercise public authority, mainly in two regards: first, by reviewing government acts as to their legality, and second, by incrementally making the rules that govern public-private relations."[151] How does the *lex administrativa culturalis* relate to this new *lex mercatoria publica* concept? Both fields are characterized by the prominence of private actors in the global arena and by internationalized and privatized dispute settlement mechanisms. Additionally, both raise important questions with regard to the legitimacy of the investor-state arbitration. As Schill points out, there is a risk that arbitrators "redefine through their dispute settlement activity the relationship between private rights and public interests and bypass public policy choices made by democratically elected public authorities."[152] The principal difference between the two concepts is that the *lex administrativa culturalis* is more specific in that it concerns those arbitral awards that relate to cultural heritage. One could even argue that the *lex administrativa culturalis* is but a part of the *lex mercatoria publica*. In fact, both are "means by which international law harnesses and guides national administrative" decisions.[153] At the same time, however, they raise important concerns of legitimacy.

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[148] Cuniberti, *supra* note 145, at 379.

[149] Vadi, *Toward a* Lex Administrativa Culturalis*?*, *supra* note 19, at 3.

[150] Schill, *supra* note 134.

[151] *Id.*

[152] *Id.*

[153] Joel P. Trachtman, *International Legal Control of Domestic Administrative Action*, 17 J. INT'L ECON. L. 753, 753 (2014).

4. *Lex Petrolea*

The expression *lex petrolea* was used by the state party in the *Aminoil* arbitration[154] to refer to a set of awards that stemmed from a series of nationalizations of oil concessions in the 1970s.[155] Although those awards did not embody "a mature set of legal regulations," they constituted "the beginnings of a *lex petrolea*" to govern the international petroleum industry.[156] More recent awards "address a sufficiently wide range of issues to create a '*lex petrolea*' or customary law comprising legal rules adapted to the industry's nature and specificities."[157] Like *lex petrolea*, the *lex administrativa culturalis* develops through arbitral awards in investment treaty arbitrations, and reflects the balance between public and private interests in the administration of limited resources, such as cultural assets. It is not a coincidence that art and cultural heritage have been defined as the "oil" of some countries in emphasizing the associated benefits that are derived from the good governance of cultural resources in terms of economic growth and societal wellbeing.[158] Depending on the applicable law, both *lex petrolea* and *lex administrativa culturalis* may incorporate elements of national and international law.[159] Yet, the two differ in their objectives. Furthermore, while the adjudication of oil-related disputes provides a specific, direct cause of action in investment arbitration, cultural heritage is often involved indirectly in investment disputes.

5. *Lex Sportiva*

Lex sportiva refers to judge-made law developed by the Court of Arbitration for Sport ("CAS").[160] The CAS is a highly specialized forum

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[154] Gov't of the State of Kuwait v. Am. Indep. Oil Co., 21 I.L.M. 976 (1982).

[155] *Id.*

[156] Bishop, *supra* note 135, at 1131.

[157] Childs, *supra* note 135, at 259.

[158] Fiona Ehlers, *Temple for Rent: Italy Hopes Sponsoring Can Save Cultural Treasures*, SPIEGEL, Apr. 18, 2012, http://www.spiegel.de/international/zeitgeist/italy-turns-to-sponsors-to-save-its-cultural-sites-a-828256.html ("Culture is Italy's natural resource, almost like oil for the Middle East."); *see also Who pays the Bill for Italy's Cultural Heritage?*, EURONEWS, Feb. 1, 2013, http://www.euronews.com/2013/02/01/who-pays-the-bill-for-italy-s-cultural-heritage ("Italy has no natural oil wealth but an [sic] historical and cultural resource fashioned through 28 centuries of an unbroken civilisation.").

[159] In some investment arbitrations, the applicable law is the law of the host state; in others, it is that of the host state and other applicable rules of international law. *See, e.g.*, International Bank for Reconstruction and Development, Convention on the Settlement of Disputes Between States and Nationals of Other States art. 42, June 10, 1966, 17 U.S.T. 1270.

[160] Louise Reilly, *Introduction to the Court of Arbitration for Sport (CAS) and the Role*

where sport-related disputes "[may] be heard and decided, quickly and inexpensively, according to a flexible procedure."[161] CAS jurisprudence includes general principles of sports law,[162] such as good governance, procedural fairness, and equitable treatment.[163] The *lex sportiva* constitutes "a transnational autonomous private order . . . created by international sporting federations [on] a . . . contractual basis[;] and its legitimacy comes from voluntary agreement or submission to the jurisdiction of sporting federations by athletes and others who come under its jurisdiction."[164] *Lex administrativa culturalis* and *lex sportiva* have a few commonalities. Both are developed by highly specialized arbitral tribunals. Additionally, both treaty arbitral tribunals and "CAS panels rely heavily on previous arbitral awards in reaching their decisions."[165] Both bodies of jurisprudence have also raised certain concerns with regard to their human rights implications.[166] Further, overlap between *lex sportiva* and international investment law may exist where certain activities of sports federations are deemed to be "investments."[167] However, there are important differences between the *lex sportiva* and the *lex administrativa culturalis*: the *lex sportiva* is a purely private order, while investment treaty arbitration has

of National Courts in International Sports Disputes, 2012 J. DISP. RESOL. 63, 75 (2012).

[161] *Id.* at 63.

[162] Ken Foster, Lex Sportiva *and* Lex Ludica*: The Court of Arbitration for Sport's Jurisprudence*, 3 ENT. & SPORTS L.J. 1 (2006).

[163] *Id.*

[164] *Id.* at 2.

[165] Although there is no rule of binding precedent in international law, arbitral tribunals demonstrate a consistent deference to prior awards, tending to follow prior jurisprudence. With regard to CAS panels, see, e.g., Annie Bersagel, *Is There a Stare Decisis Doctrine in the Court of Arbitration for Sport?*, 12 PEPP. DISP. RESOL. L.J. 189, 189 (2012). With regard to investment treaty tribunals, see, e.g., Andrea K. Bjorklund, *Investment Treaty Arbitral Decisions as Jurisprudence Constante*, *in* INTERNATIONAL ECONOMIC LAW: THE STATE AND FUTURE OF THE DISCIPLINE 265 (Colin Picker, Isabella Bunn & Douglas W. Arner eds., 2008); Gabrielle Kaufmann-Kohler, *Arbitral Precedent: Dream, Necessity or Excuse?*, 23 ARB. INT'L 357, 364 (2007).

[166] Clara Reiner & Christoph Schreuer, *Human Rights and International Investment Arbitration*, *in* HUMAN RIGHTS IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION 82 (Pierre-Marie Dupuy, Francesco Francioni & Ernst-Ulrich Petersmann eds., 2008); James A.R. Nafziger, Lex Sportiva, INT'L SPORTS L.J. 3, 3, 14 (2004).

[167] *See* Franck Latty, *Compétition sportive et droit des investissements. Quelques élucubrations juridiques à l'approche de la Coupe du monde de football au Brésil et des Jeux olympiques de Rio de Janeiro*, 1 VI ANUÁRIO BRASILEIRO DE DIREITO INTERNACIONAL [BRAZILIAN Y.B. INT'L LAW] 149-69 (2011); Robert A. Schmoll, Note, *NAFTA Chapter 11 and Professional Sports in Canada*, 36 VAND. J. TRANSNAT'L L. 1027 (2003).

public law features.[168] Furthermore, while the *lex sportiva* seems to have developed relatively autonomous rules, and the jurisdiction of the CAS is based on contract, the *lex administrativa culturalis* is a creature of international law in which international treaties establish investment arbitral tribunals.[169]

B. The Makers of a Lex Administrativa Culturalis

This section explores the identities of investment arbitrators and their role in investment arbitration. In investor-state arbitration, the parties to the dispute select a single or uneven number of arbitrator(s).[170] Arbitrators are required to be neutral and impartial.[171] Although "[t]he rationale underlying international judicial appointments remains mostly implicit in both the legal and political science literatures,"[172] sociological factors matter when one scrutinizes whether the parties take advantage of the freedom offered to them, and how.[173] Parties perceive the selection of their own arbitrator as an advantage.[174]

In general terms, arbitrators are usually experts in international law, international trade, or dispute resolution.[175] For instance, NAFTA "[p]anelists are chosen from rosters of experts established by the Parties in

[168] *But see* Carmen Pérez González, *International Sports Law and the Fight Against Doping: An Analysis from an International Human Rights Law Perspective* 2, 15 (Eur. Soc'y Int'l Law, 10th Anniversary Conference, Vienna, Conference Paper No. 5/2014, 2014), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2546141 (stressing the need for "the application of the fundamental principles of public law" to sports activity).

[169] *See generally* Nafziger, *supra* note 166; Vadi, *Toward a* Lex Administrativa Culturalis*?*, *supra* note 19.

[170] ICSID Convention, *supra* note 98, art. 37. For commentary, see Antonio Parra, *The Development of the Regulations and Rules of the International Centre for the Settlement of Investment Disputes*, 41 INT'L L. 47 (2007).

[171] ICSID Convention, *supra* note 98, art. 14.

[172] Eric Voeten, *The Politics of International Judicial Appointments*, 9 CHI. J. INT'L L. 387, 391 (2008-2009).

[173] Aleksander Goldštajn, *Choice of International Arbitrators, Arbitral Tribunals and Centres: Legal and Sociological Aspects*, *in* ESSAYS IN INTERNATIONAL COMMERCIAL ARBITRATION 31 (Peter Šarčević, ed., 1989).

[174] *See* William W. Park, *Arbitrator Integrity*, *in* THE BACKLASH AGAINST INVESTMENT ARBITRATION: PERCEPTIONS AND REALITY 189-251 (Michael Waibel, Asha Kaushal, Kyo-Hwa Liz Chung & Claire Balchin eds., 2010).

[175] Valentina Vadi, *Socio-Legal Perspectives on the Adjudication of Cultural Diversity Disputes in International Economic Disputes* 17 (Oñati Int'l Inst. for the Sociology of Law, Oñati Socio-Legal Series, Working Paper No. 4, 2011) [hereinafter Vadi, *Socio-Legal Perspectives*].

each NAFTA country."[176] Panelists must have good character, be objective and reliable, and have sound judgment and general familiarity with international trade law.[177] The majority of the members of a panel, including the Chair, must be lawyers,"[178] albeit non-lawyers, including two architects, have been appointed to a few tribunals.[179] Although there is no requirement for arbitrators to have experience that is relevant to the particular subject matter of the dispute, a legal background is common among investment arbitrators.[180] "Expertise in public international law, or constitutional and administrative law, [as well as commercial law,] is a common feature in the arbitrator's profile."[181] Indeed, most arbitrators have been professors of public international law or administrative law, or judges in other international *fora*, including the ICJ and regional human rights courts.[182] This feature is of relevance because it may informally promote the coherence of international law.[183] Arbitrators tend to be a relatively homogenous group.[184] Usually, they are "exceptionally talented

[176] NAFTA Secretariat, *Frequently Asked Questions* (May 11, 2014), https://www.nafta-sec-alena.org/Home/Resources/Frequently-Asked-Questions.

[177] *Id.*

[178] *Id.*

[179] Sergio Puig, *Social Capital in the Arbitration Market*, 25 EUR. J. INT'L L. 387, 397 (2014) ("While mostly lawyers act as arbitrators, non-lawyers, including two architects, two maritime experts, and one economist, have been appointed in a few instances.").

[180] José Augusto Fontoura Costa, *Comparing WTO Panelists and ICSID Arbitrators: The Creation of International Legal Fields* 15 (Oñati Int'l Inst. for the Sociology of Law, Oñati Socio-Legal Series, Working Paper No. 4, 2011) ("Virtually all ICSID arbitrators and *ad hoc* committee members have some legal background, since only 0.4% of the whole population is of individuals who had not at least studied law.").

[181] Vadi, *Socio-Legal Perspectives*, *supra* note 175, at 17; *see* Stephan Schill, *W(h)ither Fragmentation? On the Literature and Sociology of International Investment Law*, 22 EUR. J. INT'L LAW 875, 888 (2011) ("[I]nternational investment law is . . . characterized by . . . a division of epistemic communities along different lines, namely those joining the field from private commercial law and arbitration, and those coming from public international law and inter-state dispute settlement.").

[182] Schill, *supra* note 181, at 889 ("[T]he legitimating discourse is centered on the image of arbitrators who are highly technically prepared, who have outstanding careers as professors and lawyers, though sometimes also having some former experience in public affairs.").

[183] Valentina Vadi, *Critical Comparisons: The Role of Comparative Law in Investment Treaty Arbitration*, 39 DENV. J. INT'L L. & POL'Y 67, 88 (2010).

[184] Authors have pointed out the inadequate representation of developing countries. Michael Weibel et al., *The Backlash against Investment Arbitration: Perceptions and Reality*, *in* THE BLACKLASH AGAINST INVESTMENT ARBITRATION: PERCEPTIONS AND REALITY xl (Michael Weibel et al. eds., 2010).

individuals [who] speak multiple languages"[185] and have studied at prestigious universities,[186] exercised the legal profession, or taught in two or more jurisdictions and are therefore exposed to more than one legal culture.[187] The fact that these arbitrators are not rooted in a single country also makes them less susceptible to national influences.[188]

Some studies have analyzed arbitrators' judicial patterns through an economic lens, theorizing that as utility maximizers, arbitrators may have an economic incentive to rule in favor of prospective claimants (i.e., foreign companies) to "increase their chances of reappointment in future disputes. . . ."[189] To counter the appearance of bias, some authors have proposed the establishment of a World Investment Court,[190] or that every arbitrator "should be chosen jointly or selected by a neutral body."[191] Nonetheless, recent empirical studies based on statistical analysis have shown "no tendency [of] any group of arbitrators . . . to rule in favour of investors."[192] Authors have stressed that the arbitrators' valuable professional reputation is a key incentive for them to be impartial.[193]

Critical theorists suggest that arbitration is a "technocratic mechanism of dispute settlement."[194] Accordingly, the internationalization of given disputes would constitute a form of imperialism where transnational elites support globalization and disempower national governance.[195] This criticism is frequently brought against international dispute settlement mechanisms. The internationalization of given disputes, however, does not necessarily entail a disempowerment of the state: it can also reinforce its

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[185] Catherine Rogers, *The Vocation of the International Arbitrator*, 20 AM. U. INT'L L. REV. 957, 958 (2004-2005).

[186] YVES DEZALAY & BRYAN GARTH, DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER 18-21 (1996).

[187] *Id.* at 21.

[188] Valentina Vadi, *The Cultural Wealth of Nations in International Law*, 21 TUL. J. INT'L & COMP. L. 87, 93 (2012-2013).

[189] Daphna Kapeliuk, *The Repeat Appointment Factor – Exploring Decision Patterns of Elite Investment Arbitrators*, 96 CORNELL L. REV. 47, 49 (2010).

[190] GUS VAN HARTEN, INVESTMENT TREATY ARBITRATION AND PUBLIC LAW 152-84 (2007).

[191] Jan Paulsson, *Moral Hazard in International Dispute Resolution*, 25 ICSID REV. – FOREIGN INVESTMENT L.J. 339, 352 (2010).

[192] Kapeliuk, *supra* note 189, at 90; *see also* Susan Franck, *Development and Outcomes of Investor-State Arbitration*, 50 HARV. INT'L L.J. 435-89 (2009).

[193] Kapeliuk, *supra* note 189, at 90.

[194] Amr A. Shalakany, *Arbitration and the Third World: A Plea for Reassessing Bias Under the Specter of Neoliberalism*, 41 HARV. INT'L L.J. 419, 430 (2000).

[195] Puig, *supra* note 179, at 389 (reporting this criticism).

policies in given sectors. Moreover, some scholars suggest that a recalibration of the system is taking place, as claims have been brought against both developing and industrialized states.[196] In addition, investment treaties have also started to include a more comprehensive language so as to include reference to non-economic values.[197]

Can the background of arbitrators affect their responsiveness to other branches of international law in the settlement of investment disputes? Some scholars have examined how social factors can affect the constitution of arbitral tribunals and their decision-making processes.[198] Moshe Hirsch, for instance, has found that "the socio-cultural distance between the particular branches of international law affects the inclination of relevant decision-makers to incorporate, or reject, legal rules developed in other branches of international law."[199] On the other hand, the background of some arbitrators in international law may facilitate a positive appreciation of the same legal rules in investment treaty arbitration.[200] In turn, this might overcome any perceived "superiority complex" vis-à-vis other branches of international law.[201]

Several arbitral tribunals have settled cultural diversity related disputes in a dynamic fashion.[202] Other tribunals, however, have adopted a more restrictive approach to the relevance of cultural heritage law in the context of arbitration.[203] One may wonder whether the fact that renowned professors of public international law sat on the more dynamic tribunals, while commercial law experts sat on the more restrictive tribunals, had any impact on the final outcome.[204]

Analyzing the arbitrators' patterns through a socio-legal lens may lead to

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[196] Roberts, *supra* note 109, at 78.

[197] *Id.* at 82.

[198] Puig, *supra* note 179, at 387 (assessing the social structure of investor-state arbitrators).

[199] Moshe Hirsch, *The Sociology of International Investment Law*, *in* THE FOUNDATIONS OF INTERNATIONAL INVESTMENT LAW: BRINGING THEORY INTO PRACTICE 143, 144 (Zachary Douglas, Joost Pauwelyn & Jorge Viñuales eds., 2014).

[200] *Id.* at 165.

[201] Joost Pauwelyn, *WTO Compassion or Superiority Complex?: What to Make of the WTO Waiver for "Conflict Diamonds*," 24 MICH. J. INT'L L. 1177, 1177 (2003) (elaborating on the notion of institutional superiority complex vis-à-vis other international organizations).

[202] *See, e.g.*, Glamis Gold Ltd. v. United States, ICSID, Award, ¶ 834 (June 8, 2009), 48 I.L.M. 1035; Grand River Enter. Six Nations Ltd. v. United States, UNCITRAL/NAFTA Chapter 11, Award (Jan. 12, 2011).

[203] Vadi, *Socio-Legal Perspectives*, *supra* note 175, at 18.

[204] Roberts, *supra* note 109, at 53 ("[O]ne's interests and background often influence one's choice of analogy.").

nuanced outcomes. Socio-legal studies perceive "law [as] a social product—a complex of activities of real people with socially shared and produced, but individually carried out, . . . ideas, beliefs, motivations and purposes."[205] Certainly, arbitrators have cultural capital that encompasses a set of attitudes, knowledge, and language, as well as the structural constraints within which international lawyers live and work.[206] Arguably, the background of arbitrators influences their cognitive framework, heuristics, and legal reasoning.[207] While intuitively socio-legal factors that characterize the composition and the selection process of investment tribunals matter, the question as to whether the cultural capital of some arbitrators leads to "better" settlements of cultural diversity related disputes remains open. Whether and how sociological factors impact the final outcome of the arbitral process remains immeasurable. Broad judgments cannot be made about the adjudicators in either context based on a review of a limited number of cases. In this regard, further research is needed.

C. Good Cultural Governance

The review by an international tribunal of domestic regulations can improve good cultural governance and the transparent pursuit of legitimate cultural policies.[208] Cultural governance refers to the need to regulate human activities, and their implications on cultural heritage and protect the cultural interests of present and future generations. It entails a number of legislative, executive, and administrative functions.[209] Good cultural governance refers to the exercise of state authority according to due process and the rule of law, which includes respect for human rights and fundamental freedoms.[210] In fact, the growing importance of arbitral tribunals may compel governments to consider the impact of regulations, including cultural policies, on foreign investors and their investments before the enactment of such measures to avoid potential claims and subsequent liability.[211] If a foreign investment is expropriated, whether

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[205] Vadi, *Socio-Legal Perspectives*, *supra* note 175, at 18 (citing Brian Tamanaha, *A Holistic Vision of the Socio-Legal Terrain*, 71 LAW & CONTEMP. PROBS. 89, 89-90 (2008)).

[206] MARTII KOSKENNIEMI, THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870-1960 2 (2001).

[207] Vadi, *Socio-Legal Perspectives*, *supra* note 175, at 18.

[208] Anél A. Du Plessis & Christa Rautenbach, *Legal Perspectives on the Role of Culture in Sustainable Development*, 13 POTCHEFSTROOM ELEC. L.J. 27, 55 (2010).

[209] *Id.* at 46.

[210] *Id.* at 48, 62.

[211] Eyal Benvenisti, *Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders*, 107 AM. J. INT'L L. 295, 297 (2013).

directly or indirectly, compensation must be paid.[212] While states are free to adopt zoning measures, they must treat foreign companies fairly and equitably.[213] However, regulatory distinctions based on the protection of cultural heritage do not constitute discrimination.[214]

While each state retains the right to regulate within its own territory, international law poses vertical constraints on this right, "introducing global interests into the decision-making processes of domestic authorities. . . ."[215] Adherence to these international regimes "add[s] a circuit of 'external accountability,' forcing domestic authorities to consider the interests of the wider global constituency affected by their decisions."[216] At the same time, the internal accountability of state authorities to their own domestic constituencies does not cease to exist.[217] Domestic law is not replaced by international law; rather, it becomes permeable with respect to international law.[218] International investment rules can also "bring about change in domestic governance institutions and practices."[219]

In the specific context of cultural disputes, the boundaries between global and local become blurred. When adjudicating disputes relating to cultural heritage, arbitrators have to deal with a complex mixture of international investment law, national law, and cultural heritage law. Recent arbitrations have shown that arbitrators are taking cultural elements into account when adjudicating such disputes. The administrative acts under review belong to the national sphere, but they implement norms of an international character

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[212] Marion & Reinhard Unglaube v. Republic of Costa Rica, ICSID Case No. ARB/09/20, Award, ¶ 332.2 (May 16, 2012) (with regard to indirect expropriation); Compañia del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica [Development Company of Santa Elena S.A..], ICSID Case No. ARB/96/1, Award (Feb. 17, 2000), (with regard to direct expropriation).

[213] MTD Equity Sdn. Bhd. & MTD Chile S.A. v. Republic of Chile, ICSID Case No. ARB/01/7, Award, ¶ 166 (May 25, 2004).

[214] Parkerings-Compagniet AS v. Republic of Lithuania, ICSID Case No. ARB/05/8, Award, ¶ 332 (Sept. 11, 2007) ("It is each State's undeniable right and privilege to exercise its sovereign legislative power. . . . Save for the existence of an agreement, in the form of a *stabilization* clause or otherwise, there is nothing objectionable about the amendment brought to the regulatory framework existing at the time an investor made its investment.").

[215] Stefano Battini, *The Procedural Side of Legal Globalization: The Case of the World Heritage Convention*, 9 INT'L J. CONST. L. 340, 343 (2011).

[216] *Id*. at 364.

[217] *Id*.

[218] *Id*. at 366.

[219] Mavluda Sattorova, *International Investment Treaties and the Promise of Good Governance: Norm and Institutional Design, Internalisation, and Domestic Rule-Making* 3 (Eur. Soc'y Int'l Law, 10th Anniversary Conference, Vienna, Conference Paper No. 11/2014, 2014), *available at* http://ssrn.com/abstract=2546404.

(e.g., UNESCO conventions). Therefore, the theory that investment arbitration may constitute a form of global administrative review becomes more plausible.

If investment treaty arbitrations constitute a form of global administrative review, the existence of a discrete number of cultural heritage related arbitrations tests the hypothesis of the coalescence of a *lex administrativa culturalis* as an archetype of global administrative law. Cultural law can be conceived as a species of administrative law, i.e., the body of law that governs the activities of administrative agencies of governments in the cultural sector. Executive organs, such as the World Heritage Committee, bring to mind a centralized system of administration. While states retain control over administrative matters, cultural matters no longer lie within their *domain reservé*. World heritage sites are emblematic of regulatory pluralism, in which public administrations need to comply with multiple international norms, i.e., the World Heritage Convention, its guidelines, and the indications of the World Heritage Committee. In monist systems, these rules are immediately effective and can be applied by a domestic judge. In dualist systems, these international norms need to be translated into national law, but they do not lose their international origin. While arbitral tribunals have denied being administrative courts,[220] de facto, they exercise international public law by reviewing national measures to assess their compliance with relevant investment treaties.

Like other international adjudicative bodies,[221] arbitral tribunals are not to undertake a de novo review of the evidence once brought before the national authorities, merely repeating the fact-finding conducted by those authorities.[222] It is not appropriate for arbitral tribunals to "second-guess the correctness of the . . . decision-making of highly specialized national regulatory agencies."[223] For instance, in *Glamis Gold*, the arbitral tribunal adopted a high standard of review, according deference to the federal and state legislative measures aimed at protecting indigenous cultural heritage.[224] The arbitral tribunal recognized that "[i]t is not the role of this Tribunal or any international tribunal, to supplant its own judgment of underlying factual material and support for that of a qualified domestic

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[220] Vadi, *Toward a* Lex Administrativa Culturalis*?*, *supra* note 19, at 14.

[221] *See, e.g.*, Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) art. 11, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 33 I.L.M. 1125 (1994).

[222] Vadi, *Toward a* Lex Administrativa Culturalis*?*, *supra* note 19, at 16.

[223] Chemtura Corp. (formerly Crompton Corp.) v. Canada, Ad Hoc NAFTA Arbitration, Award, ¶ 134 (Aug. 2, 2010).

[224] Vadi, *Toward a* Lex Administrativa Culturalis*?*, *supra* note 19, at 16.

agency,"[225] and that "governments must compromise between the interests of competing parties."[226]

On the other hand, arbitral tribunals scrutinize national measures to ascertain their compliance with host state investment law obligations. Thus, arbitral tribunals are not to pay total deference before national cultural policies, and simply accept the determinations of the relevant national authorities as final. Rather, they assess whether or not the competent authorities have complied with their international investment law obligations in making their determinations. For instance, in *S. Pac. Prop. (Middle East) Ltd. v. Arab Republic of Egypt* (the "*Egyptian Pyramids Case*"), which involved the denial of a construction project in front of the Pyramids for understandable cultural reasons, loss of profits was not awarded due to the unlawfulness of the proposed economic activity under cultural heritage law.[227] Notwithstanding the previous approval of the investment at stake, Egypt cancelled the contract, and the area was added to the *World Heritage List*.[228] The ICSID tribunal noted that it had been added to the list *after* the cancellation of the project.[229] Therefore, it found contractual liability and sustained the claimants' argument that the particular public purpose of the expropriation could not change the obligation to pay fair compensation.[230] However, it reduced the amount of the award (or payment), stating that only the actual damage (*damnum emergens*), and not the loss of profit (*lucrum cessans*), could be compensated.[231] Indeed, it stated: "[S]ales in the areas registered with the World Heritage Committee under the UNESCO Convention would have been illegal under . . . international law and . . . the allowance of *lucrum cessans* may only involve those profits which are legitimate."[232]

Therefore, it will be important for the states to show that their regulations aim to achieve legitimate public goals and that they follow due process of law. As one arbitral tribunal held,

> "*public interest*" requires some genuine interest of the public. If mere reference to "*public interest*" can magically [create] such interest . . . and therefore satisfy this requirement, then this requirement would be

[225] Glamis Gold, Ltd. v. United States, Award, ¶ 779 (June 8, 2009), 48 I.L.M. 1035.

[226] *Id.* ¶ 803.

[227] S. Pac. Prop. (Middle East) Ltd. v. Arab Republic of Egypt, ICSID Case No. ARB/84/3, Award (May 20, 1992), 32 I.L.M. 933, 974 (1993).

[228] *Id.* at 966.

[229] *Id.*

[230] *Id.* at 972.

[231] *Id.* at 973.

[232] *Id.*

> rendered meaningless since the Tribunal can imagine no situation where this requirement would not have been met.[233]

That being said, the review of cultural heritage related disputes by arbitral tribunals could also jeopardize the protection of cultural heritage.[234] At the end of the day, the protection of cultural heritage is not listed among the objectives of investment treaties. Arbitrators have a limited mandate, and may not have adequate expertise to deal with cultural heritage. Scholars have pointed out that good governance can be a patronizing concept.[235] For instance, Kate Miles has argued that "the current framing of investor-state arbitration as the embodiment of good governance and the rule of law is representative solely of the perspective of political and private elites."[236] Miles adds that "it will remain so without the incorporation of substantive principles from other areas of international law. . . ."[237] Finally, whether investment treaty arbitration may cause a regulatory chill is also up for debate.[238]

CONCLUSION

Cultural governance has come of age, and is a good example of legal pluralism and multilevel governance. The governance of cultural heritage raises important political, legal, and economic conflicts among different actors at different levels. The connection between cultural heritage law and international investment law has also become important. Investment treaties provide extensive protection for investors to encourage foreign direct investment and promote the economic development of host states. Tension exists when a state adopts cultural policies that interfere with foreign investment because such policies may breach investment treaty provisions. Additionally, investment treaties offer direct access for investors to an international arbitral tribunal where they may seek compensation for the adverse impact of cultural regulations on their businesses.

Because international cultural treaties do not include compulsory dispute

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[233] ADC Affiliate Ltd. & ADC & ADMC Management Ltd. v. Republic of Hung., ICSID Case No. ARB/03/16, Award, ¶ 432 (Oct. 2, 2006).

[234] Vadi, *When Cultures Collide*, *supra* note 131, at 841.

[235] *Id*.

[236] KATE MILES, THE ORIGINS OF INTERNATIONAL INVESTMENT LAW: EMPIRE, ENVIRONMENT AND SAFEGUARDING CAPITAL 335 (2013).

[237] *Id*.

[238] *See* Kyla Tienhaara, *Regulatory Chill and the Threat of Arbitration: A View from Political Science*, *in* EVOLUTION IN INVESTMENT TREATY LAW AND ARBITRATION 606 (Chester Brown & Kate Miles eds., 2011).

resolution mechanisms, cultural heritage related disputes have been adjudicated by international arbitral tribunals, which are highly effective dispute resolution mechanisms. The availability of arbitral tribunals has been a mixed blessing. On the one hand, cultural heritage related investment arbitrations test the effectiveness of cultural governance given the lack of permanent heritage tribunals. On the other hand, concerns remain with regard to the efficacy of cultural governance because arbitral tribunals have a limited mandate and cannot adjudicate violations of international cultural law. Thus, socio-legal aspects—that certain arbitrators, for instance, are not experts in public international law—may be of limited relevance.

Can the global administrative review of substantive domestic regulations improve good governance and the transparent pursuit of legitimate cultural policies? Are arbitral tribunals promoting good cultural governance in adhering to the provisions of investment treaties, including the prohibition of discrimination and the fair and equitable treatment standard, and by adopting general administrative law principles, such as due process, proportionality, and reasonableness? While not every breach of local administrative law amounts to a breach of an investment treaty, relevant violations will come under the purview of arbitral tribunals. The awards of arbitral tribunals may be in line with good cultural governance as UNESCO instruments require; however, unrestricted state sovereignty may jeopardize the protection of cultural heritage.

Arbitral tribunals are developing common legal principles with an administrative character that may contribute, albeit indirectly, to the protection of cultural heritage. Such administrative principles may be usefully applied in adjudication to preserve an appropriate balance between public and private interests. While these administrative principles are not exclusive to the protection of cultural heritage,[239] they do help shape cultural heritage law. This jurisprudence may also influence other international courts and tribunals, and even legislators. More importantly, this jurisprudence contributes to the development of common legal principles, requiring the protection of cultural heritage and the respect of legality, fairness, and good faith in cultural governance, as well as the prohibition of arbitrary or unreasonable measures.

Thus, one could argue that administrative law is colonizing the space that was once occupied by international law, or perhaps more appropriately, that

[239] As such, these administrative law principles are not per se specific to the cultural field but are equally applicable in adjudications relating to other fields such as environmental protection and public health. Therefore, they may also promote good environmental governance and good public health governance. Yet, their application to the cultural field could further clarify their proper boundaries.

international law is colonizing the legal space that was traditionally occupied by administrative law. In either case, administrative law and international law have gone beyond their traditional boundaries. The intermingling of local and global, private and public, and national and international dimensions has created a complex, multi-polar, and multilevel legal system. Whether these developments have given rise to a multipolar global cultural law is open to debate. By taking elements of cultural heritage law into account, arbitral tribunals may contribute to the development of general principles of law that require the protection of cultural heritage, and balance public and private interests.

Whether, in addition to promoting effective investment governance, arbitral tribunals can contribute to effective cultural governance remains to be seen. Questions also remain as to whether investment treaty arbitration is the best forum to adjudicate cultural heritage disputes and whether investment treaty arbitration adequately balances private and public interests, not only from an investment law perspective but also from a cultural heritage law perspective. At the end of the day, arbitral tribunals have a specific function: to settle disputes between investors and host states. They aim to provide fair treatment of foreign investors, and they endorse certain assumptions, namely that foreign direct investment spurs economic development of the host state. In other words, arbitral tribunals have a mandate that differs from the mandate that a cultural heritage court would have if such a court existed. On the one hand, there is a risk of retrogression in the protection of cultural heritage and epistemological misappropriation, as arbitral tribunals do not have specific expertise in cultural heritage matters. On the other hand, there is also a risk of implosion in investor-state arbitration because some question investor-state arbitration's legitimacy. If the ultimate task of the arbitral tribunals is to ascertain eventual state liability for a wrongful act, the parameters for ascertaining what is wrongful under international investment law necessarily differ from the parameters for ascertaining a wrongful act under international cultural law. Namely, international cultural law may justify certain measures that might otherwise be wrongful, or may even preclude the wrongfulness of a measure *tout court*. Thus, whether a *lex administrativa culturalis* is effective as a tool of cultural governance remains to be seen.