The Role of the World Heritage Convention for Foreign Investments and Investment Disputes: An Overlooked Instrument for Preventing Harmful Investment Activities?

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Abstract

Investment activities by foreign investors such as mining operations or energy production can threaten natural and cultural World Heritage, which is protected under the World Heritage Convention. As World Heritage sites have been at the heart of various (recent) investment disputes, the question arises as to how obligations under the World Heritage Convention affect investment activities and investment disputes. The article seeks to shed light on this issue by analysing different aspects of the World Heritage Convention in the context of investment law. It starts by exploring how investment tribunals have approached investment disputes involving World Heritage sites and what their decisions imply for the regulation of investment activities in or near World Heritage sites. Subsequently, the article examines which obligations the World Heritage Convention imposes on foreign investors, host states, and investors’ home states. In the analysis of the home states’ duties, Article 6(3) of the Convention, which has hitherto received little scholarly attention, is of particular interest. Based on decisions of the World Heritage Committee and doctrinal opinions, the authors interpret said provision and place it in the specific context of investment law. In doing so, they find that a limited duty to regulate exists for home states of investors if they provide financial or non-financial support to a business operation abroad.

Keywords

I. Introduction

The recognition of the need to preserve cultural and natural heritage as a global public good provides the basis for the UNESCO World Heritage Convention of 1972 (WHC), which aims at protecting cultural and natural heritage of an outstanding universal value from a historical, scientific, aesthetic, conservationist, ethnological or anthropological point of view (so-called World Heritage sites).\(^1\) Since World Heritage sites form part of World Heritage of all humankind, it is the duty of the international community as a whole to preserve them.\(^2\) Besides, the protection and conservation of these sites may be a social good for national and local communities or in terms of maintaining biodiversity and a healthy environment.

Yet, investment activities become an increasing threat to World Heritage sites. This is especially true for sites that are deemed economically exploitable\(^3\) through mining activities, the development of tourist facilities and energy production.\(^4\) For instance, the Virunga National Park in the Democratic Republic of Congo – home to endangered mountain gorillas\(^5\) – has *inter alia* been jeopardized by potential oil and gas exploitation activities of transnational companies.\(^6\) Considering these threats, it is plain that private interests of investors may clash with the public interest embodied in the preservation of World Heritage. State authorities may therefore have to intervene in order to protect World Heritage sites, which can eventually lead

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1. Arts 1 and 2 Convention for the Protection of the World Cultural and Natural Heritage, 23 November 1972, 1037 UNTS 151 (WHC).
2. Preamble WHC (‘*Considering that parts of the cultural or natural heritage are of outstanding interest and therefore need to be preserved as part of the world heritage of mankind as a whole*) [emphasis added].
4. See below Section VI.B.
to investment disputes with foreign investors. However, investors may also receive support from both the host state of the investment and the home state of the investor for developing projects close to World Heritage sites. In this way, states permit or contribute to the threats posed to World Heritage sites by investment activities.

Against this backdrop, the paper explores two main questions: first, what role has the WHC played and could it play in investment disputes; secondly, which obligations arise for host states of foreign investments and the home state of investors? In answering these questions the article attempts to outline to what extent the WHC can regulate the conduct of investors and states and contribute to the protection of cultural and natural World Heritage sites when foreign investors plan investment activities in or close to these sites. In this regard, the analysis of host and home state obligations under the WHC provides relevant knowledge for parties involved in future investments, as mining projects to extract the nowadays highly demanded lithium in areas close to World Heritage sites illustrate. In addition, exploring answers to said questions may offer insights into the intricate relationship between international investment law and international climate law, including the multilateral Paris Agreement. The manner in which investment tribunals have approached the multilateral WHC and World Heritage sites in their awards may be particularly instructive for pending investment disputes involving coal phase-outs.


9 RWE AG and RWE Eemshaven Holding II BV v Kingdom of the Netherlands, ICSID Case No ARB/21/4 (registered 2 February 2021); Uniper SE, Uniper Benelux Holding B.V and Uniper Benelux N.V. v Kingdom of the Netherlands, ICSID Case No ARB/21/22 (registered 30 April 2021). However, the Uniper arbitration will soon come to an end as the company is required to withdraw its arbitration claim against the Netherlands as part of a bailout package by the German government, see Lisa Bohmer, ‘Uniper is required to withdraw its intra-EU ECT claim against the Netherlands as part of German bailout package’ (IAReporter, 22 July 2022) <www.iareporter.com/articles/uniper-is-required-to-withdraw-its-
The paper starts with a brief overview of the WHC, the World Heritage Committee (II.) and investment disputes involving the WHC (III.). Subsequently, it addresses how tribunals can take into account the public interest of protecting World Heritage and misconduct of foreign investors in or close to World Heritage sites (IV.). Finally, the article explores which regulatory obligations arise from the WHC for host states of foreign investments, on the one hand (V.) and from Article 6(3) WHC for home states of the investors, on the other (VI.) – an issue that has thus far received no attention in scholarship – followed by a brief conclusion (VII.).

II. World Heritage Convention and the World Heritage Committee – Legal and Institutional Framework for Protecting World Heritage

The WHC was adopted on 16 November 1972 and is based upon the principle that items of cultural and natural heritage are a common good of all peoples.\(^\text{10}\) Thus, the Convention obliges all 194 state parties to make a common effort in identifying and conserving World Heritage sites.\(^\text{11}\) In these efforts the state parties are assisted by the World Heritage Committee,\(^\text{12}\) an inter-governmental
body consisting of 21 state party representatives, who ought to be ‘qualified in the field of the cultural or natural heritage’\textsuperscript{13}.

Properties recognized as World Heritage sites are inscribed in the World Heritage List,\textsuperscript{14} which as of mid-2022 contains 1154 entries.\textsuperscript{15} The identification of cultural and natural heritage relies on the properties’ outstanding universal value,\textsuperscript{16} allowing the WHC to protect a wide variety of cultural, natural and mixed heritage.\textsuperscript{17} The initial identification of a site’s global significance for humanity, its delineation as well as its nomination for admission to the World Heritage List is incumbent upon the state party in whose territory the property is located.\textsuperscript{18} Based on ten assessment criteria, e.g., the property being an outstanding example of a type of building, the nomination has to include an explanation as to why the proposed cultural,\textsuperscript{19} natural\textsuperscript{20} or mixed property has outstanding universal value.\textsuperscript{21} If a site fulfils the necessary requirements, the admission to the World Heritage List depends on the evaluation of UNESCO’s advisory bodies and the decision of the World Heritage Committee.\textsuperscript{22} However, as a site’s outstanding universal value is the only prerequisite for its protection, the non-listing in the World Heritage

\textsuperscript{13} Art 9(3) WHC; Scovazzi, supra note 12, 155; see Lynn Meskell, ‘States of Conservation: Protection, Politics, and Pacting within UNESCO’s World Heritage Committee’ (2014) 87 Anthropological Quarterly 217, 220.

\textsuperscript{14} Art 11(2) WHC; Operational Guidelines, supra note 10, ch III.


\textsuperscript{17} Francioni, supra note 10, 17ff, Scholze, supra note 16, 217.


\textsuperscript{19} Art 1 WHC.

\textsuperscript{20} Art 2 WHC.

\textsuperscript{21} Operational Guidelines, supra note 10, N°77; Boer, supra note 18, 92-94; Albert and Ringbeck, supra note 10, 24.

\textsuperscript{22} Operational Guidelines, supra note 10, N° 24 a), 31 e); Meskell, supra note 13, 220ff; Scholze, supra note 16, 217.
List neither implies that it is not protected under the WHC nor that the site does not have outstanding universal value (Article 12 WHC).23

Unlike the identification, the protection of cultural and natural heritage is a common responsibility of all state parties.24 While this generally follows the Convention’s logic of World Heritage sites as common good, Article 4 WHC imposes the primordial obligation to protect and conserve the cultural or natural heritage on the state party in whose territory the property is located. Article 6(1) WHC complements the obligation of the territorial state by emphasizing the duty of the international community as a whole to cooperate. Article 6(2) WHC stipulates that state parties must provide help in the identification and preservation of a World Heritage site if requested by the state which the site is located. Additionally, Article 6(3) WHC compels all state parties to refrain from ‘deliberate measures that might damage directly or indirectly’ a World Heritage site ‘on the territory of other state parties’.25

In the event of a threat to a World Heritage site, Article 11(4) WHC provides a specific procedure – the inscription in the List of World Heritage in Danger by the World Heritage Committee.26 Said procedure does not, unlike the admission to the World Heritage List, require the consent of the state in

23 Art 12 WHC (‘The fact that a property belonging to the cultural or natural heritage has not been included in […] [the World Heritage List or List of World Heritage in Danger] shall in no way be construed to mean that it does not have an outstanding universal value for purposes other than those resulting from inclusion in these lists.’); Boer, supra note 18, 89; Federico Lenzerini, ‘Article 12’ in Francioni, supra note 10, 205.

24 Art 4; Art 6(2) WHC.

25 See also Request for Interpretation of the Judgement from 15 June 1962 in the Case concerning the Temple of Preah Vihear (Cambodia v Thailand) [2013] ICJ 281, 317ff (Judgment of 11 November) (‘[…] the Court recalls that under Article 6 of the World Heritage Convention, to which both States are parties, Cambodia and Thailand must co-operate between themselves and with the international community in the protection of the site as a world heritage. In addition, each State is under an obligation not to “take any deliberate measures which might damage directly or indirectly” such heritage. In the context of these obligations, the Court wishes to emphasize the importance of ensuring access to the Temple from the Cambodian plain.’).

26 See further Operational Guidelines, supra note 10, N° 9, 182ff; Operational Guidelines, supra note 10, N° 177ff; Gionata P Buzzini and Luigi Condorelli, ‘Article 11’ in Francioni, supra note 10, 180ff.
the territory of which the relevant property is located. Once a property is on the List of World Heritage in Danger, the Committee conducts regular reviews of its state of conservation. Based upon these investigations and consultations with the state party concerned, the Committee decides if further measures for conservation are needed, the property is no longer in danger or the property has lost its outstanding universal value and must therefore be deleted from the World Heritage List. Hitherto, the World Heritage Committee has delisted three World Heritage sites: the Omani Arabian Orxy Sanctuary, the German Dresden Elbe Valley and Maritime Mercantile City of Liverpool.

III. The World Heritage Convention and World Heritage in Investment Disputes

To the knowledge of the authors, the WHC and/or a World Heritage site to date has been at the heart of the dispute in six publicly available awards of investment tribunals. Additionally, the listing of a site on the World Heritage List is a relevant issue in three pending investment disputes. The following

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27 Buzzini and Condorelli, supra note 26, 181; Albert and Ringbeck, supra note 10, 40.
28 Operational Guidelines, supra note 10, N° 190.
30 Operational Guidelines, supra note 10, N° 19; Albert and Ringbeck, supra note 10, 44.
31 Arabian Oryx Sanctuary (Oman) [2007] World Heritage Committee Decision 31 COM 7B.11.
33 Liverpool – Maritime Mercantile City (United Kingdom) [2021] World Heritage Committee Decision 44 COM 7A.34.
34 Gabriel Resources Ltd. and Gabriel Resources (Jersey) v Romania, ICSID Case No ARB/15/31: This dispute was initiated in 2015. At that point the Romanian government considered adding the mining site in question to the World Heritage List, but subsequently postponed the application in light of the ICSID proceeding. In 2020, Romania revived its UNESCO application.
section outlines the role that investment tribunals have attributed to the WHC or the concept of World Heritage in the six awards.35

A. Awards by Investment Tribunals

1. SPP v Egypt

Southern Pacific Properties (SPP) v Egypt36 was the first case in which the WHC constituted a crucial element of the dispute. The investor and the Egyptian state had agreed to establish a joint venture for the development of tourist complexes within the vicinity of the Pyramid Fields.37 The construction of said tourist facilities began in July 1977, but soon thereafter encountered political resistance.38 The land around the pyramids was declared ‘public


35 See also the analysis of some of these awards in Valentina Vadi, Cultural Heritage in International Investment Law and Arbitration (2014) 93ff.
36 Southern Pacific Properties (Middle East) Limited v Arab Republic of Egypt, ICSID Case No ARB/84/3 (Award of 20 May 1992).
38 Ibid., para 61ff.
property’ due to antiquities in the area and approval of the project was officially withdrawn.³⁹ In 1979, the Pyramid Fields was added to the World Heritage List.⁴⁰

In 1984, SPP initiated arbitration proceedings against Egypt arguing that Egypt had violated its obligations under the contract and the Egyptian foreign investment law.⁴¹ Egypt claimed that its ratification of the WHC had required the termination of the project.⁴² The tribunal only partially followed this argument. When addressing the applicable law it acknowledged that the WHC would be relevant for the decision in the investment dispute,⁴³ but the tribunal held the WHC ‘by itself does not justify the measures taken by the Respondent to cancel the project, nor does it exclude the Claimants’ right to compensation’.⁴⁴ The mere ratification of the WHC by Egypt in 1975, i.e. prior to the start of the construction work, was treated as irrelevant, but the tribunal found that the inclusion of the Pyramid Fields in the World Heritage List in 1979 meant that the ‘relevant international obligations emanating from the Convention became binding on the Respondent.’⁴⁵ This particular reasoning by the tribunal has been criticized in light of Article 12 WHC.⁴⁶ The tribunal went on to state that after the inclusion of the site in the World Heritage List ‘a hypothetical continuation of the Claimants’ activities interfering with antiquities in the area could be considered as unlawful from the international point of view.’⁴⁷ The latter conclusion affected the amount of damages eventually awarded. As far as the expropriation claim was concerned, the tribunal recognized that Egypt had the sovereign right to cancel the project in order to protect the site. The cancellation of the project and the re-designation of the land as public property was a ‘right [that] was exercised for a public purpose, namely, the preservation and protection of

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³⁹ Ibid., paras 63-65.
⁴⁰ Ibid., para 153.
⁴¹ Ibid., para 1.
⁴² Ibid., paras 150, 156.
⁴³ Ibid., para 76.
⁴⁴ Ibid., para 154.
⁴⁵ Ibid.
⁴⁷ Southern Pacific Properties (Middle East) Limited v Arab Republic of Egypt, ICSID Case No ARB/84/3 (Award of 20 May 1992) para 154.
antiquities in the area’.\textsuperscript{48} Still compensation was due.\textsuperscript{49} However, damages for lost profits could only be awarded until the site was inscribed on the World Heritage List because afterwards ‘the Claimants’ activities on the Pyramids Plateau would have been in conflict with the Convention and therefore in violation of international law, and any profits that might have resulted from such activities are consequently non-compensable.\textsuperscript{50}

2. \textit{Santa Elena v Costa Rica}

\textit{Santa Elena v Costa Rica}\textsuperscript{51} also concerns the expropriation of a property located in an area with a unique natural habitat, which an investor had purchased to develop a tourist resort.\textsuperscript{52} Costa Rica argued that the expropriation pursued a public purpose: it wanted to expand a national park to conserve flora and fauna in the area.\textsuperscript{53} The investor received compensation, but the amount was contested, which eventually led to ICSID arbitration in 1995.\textsuperscript{54}

The arbitration proceedings merely concerned the question whether the amount of compensation was sufficient, not whether a direct expropriation had occurred.\textsuperscript{55} After the proceedings had commenced, Costa Rica nominated the site in question for inclusion in the World Heritage List, which occurred in 1999.\textsuperscript{56} The tribunal did not address the WHC pointing out in a footnote that ‘[it] does not analyse the detailed evidence submitted regarding what Respondent refers to as its international legal obligation to preserve the unique ecological site that is the Santa Elena Property.’\textsuperscript{57} The reason for that was the

\textsuperscript{48} Ibid., para 158.

\textsuperscript{49} Ibid., para 179.

\textsuperscript{50} Ibid., para 191; see also \textit{ibid.}, para 190 (referring to illegality of lot sales both under international and Egyptian law); see also \textit{ibid.}, para 157; see further Irmgard Marboe, \textit{Calculation of Compensation and Damages in International Investment Law} (2nd edn, 2017) 79.

\textsuperscript{51} Compañía del Desarrollo de Santa Elena S.A. v Republic of Costa Rica, ICSID Case No ARB/96/1 (Award of 17 February 2000).

\textsuperscript{52} Ibid., paras 15-17.

\textsuperscript{53} See the 1978 Expropriation Decree cited in \textit{ibid.}, para 18.

\textsuperscript{54} Ibid., paras 19-20, 26.

\textsuperscript{55} Ibid., para 54; see also \textit{ibid.}, paras 73ff.


\textsuperscript{57} Compañía del Desarrollo de Santa Elena S.A. v Republic of Costa Rica, ICSID Case No ARB/96/1 (Award of 17 February 2000) para 71, fn 32.
tribunal’s finding that ‘the [public] purpose of protecting the environment for which the Property was taken does not alter the legal character of the taking for which adequate compensation must be paid. The international source of the obligation to protect the environment makes no difference.’

3. Parkerings v Lithuania

In Parkerings v Lithuania, a Lithuanian subsidiary owned by the Norwegian investor Parkerings, joined a consortium and the Municipality of the City of Vilnius granted it with an exclusive concession to operate ten multi-storey car parks, which the consortium was required to construct. However, the Municipality eventually terminated the agreement in 2004 for alleged material breaches by the consortium. As a response, Parkerings instituted ICSID proceedings against Lithuania in 2005, arguing inter alia that it had been discriminated against because the Municipality supposedly treated the Norwegian investor less favourably than a Dutch company in like circumstances. However, the arbitral tribunal concluded that the two investors were not in like circumstances. The planned car parking facility of Parkerings would have extended far into the Old Town of Vilnius, a World Heritage site, reaching the historical site of the cathedral. While the other car park was also located in the old town, the fact that Parkering’s project ‘extended significantly more into the Old Town as defined by the UNESCO, is decisive’ and implied that these two construction projects were not comparable. Furthermore, ‘the City of Vilnius did have legitimate grounds to distinguish between the

58 Ibid., para 81 (footnote omitted); see also ibid., para 72. Subsequent proceedings also concerned expropriation claims in the same province, but the WHC and the concept of World Heritage was not raised by the parties and the tribunal did not address it either, see Marion Unglaube and Reinhard Unglaube v Republic of Costa Rica, ICSID Case No ARB/08/1 and ICSID Case No ARB/09/20 (Award of 16 May 2012). For further details see Vadi, supra note 35, 117-119.

59 Parkerings-Compagniet AS v Republic of Lithuania, ICSID Case No ARB/05/8 (Award of 11 September 2007).


61 Ibid., paras 188-193.

62 Ibid., para 10.

63 Ibid., paras 363-365.

64 Ibid., para 382ff, 385.

65 Ibid., para 381.

66 Ibid., para 392. See also ibid., para 396.
two projects’, namely concerns related to ‘historical and archaeological preservation and environmental protection’.

4. **Glamis Gold v USA**

*Glamis Gold v USA* concerned an investor who planned a gold mine project in an area of the Californian desert, which was not listed as a World Heritage site. However, the Native American Quechuan tribe considered the area important for cultural and religious reasons. The US Federal Government had originally refused to approve a mining project in the area, but after a change of government following the 2000 election, the mining claims were recognized as valid. In response, the Californian state took legislative measures to prevent negative impacts of mining activities on sacred Native American sites and *inter alia* required operators of open-pit mining sites to backfill the mines. Due to the original failure by federal authorities to approve the project and the backfilling requirement, the investor initiated arbitration proceedings arguing that an indirect expropriation and a violation of the minimum standard of treatment had occurred. The tribunal dismissed the claims on the merits holding that the legislative measures were not arbitrary and unreasonable and *inter alia* pointed out that the measures tried to prevent harm by pits and waste piles to ‘pot shards, spirit circles, and the like, sight lines, teaching areas and viewsheds’. While the WHC did not play a major role in the reasoning, the tribunal noted that US domestic law implemented the WHC. Moreover, in a footnote it referred to Article 12 WHC emphasizing that ‘a site’s non-inclusion on the register does not signify

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69 *Glamis Gold, Ltd. v the United States of America*, UNCITRAL (Award of 8 June 2009).
its failure to possess “outstanding universal value”.\textsuperscript{78} Thereby, the tribunal recognized that the inclusion in the World Heritage List was not constitutive for the determination of whether a natural or cultural site is so unique that it deserves protection.

5. \textit{Cortec Mining v Kenya}

The investment dispute in \textit{Cortec Mining v Kenya}\textsuperscript{79} involved a World Heritage site,\textsuperscript{80} namely sacred indigenous sites located in a natural dry forest area protected under Kenyan law as a forest reserve, nature reserve and national monument.\textsuperscript{81} The investor planned a mining project in the dry forest area and started intensive exploration activities after the area had been re-opened for mining.\textsuperscript{82} Subsequently, the investor submitted an application for a full mining licence, which was first rejected due to a missing environmental impact assessment (EIA),\textsuperscript{83} but two days after the 2013 general election a special mining licence was granted before a new government had been sworn in.\textsuperscript{84} However, all mining licences issued in the transitional period were later revoked\textsuperscript{85} and Kenyan courts held that the special mining licence had been \textit{void ab initio}.\textsuperscript{86} In the subsequent investment arbitration proceedings, the tribunal dismissed the case on jurisdictional grounds holding that no protected investment existed. In particular the tribunal held that the investor’s disregard for the domestic laws protecting the area in question and its failure to obtain an EIA approval ‘constituted violations of Kenyan law that, in terms of international law, warrant the proportionate response of a denial of treaty protection under the BIT and the ICSID Convention.’\textsuperscript{87}

\textsuperscript{78} Ibid., para 84, fn 194; see also Art 12 WHC, text \textit{supra} note 23.
\textsuperscript{80} Ibid., para 42, fn 18.
\textsuperscript{81} Ibid., para 43.
\textsuperscript{82} Ibid., paras 1, 68, 73-76; on the renewals of the special prospecting licence see \textit{ibid.}, paras 85-96, 102-115.
\textsuperscript{83} Ibid., paras 120-122, 153-155.
\textsuperscript{84} Ibid., paras 161-166.
\textsuperscript{85} Ibid., paras 201ff.
\textsuperscript{86} Ibid., paras 212-223.
\textsuperscript{87} Ibid., para 356. The legality of the investment under domestic law was treated as an implicit prerequisite for jurisdiction under the ICSID Convention and the BIT, see \textit{ibid.}, paras 259-261, 321, 333 (a).
did not explicitly mention the WHC, compliance with domestic rules that also protected a World Heritage site were of paramount importance for the tribunal’s finding.

6. *Gosling and Others v Mauritius*

The most recent award addressing the WHC, *Thomas Gosling and Others v Mauritius*, 88 concerned an investor, who *inter alia* had planned a tourism development project and purchased land in an area, which the government planned have added to the World Heritage List. 89 The project was supposed to be implemented in a buffer zone of the designated World Heritage site in accordance with the plans prepared by government-appointed experts, who worked on the application for inscription on the World Heritage List. 90 In addition, the project needed various permits from state authorities to proceed.91 The authorities issued a letter of intent for a tourism development certificate to the investor92. Moreover, Mauritius submitted an application for inscription to the World Heritage List with a management plan, which the World Heritage Committee rejected twice in 2006.93 Mauritius nominated new experts and submitted a new application and management plan that met the technical requirements.94 Subsequently a document on planning policy guidance for the area allowing for certain tourism development in the buffer zone was published,95 but upon advice from the experts the government revised the guidance a few months later so that tourism development projects in the particular area of the buffer zone which the investor had selected were no longer permitted.96 In July 2008 the site in question was added to the World Heritage List97 and the investor eventually initiated arbitration proceedings in

88 *Thomas Gosling and Others v Republic of Mauritius*, ICSID Case No ARB/16/32 (Award of 18 February 2020).
95 *Ibid.*, para 73.
97 *Ibid.*, para 76.
2016, arguing in particular that the revised planning policy guidance violated their rights as investors.

The majority of the tribunal rejected the argument that the investor had been expropriated,\(^{98}\) that the Fair and Equitable Treatment (FET) standard had been breached\(^ {99} \) or that discriminatory treatment had occurred.\(^ {100} \) Primarily, the tribunal did not find that the letter of intent was tantamount to governmental approval of the project\(^ {101} \) and pointed out that the prime minister ‘did hint at the risk of going ahead’\(^ {102} \) prior to World Heritage Committee’s decision on Mauritius’ application in a meeting with the investor. According to the tribunal, the record ‘of this meeting show[s] the paramount interest of the Government in the inscription of the site in UNESCO’s World Heritage List’.\(^ {103} \) The majority noted that Mauritius had always had the objective to register the site as World Heritage, which was known to the investor and furthermore, the state was permitted to change its policies with respect to whether a project can go ahead in the buffer zone since no contrary assurances had been given to the investor.\(^ {104} \) Moreover, the investor had not received any permits prior to the change in policy.\(^ {105} \) On the issue of discrimination between different tourism development projects in the buffer zone, the majority of the tribunal held that the projects were not in like circumstances, \textit{inter alia} due to their location in different sub-zones of the buffer zone, and pointed out that the ‘division of the buffer zone in sub-zones by [the revised guidance] was justified by objective criteria of fauna, flora, and visual integrity on the basis of the recommendations of the UNESCO’s experts.’\(^ {106} \)

\(^{98}\) \textit{Ibid.}, para 242.

\(^{99}\) \textit{Ibid.}, paras 247-248, 250.

\(^{100}\) \textit{Ibid.}, paras 251-252, 256.

\(^{101}\) \textit{Ibid.}, para 236.

\(^{102}\) \textit{Ibid.}, para 238.

\(^{103}\) \textit{Ibid.}

\(^{104}\) \textit{Ibid.}, para 249.

\(^{105}\) \textit{Ibid.}

\(^{106}\) \textit{Ibid.}, para 254. The dissenter acknowledged that the inscription on the World Heritage List was done in the public interest, but considered that the change in planning policy violated the investment treaty in question, see \textit{Thomas Gosling and Others v Republic of Mauritius}, ICSID Case No ARB/16/32 (Dissenting Opinion of Arbitrator Stanimir Alexandrov of 14 February 2020).
B. Conclusion on Arbitral Practice with Respect to the WHC

In summary, these investment cases not only share important similarities, but also some key differences in their treatment of World Heritage. In *SPP v Egypt* (and arguably *Santa Elena v Costa Rica*) the tribunal recognized that World Heritage concerns constitute a public purpose for reasons of expropriation. Still, this did not render the taking of property non-compensable in the eyes of the tribunals. While in *Santa Elena v Costa Rica* the amount of compensation was neither affected by the ecological value of the site nor by the subsequent inscription on the World Heritage List, the tribunal in *SPP v Egypt* did not award lost profits for the time after the site in question had been registered on the World Heritage List. Nonetheless, in *SPP v Egypt* the tribunal focused on formalities to treat the site as World Heritage, namely the registration on the World Heritage List. In contrast, the tribunal in *Glamis Gold v USA* recognized that the non-listing of an area as a World Heritage site was irrelevant for acknowledging its outstanding universal value and protection as World Heritage. The *Parkerings v Lithuania* case as well as the *Gosling v Mauritius* case indicate that different potential impacts on a World Heritage site permit treating investments differently. *Gosling v Mauritius* also shows that an investor’s knowledge of the government’s intention to have an area added to the World Heritage List can affect the investor’s legitimate expectations. The tribunal in *Cortec Mining v Kenya* prevented an investor from relying on investment protection after having essentially circumvented requirements of environmental regulations under domestic law, which helped conserving a World Heritage site. The latter case bears testimony to the interplay between domestic law and international law in the protection of World Heritage.

IV. Addressing World Heritage in Investment Disputes and Investor Misconduct with Respect to World Heritage Sites

When investment activities take place on or close to World Heritage sites, questions arise whether international law provides framework for regulating the investors’ conduct affecting these sites. Therefore, this section addresses whether the WHC imposes any obligations on investors (A) and irrespective of this, whether the World Heritage status of a site can be taken into account by tribunals in the jurisdictional phase, for counterclaims and on the merits.
(B.). Subsequently, the section highlights the limited effect of addressing the negative effects of investment activities in investment disputes (C.).

A. Investor Obligations under the WHC?

In view of the WHC’s wording, it is not individuals or corporations,107 but state parties, which owe the obligations under the Convention. The award in SPP v Egypt might leave room for a different conclusion since the tribunal held that ‘the Claimants’ [continued] activities on the Pyramids Plateau would have been in conflict with the Convention and therefore in violation of international law’.108 However, the argument that the WHC would be directly binding for a foreign investor is a too far-reaching inference. In particular, the tribunal did not hold that the investor would have violated the WHC, but rather that the activities in question contravened the WHC. A distinction must therefore be made between the ‘act’ which breaches the WHC and the two different ‘actors’ involved in that ‘act’: the investor and the state party to the WHC. The tourist development project was an ‘act’ contravening the WHC. The investor carrying out the act, however, was not the ‘actor’ in breach of the WHC. Rather, the state party was the only actor legally capable of violating the WHC through authorizing the project or having it continue.109

107 Private investors are generally not subjects of international law, see, e.g., Casinos Austria International GmbH and Casinos Austria Aktionssellschaft v Argentine Republic, ICSID Case No ARB/14/32 (Decision on Jurisdiction of 29 June 2018) para 275; see, however, Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskia Ur Partzuergoa v the Argentine Republic, ICSID Case No ARB/07/26 (Award of 8 December 2016) para 1194; David R. Aven and Others v Republic of Costa Rica, ICSID Case No UNCT/15/3 (Final Award of 18 September 2018) para 738.

108 SPP v Egypt, supra note 36, para 191.

109 Similarly, in a dispute involving the ILO Indigenous and Tribal Peoples Convention the tribunal held that ‘the ILO Convention 169 imposes direct obligations only on States. Contrary to Respondent’s arguments, private companies cannot “fail to comply” with ILO Convention 169 because it imposes no direct obligations on them.’ See Bear Creek Mining Corporation v Republic of Peru, ICSID Case No ARB/14/21 (Award of 30 November 2017) para 664.
B. Taking into Account the Status of World Heritage Sites and Investor Misconduct: Jurisdiction, Counterclaims and Merits

The fact that the WHC does not directly create legal obligations for investors ‘does not [...] mean that it is without significance or legal effects for them’.\(^{110}\) As the awards described in the previous section suggest, investors who have entirely disregarded the World Heritage status of an area might be completely deprived of investment protection if they are not acting in accordance with the standards set out in the WHC. This may be the case if the WHC is implemented in domestic law\(^ {111}\) and if the investment treaty includes a so-called ‘in accordance with host state law’-clause.\(^ {112}\) For instance, the Netherlands-Turkey BIT stipulates that it ‘shall apply to investments owned or controlled by investors of one Contracting Party in the territory of the other Contracting Party which are established in accordance with the laws and regulations in force in the latter Contracting Party’s territory at the time the investment was made.’\(^ {113}\) In such circumstances the tribunal may deny jurisdiction to hear the investment claims if the investment was made in contravention of domestic legislation protecting World Heritage or reject the claim as inadmissible.

\(^{110}\) To borrow the words of the partially dissenting arbitrator Philipp Sands in *Bear Creek*, who stated that ‘the fact that the [ILO] Convention may not impose obligations directly on a private foreign investor as such does not, however, mean that it is without significance or legal effects for them.’ See *Bear Creek Mining Corporation v Republic of Peru*, ICSID Case No ARB/14/21 (Partial Dissenting Opinion of Professor Philippe Sands of 30 November 2017) para 10.

\(^{111}\) *Glamis Gold v USA*, *supra* note 69, para 84; *Cortec Mining v Kenya*, *supra* note 79, para 43.

\(^{112}\) For a detailed analysis of such provisions see Jarrod Hepburn, ‘In Accordance with Which Host State Laws? Restoring the “Defence” of Investor Illegality in Investment Arbitration’ (2014) 5 Journal of International Dispute Settlement 531. In *Cortec Mining v Kenya, supra* note 79, the legality requirement was regarded as an implicit element of the definition of investment under the ICSID Convention and the BIT (paras 260, 321, 333 (a)). Other tribunals have refused to read a legality requirement into the ICSID Convention or BITs, which do not contain an ‘in accordance with host state law’-clause, see, e.g., *Saba Fakes v Republic of Turkey*, ICSID Case No ARB/07/20 (Award of 14 July 2010) para 114.

\(^{113}\) Art 2(2) Netherlands-Turkey BIT (1986) [emphasis added].
Alternatively, the concept of World Heritage may become relevant for counterclaims, i.e. claims brought by the respondent state against the claimant investor in the arbitral proceedings. However, the success of such a claim firstly depends on whether the jurisdictional clause of the underlying investment treaty covers any dispute (related to the investment) and not only claims by an investor against a state. For instance, the tribunal in *Urbaser v Argentina* accepted that the dispute resolution clause of the Argentina-Spain BIT covering ‘[d]isputes arising between a Party and an investor of the other Party in connection with investments’ and allowing for arbitration ‘at the request of either party to the dispute’ permitted the respondent state Argentina to bring a counterclaim against the investor. Secondly, it depends on the applicable law clause, which must provide a legal ground for a claim against the investor. Mere reference to international law and thus the WHC would arguably not suffice since no obligations for investors are emanating from the WHC. Similarly, the arbitral tribunal in *Urbaser v Argentina* pointed out in connection with Argentina’s counterclaim, which was primarily based on the human right to water, that ‘[t]he human right to water entails an obligation of compliance on the part of the State, but it does not contain an obligation for performance on part of any company’. Rather, ‘the investor’s obligation to perform has as its source domestic law; it does

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115 See, e.g., Hesham T. M. Al Warraq v Republic of Indonesia, UNCITRAL (Final Award of 15 December 2014) paras 659-661; Rusoro Mining Ltd. v Bolivarian Republic of Venezuela, ICSID Case No ARB(AF)/12/5 (Award of 22 August 2016) paras 623-629.


118 *Urbaser v Argentina*, supra note 107, paras 1143-1155.

119 See, e.g., Spyridon Roussalis v Romania, ICSID Case No ARB/06/1 (Award of 1 December 2011) paras 870ff; Burlington Resources Inc. v Republic of Ecuador, ICSID Case No ARB/08/5 (Decision on Ecuador’s Counterclaims of 7 February 2017) paras 71-75.

120 *Urbaser v Argentina*, supra note 107, para 1208.
not find its legal ground in general international law.’121 Thus, it is again the domestic law of the host state implementing the WHC, which could provide an adequate legal basis for a counterclaim if domestic law forms part of the applicable law.

Apart from the jurisdictional phase and counterclaims, the tribunal may consider the WHC when assessing the merits of a claim. This is largely uncontroversial if the applicable law clause not only refers to the investment treaty, but international law as well,122 and if the respondent state relies on the WHC as a defence. Even if the applicable law clause is more narrow, a tribunal may consider other sources of international law under Article 31(3) (c) Vienna Convention on the Law of Treaties (VCLT).123 Whether and under which circumstances an arbitral tribunal could take into account other sources of international law – including the WHC – on its own initiative (iura novit curia) remains contested.124 Moreover, it should be noted that taking into account the WHC does not allow arbitral tribunals to ‘adjudicate on the eventual breach of cultural heritage law’125 since their mandate is limited to rule on whether the state breached investment law. Nonetheless, tribunals ‘may analyse the specific investment claims in the light of the relevant rules of international law applicable in the relationship between the parties, including the WHC.’126 In any event, as the arbitral awards described above indicate, on the merits an investor’s disregard for the WHC regime and the listing of an area as a World Heritage site may prove fatal for investment claims. This is

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121 Ibid, para 1210.
124 See, e.g., Christoph Schreuer and Ursula Kriebaum, ‘From Individual to Community Interest in International Investment Law’ in Ulrich Fastenrath et al (eds), From Bilateralism to Community Interest: Essays in Honour of Bruno Simma (2011) 1079, 1096; see, e.g., Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v Argentine Republic, ICSID Case No ARB/01/3 (Decision on the Application for Annulment of the Argentine Republic of 30 July 2010) para 375.
125 Vadi, supra note 35, 134.
126 Ibid.
particularly true for those based on the legitimate expectations under FET,\textsuperscript{127} since prudent investors may need to be aware that it is impossible or only possible with restrictions to conduct investment activities on or close to World Heritage sites. In addition, investment claims based on non-discrimination standards are unlikely to succeed in situations where investments negatively affecting a World Heritage site are treated differently from investments (in same economic sector) that do not cause harm to World Heritage sites.\textsuperscript{128}

C. Limited Effect of Addressing Investor Misconduct in Investment Proceedings

These procedural and substantive limitations in investment arbitration only become relevant once an investor has commenced arbitral proceedings. Hence, they only provide for – as Valentina Vadi argues – an \textit{ex post} remedy,\textsuperscript{129} \textit{i.e.} denial of investment arbitration, rejection of investment claims or maybe a reduction of damages. This may evidently have monetary implications for investors, but it only serves as an indirect incentive to respect World Heritage sites and the WHC. Tangible obligations under international law, which by themselves require observance by foreign investors are still non-existent.\textsuperscript{130} This gap could best be filled through modifications in treaty law: either extensively through a multilateral treaty providing for obligations of investors to protect heritage; or in a limited form in investment treaties that could establish obligations for investors.\textsuperscript{131} Such efforts are currently not being pursued in a comprehensive manner. Investor obligations are still an exception and when included they do not specifically cover obligations with

\begin{footnotesize}
\begin{itemize}
    \item[127] Gosling and Others v Mauritius, supra note 88, para 249; see also Lorraine de Germiny, ‘Considerations before Investing near a UNESCO World Heritage Site’ (2013) 10(5) Transnational Dispute Management 1, 9.
    \item[128] Parkerings v Lithuania, supra note 59, paras 392, 396; Gosling and Others v Mauritius, supra note 88, para 254.
    \item[130] Occasionally transnational corporations voluntarily commit not to exploit the natural resources located in a World Heritage site, see, \textit{e.g.}, Virunga National Park (Democratic Republic of the Congo) [2014] World Heritage Committee 38 COM 7A.37, paras 6ff, but these are not commitments binding under international law.
\end{itemize}
\end{footnotesize}
respect to cultural or natural heritage, but rather refer to the environment or human rights. Moreover, state parties tend to incorporate general exception clauses to further restrict the possibility of investment claims by investors when measures are taken in the public interest, including the protection of the environment and cultural sites. For instance, the Israel-Japan BIT provides that ‘nothing in this Agreement shall be construed so as to prevent the former Contracting Party from adopting or enforcing measures: […] imposed for the protection of national treasures of artistic, historic or archaeological value’. Such exception clauses do not establish obligations for investors, but may insulate states from investment claims for measures taken to protect heritage. However, the effect of such exception such clauses has been contested in scholarship and recent arbitral practice and it is doubtful whether such clauses preclude awards granting compensation or damages.

V. Host State Obligations under the WHC

Chapter II of the WHC is the Convention’s centrepiece as it is the only source of the state parties’ obligation to protect World Heritage sites. The chapter is independent of protection mechanisms provided in other chapters, such as the World Heritage List, since the obligations under chapter II take effect irrespective of the inscription of the property concerned.

Despite the underlying principle of World Heritage as common heritage of all nations, the chapter heading ‘national and international protection of

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132 See, e.g., Art 18 Morocco-Nigeria BIT (2016); Art 7(1) Netherlands Model BIT (2019).
133 See, e.g., Art 32.1 India Model BIT (2015); Art 24 Norway Model BIT (2015); Art 10(1) Canada-Jordan BIT (2009); Art 18(1)(e) Japan-Lao People’s Democratic Republic BIT (2008); see also Germiny, supra note 127, 10.
135 See, e.g., Eco Oro Minerals Corp. v Republic of Colombia, ICSID Case No. ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum (9 September 2021) para 829. See also Kilian Wagner, Regulation by Exception – The Emergence of (General) Exception Clauses in International Investment Law? in this volume and the case law and literature discussed therein.
137 Ibid.
cultural and natural heritage’ indicates a separation of obligations. While Articles 4 and 5 WHC focus on the duties of the state party in whose territory the property is located, Article 6 WHC puts an emphasis on the responsibilities of the international community. Thus, regarding foreign investments, Articles 4 and 5 WHC are the relevant provisions for the determination of the host state’s obligations.

A state has to fulful the obligations under Articles 4 and 5 with respect to any property of outstanding universal value on its territory. While the WHC does not define those obligations, Article 5 provides an open-ended list of possible measures to ensure the protection, conservation and presentation of properties. A further indication of the host state’s obligations’ specific content are the ‘Operational Guidelines for the implementation of the World Heritage Convention’. Despite detailed instructions in the Guidelines concerning the identification and protection of properties, the legally binding responsibilities undertaken by the state parties may not be as far reaching as Articles 4 and 5 WHC suggest.

While the wording of the first sentence in Article 4 WHC reveals the recognition of territorial sovereignty,
the language in the second part narrows down the obligations to a pledge ‘to do all [they] can, to the utmost of [their] own resources’.\textsuperscript{146} Similarly, the commitment to request international assistance, which is meant to be complemented by Article 6(1) WHC, only applies ‘where appropriate’.\textsuperscript{147} Following this pattern, Article 5 WHC merely requires the state parties to ‘endeavour, in so far as possible, and as appropriate’ to take measures for the protection of World Heritage sites.\textsuperscript{148} The qualifying language of both Articles 4 and 5 WHC reveals the conflicting interests of protecting World Heritage as a common good on the one hand and sovereignty on the other.\textsuperscript{149} Since the Convention’s authors opted for a strong accentuation of sovereignty explicitly referred to in Article 6(1) WHC\textsuperscript{150} – the language of the WHC reflects the correlating consideration of varying economic conditions and domestic legislations.\textsuperscript{151}

The extent of the obligations under Articles 4 and 5 WHC have been subject to interpretation in a number of domestic court proceedings. For instance, in the \textit{Commonwealth v Tasmania} case the High Court of Australia was concerned with the construction of a hydro-electronic dam on the Gordon

\begin{itemize}
\item[146] Art 4 WHC (‘[…] It will do all it can to this end, to the utmost of its own resources and, where appropriate, with any international assistance and co-operation, in particular, financial, artistic, scientific and technical, which it may be able to obtain.’); Huggins, \textit{supra} note 140, 131-132.
\item[147] Art 4 WHC; Quirico, Amidst Fragmentation and Coherence, \textit{supra} note 140, 45; Carducci, \textit{supra} note 136, 118.
\item[148] Art 5 WHC; Huggins, \textit{supra} note 140, 131-132.
\item[149] See Preamble (‘Considering that protection of this heritage at the national level often remains incomplete because of the scale of the resources which it requires and of the insufficient economic, scientific, and technological resources of the country where the property to be protected is situated’); Art 6(1) WHC; Prott, \textit{supra} note 144, 269; Erica J Thorson, ‘The World Heritage Convention and Climate Change: The Case for a Climate-Change Mitigation Strategy beyond the Kyoto Protocol’ in William CG Burns and Hari M Osofsky (eds), \textit{Adjudicating Climate Change: State, National, and International Approaches} (2009) 255, 264; Quirico, Amidst Fragmentation and Coherence, \textit{supra} note 140, 44.
\item[150] Art 6(1) WHC (‘Whilst fully respecting the sovereignty of the States […]’).
\item[151] See \textit{supra} note 148; see also Quirico, Amidst Fragmentation and Coherence, \textit{supra} note 140, 44; Carducci, \textit{supra} note 136, 115ff.
\end{itemize}
River in Tasmania, which threatened to flood a World Heritage site.\textsuperscript{152} In the context of the case, the justices interpreted Articles 4 and 5 WHC.\textsuperscript{153} Based on the removal of the term ‘undertake’ from the draft version of these articles, and its usage in Article 6 WHC, Justice Wilson reasoned that Articles 4 and 5 WHC amount to a promise or aspiration rather than a legal obligation.\textsuperscript{154} Yet, the majority of justices argued that the articles do in fact contain a legal obligation. Therefore, the Court came to the conclusion that the federal government’s ban of the construction was lawful.\textsuperscript{155}

The German Federal Constitutional Court substantiated Justice Wilson’s interpretation in its \textit{Waldschlösschenbrücke} decision.\textsuperscript{156} In this case, the Court had to deal with the impact of the construction of a bridge on the \textit{Dresden Elbe Valley’s} outstanding universal value. Drawing upon recognition of the state parties’ sovereignty, it held that ‘the World Heritage Convention does not offer absolute protection against any kind of changes to World Heritage sites’.\textsuperscript{157}

The Austrian Supreme Administrative Court came to a similar conclusion in its judgement concerning the lawfulness of the construction of a train tunnel, which was deemed to threaten the \textit{Semmering Railway} World Heritage site.\textsuperscript{158} By juxtaposing Article 4 WHC with Article 6(3) WHC,\textsuperscript{159} it found that the former ‘stipulates a different, less far reaching standard under international

\textsuperscript{152} \textit{Commonwealth v Tasmania (Tasmanian Dams case)} (High Court of Australia) 1 July 1983, [1983] HCA 21, (1983) 158 CLR 1.
\textsuperscript{153} \textit{Ibid}.
\textsuperscript{154} Wilson J, \textit{supra} note 144, 18, 20, 26
\textsuperscript{156} \textit{Beschluss der 1. Kammer des Zweiten Senats vom 29. Mai 2007} (Federal Constitutional Court, Germany) 29 May 2007, 2 BVR 695/07, 35
\textsuperscript{157} \textit{Ibid}.
\textsuperscript{158} Supreme Administrative Court (Austria), \textit{supra} note 11, para 9.3.
\textsuperscript{159} Art 6(3) WHC is the provision particularly relevant for the conduct of home states of investors and is analyzed in section VI.
law for the preservation of cultural and natural heritage located within the state’s own sovereign territory’.160

VI. Home State Obligations under the WHC

This section focuses on the – hitherto largely neglected – question whether the WHC includes specific obligations for home states of investors to regulate investment activities abroad when they pose a threat to World Heritage sites according to Article 6(3) WHC.161 To answer this question, the interpretations of Article 6(3) WHC provided by scholarship and the World Heritage Committee will be addressed before analysing the provision on the basis of Article 31 VCLT and with reference to the travaux préparatoires (Article 32 VCLT). The section concludes by assessing which concrete obligations may arise from Article 6(3) WHC for home states with respect to investment activities of their investors abroad.

A. Interpretations by Scholarship

According to Article 6(3) WHC ‘each State party to this Convention undertakes not to take any deliberate measures which might damage directly or indirectly the cultural and natural heritage referred to in Articles 1 and 2 situated on the territory of other States Parties to this Convention’.

The predominant school of thought construes Article 6(3) relatively narrowly. ‘Deliberate measures which might damage’ is essentially equated

160 Ibid., para 9.4.1.

161 Lyndel Prott mentions the discussion in the World Heritage Committee about the operations of a French mining company and asks the question ‘[S]hould the French government have stopped the French mining company from acting contrary to the conditions on which the site had been listed as world heritage?’ – without, however, providing an answer (see Prott, supra note 144, 269). Under human rights law there is also a debate whether home states have a duty to regulate investment activities abroad. See, e.g., Oliver De Schutter, ‘Towards a New Treaty on Business and Human Rights’ (2015) 1 Business and Human Rights Journal 41 (arguing in favour of such an obligation); Doug Cassel, ‘State Jurisdiction over Transnational Business Activity Affecting Human Rights’ in Surya Deva and David Birchall (eds), Research Handbook on Human Rights and Business (2020) 198 (arguing in favour of such an obligation); Claire Methven O’Brien, ‘The Home State Duty to Regulate the Human Rights Impacts of TNCs Abroad: A Rebuttal’ (2018) 3 Business and Human Rights Journal 47, 62-73 (arguing against such an obligation).
to ‘deliberate damage’, ‘deliberately causing damage’ or ‘deliberate harm’,\textsuperscript{162} implying a requirement of intent to cause damage.\textsuperscript{163} According to this interpretation, the provision essentially stipulates a prohibition of intentionally causing damage to World Heritage sites located in another state’s territory. Mere side effects of human activities are not within the scope of application.\textsuperscript{164}

A second school of thought does not focus on the link between intent and the real or potential damage caused, but rather on whether the measure itself – irrespective of any motivation to cause harm – was intentional.\textsuperscript{165} Accordingly, a distinction is drawn between intentional state actions (‘deliberate measures’) – which may be prohibited under Article 6(3) if a risk to a World Heritage site in another state exists – and unintended actions, which are not covered by the scope of application.\textsuperscript{166}


\textsuperscript{163} Roda Verheyen, \textit{Climate Change Damage and International Law: Prevention Duties and State Responsibility} (2005) 216 (‘However, the term “deliberate” substantially qualifies this duty and it could well be argued that in contrast to the general duties contained in Articles 6.1 and 6.2, only deliberate behaviour in the sense of intent to harm is prohibited.’).


\textsuperscript{165} Erica J Thorson, ‘On Thin Ice: The Failure of the United States and the World Heritage Committee to Take Climate Change Mitigation Pursuant to the World Heritage Convention Seriously’ (2008) 38 Environmental Law 139, 163 (‘The plain language of Article 6(3) sets forth a non-discretionary duty to forgo deliberate undertakings that may damage world heritage.’); see also \textit{ibid.}, 167-168 (‘State Parties have an obligation to reduce their greenhouse gas emissions because emitting greenhouse gases is a deliberate measure directly and indirectly damaging World Heritage sites.’).

\textsuperscript{166} Thorson, \textit{The World Heritage Convention and Climate Change}, \textit{supra} note 149, 264, note 48.
Moreover, scholars disagree on the meaning of the term ‘measure’. While it has been suggested that ‘measure’ only refers to ‘positive legislative acts’, the leading commentary on the WHC explains that ‘any measure’ implies the applicability of the provision to a variety of situations, including transboundary-poaching activities.

Some scholars also disapprove of the general understanding of Article 6(3) as a duty of omission. They argue that the provision might also require a state to intervene in activities conducted on its territory which might pose a risk to World Heritage sites abroad.

B. World Heritage Committee Decisions

The obligations under Article 6(3) WHC have repeatedly been subject to discussions in the World Heritage Committee. While the Committee is no judicial or arbitral body, its decisions as well as the views by representatives of state parties presented in the Committee, provide an insight into the Committee’s as well as state parties’ understanding of the provision.

1. Activities of Armed Forces

In the Democratic Republic of the Congo, activities of people linked to the government posed a threat to World Heritage sites. The World Heritage Committee expressed serious concern with regard to five of the country’s World Heritage sites in 2005 as mining and poaching activities of ‘armed groups, inter alia, elements of the regular army, the national police and former rebel, elements of the regular army, the national police and former rebel [sic!] troops that are awaiting demobilization or integration into the

\[167\] Quirico, Key Issues, supra note 162, 402-403.

\[168\] Carducci, supra note 136, 126; see also Thorson, On Thin Ice, supra note 165, 166, suggesting that the emission of greenhouse gases is a ‘deliberate measure’.

\[169\] Quirico, Key Issues, supra note 162, 403; Thorson, On Thin Ice, supra note 165, 163.

\[170\] Craig Forrest, International Law and the Protection of Cultural Heritage (2010) 246 (‘indirectly [Article 6(3)] may require a State Party to act in order to prevent certain action emanating from its territory from damaging the world cultural heritage situated outside its borders’).
national army’ threatened their outstanding universal value.\textsuperscript{171} Therefore, the Committee not only decided to retain all properties concerned on the List of World Heritage in Danger, but also requested Sudan to do ‘its best to prevent transborder poaching activities\textsuperscript{172} in accordance with Article 6(3) WHC.\textsuperscript{173}

2. Financial Support

The World Heritage Committee decisions concerning \textit{Ha Long Bay} in Vietnam mark the role of project financing in the Convention’s protection regime. Due to the planned construction of a new port as well as a large floating hotel, the World Heritage site’s outstanding universal value was at risk.\textsuperscript{174} As Japanese aid agencies considered to provide US $100 million of financial support for the project, the Committee alluded to the obligations under Article 6(3) WHC.\textsuperscript{175} The Canadian delegate likewise referred to the provision and drew the Committee’s attention to the issue of private companies’ involvement.\textsuperscript{176} After the Japan International Cooperation Agency (JICA) had proceeded to complete the ‘project formulation study’ nonetheless, the Committee requested the Vietnamese and Japanese authorities to provide information on the project’s environmental impact.\textsuperscript{177}

\begin{thebibliography}{9}
\bibitem{172} \textit{Ibid.}, para 11.
\bibitem{173} \textit{Ibid.}, para 11.
\bibitem{175} \textit{Ha Long Bay} (Vietnam) [1996] World Heritage Committee Decision 20 COM CONF 201 VII.D.41.
\bibitem{176} \textit{Ha Long Bay} (Vietnam) [1995] supra note 174.
\bibitem{177} \textit{Ha Long Bay} (Vietnam) [1996] supra note 175; see also the decision in \textit{Kamchatka Volcanoes} (Russian Federation) [1998] Word Heritage Committee Decision 22 COM CONF 201 V.B.29. Regarding the Committee’s emphasis on the observation of best environmental practice by all state parties that support development projects related to World Heritage sites see \textit{Selous Game Reserve} (United Republic of Tanzania) [2019] World Heritage Committee Decision 43 COM 7A.16, para 10.
\end{thebibliography}
3. Construction Measures Associated with Water Resources

The GIBE III dam on the Omo River in Ethiopia is an illustrative example of the role of Article 6(3) WHC in the context of dam projects endangering World Heritage sites in a neighbouring country. Said dam threatened the Kenyan Lake Turkana National Parks’ outstanding universal value178, as its construction would have led to a drop of water levels and disrupted the fragile hydrological regime of the property.179 In light of this, the Committee, referring to Article 6 WHC, urged Ethiopia to halt the construction of the dam.180 Additionally, the Committee requested Ethiopia to provide assessments of any other dam projects on the Omo River and encouraged institutions supporting the construction of GIBE III to intercept their financial support.181

4. Extraction of Mineral Resources182

The Virunga National Park is one of a number of World Heritage sites jeopardized by mining projects. The national park located in the DRC was threatened, because Uganda included parts of a lake bordering the property in calls for tender for future petroleum exploration projects.183 The Committee therefore reiterated that ‘oil and gas mining is incompatible with the World Heritage status’184 and underscored that private companies had committed to refrain from such activities in protected areas.185 Complementary to the

179 Ibid., para 3.
180 Ibid., para 5.
182 See also further decisions, e.g., Curonian Spit (Lithuania and Russian Federation) [2004] World Heritage Committee Decision 28 COM 15B.75; Curonian Spit (Lithuania and Russian Federation) [2003] World Heritage Committee Decision 27 COM 7B.70; Mana Pools National Park, Sapi and Chewore Safari Areas (Zimbabwe) [2016] World Heritage Committee Decision 40 COM 7B.84.
184 Ibid., para 5.
185 Ibid., para 5.
companies’ commitment, the Committee reminded Uganda of its obligation under Article 6(3) WHC and requested the state party to refrain from granting any petroleum exploitation permits in the critical area.\(^{186}\)

The Committee Decision on *Mount Nimba Strict Nature Reserve*\(^{187}\) illustrates the role foreign investors’ home states play in mining activities on World Heritage sites. As Guinea developed interest in iron-ore mining projects in the area of the transboundary World Heritage site located in Guinea and Côte d’Ivoire, the Guinean authorities proposed new boundaries of the property excising future mining sites.\(^{188}\) In order to compensate the downsizing of the World Heritage site, the organizations financing the mining project offered support for the conservation of the nature reserve.\(^{189}\) While emphasizing the respect for Guinea’s economic interests, the World Heritage Committee declined the offer and requested the nomination of the property for the List of World Heritage in Danger.\(^{190}\) Furthermore, the Committee asked the US and France as home states of the companies interested in the said mining project, to consider the obligations under Article 6(3) WHC.\(^{191}\) The US delegate countered the Committee’s request by pointing out that the WHC only applied to state parties. In addition, the delegate argued that the US government was not involved in mining activities through direct activity or financing of these private companies, which is why the US would not breach its obligations under the WHC if the mining project were to proceed.\(^{192}\)

\(^{186}\) *Ibid.*, para 6; see also *Virunga National Park* (Democratic Republic of the Congo) [2013] World Heritage Committee Decision 37 COM 7A.4, para 9; in connection with mining activities, the Committee urged state parties to abide by the ‘No-go’ commitment of the International Council on Mining and Metals (ICCM) ‘by not permitting extractive activities within World Heritage properties, and by making every effort to ensure that extractive companies located in their territory cause no damage to World Heritage properties, in line with Article 6 of the Convention’, see *Priority Africa, Sustainable Development and World Heritage* [2019] World Heritage Committee Decision 43 COM 5D, para 8.


\(^{189}\) *Ibid*.

\(^{190}\) *Ibid*.


\(^{192}\) *Ibid*; See also the similar Canadian view in *Yellowstone National Park* (United States of America) [1995] Bureau Decision CONF 201 VI.20.
5. Tourism and Fishing

As fishing activities and tourism took a toll on the Galapagos Islands’ outstanding universal value, the Committee requested the monitoring of their state of conservation.\footnote{Galapagos (Ecuador) [1990] World Heritage Committee Decision 22 COM 004 IX.} Over time, however, the impacts of anthropogenic influence increased to the extent that the property was added to the List of World Heritage in Danger.\footnote{Galapagos Islands (Ecuador) [2007] World Heritage Committee Decision 31 COM 7B.35, para 11.} Since threats, such as shipping, over-fishing and tourism, could not be attributed to a specific state party, the Committee reminded state parties in general to respect their obligations under Article 6(3) WHC.\footnote{Ibid., para 6.}

C. Article 6(3) WHC – Analysis of an Enigmatic Provision

In light of the interpretations provided by scholarship and the Committee, this section attempts to establish the scope and meaning of Article 6(3) WHC in accordance with Articles 31 and 32 VCLT.\footnote{Having entered into force in 1980, the VCLT is not directly applicable to the WHC, which entered into force prior to the VCLT in 1975. However, its rules of interpretation are widely accepted as reflecting customary international, see, e.g., Arbitral Award of 31 July 1989 (Guinea-Bissau v Senegal) [1991] ICJ 53, 70 (Judgment of 12 November).} Article 31(1) VCLT provides that treaties ‘shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.’ Article 32 VCLT stipulates that supplementary means of interpretation, such as the travaux préparatoires can be consulted ‘to confirm the meaning resulting from the application of article 31’ or ‘when the interpretation according to Article 31(a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.’

As the outline of interpretations by scholarship has shown, the most contentious terms in Article 6(3) WHC are ‘measure’ and ‘deliberate’. With regard to ‘measure’, the ordinary meaning is ‘a plan, a course of action’.\footnote{‘measure, n.’ in Oxford English Dictionary (last updated June 2022) <www.oed.com/> accessed 20 July 2022.}
These rather broad terms suggest that the word not only covers legislative acts, but also other activities. The World Heritage Committee decisions substantiate this proposition, as the Committee in most cases refers to Article 6(3) WHC in the context of non-legislative acts such as construction projects, mining, oil exploration, and poaching activities. The adjective ‘deliberate’ is commonly understood as ‘with careful consideration and full intention’. While there seems to be consensus regarding the ordinary meaning of this term, its grammatical connection with ‘measure’ and the resulting inferences are the neuralgic point in the understanding of the provision. Following general grammatical rules, an adjective refers to the following noun. Consequently, ‘deliberate’ modifies the noun ‘measure’.

On the basis of this understanding, it cannot be presumed that Article 6(3) WHC only refers to acts of deliberately caused damage. This result is supported by the travaux préparatoires of the Convention.
While early drafts qualified the obligation by using the phrase ‘refraining as far as possible from acts which might damage them’, this wording was later abandoned in favour of non-discretionary language. This development indicates that the WHC’s authors wanted to strengthen the obligation. A requirement of ‘deliberate damage’ would oppose this logic, as it would further limit the scope of the provision. Moreover, restricting the scope of Article 6(3) WHC to intentional damage would render legal texts, which exclusively prohibit intentional destruction, i.e. the UNESCO Declaration concerning the Intentional Destruction of Cultural Heritage, largely superfluous.

From the synopsis of the World Heritage Committee decisions, which often refer to projects that are not designed to damage a World Heritage site, and the analysis of the provision’s text, it can therefore be deduced that the term ‘deliberate measure’ is to be interpreted as a state party’s active involvement in a project, for example, by providing financial support.

In addition, several Committee decisions indicate that Article 6(3) WHC resembles the duty to prevent transboundary harm under customary international law. For instance, if a state party has a hydroelectric dam on

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209 Art 6(3), UNESCO Draft Convention Concerning the Protection of Cultural and Natural World Heritage (7 April 1972) UN Doc SHC-72/conf.37/5; Art 6(3) WHC; Thorson, The World Heritage Convention and Climate Change, supra note 149, 263.

210 Robert L Meyer, supra note 164, 53 (‘The words ‘so far as possible’ […] were considered an overly broad loophole, so the word ‘deliberate’ was substituted.’).


its territory – regardless of whether the state itself or a private corporation constructed the dam – the duty to prevent transboundary harm under customary international law requires the state ‘to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control’. Therefore, the state is obliged to determine whether a risk of transboundary harm exists, in particular by conducting EIAs and by taking ‘appropriate measures to prevent or mitigate that risk’. Similarly, it may constitute a violation of Article 6(3) WHC, if the state takes the deliberate measure to authorize the construction of a dam on its territory and thereby creates a risk of transboundary harm to a World Heritage site located abroad.

D. Home State Obligations for Investor Conduct: What, If Any?

The analysis above suggests that home states of investors may have obligations with respect to private investors’ misconduct abroad only in a limited set of circumstances. When the entire harmful operation takes place abroad, it is arguably not possible to establish a duty to intervene in investment activities under Article 6(3) WHC unless the private investor could be attributed to the state under the law of state responsibility or if the home state at some point had to take a ‘deliberate measure’ to render the private investor’s activity

215 Legality of the Threat or Use of Nuclear Weapons [1996] ICJ Rep 226, 242 (Advisory Opinion of 8 July); see also, e.g., Trail Smelter Case (United States v Canada) [1941] 3 UNRIA 1905, 1965 (‘[U]nder the principles of international law […] no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, […]’); Pulp Mills on the River Uruguay (Argentina v Uruguay) [2010] ICJ 14, 56 (Judgment of 20 April) (‘State is thus obliged to use all the means at its disposal in order to avoid activities which take place in its territory, or in any area under its jurisdiction, causing significant damage to the environment of another State.’).


217 Certain Activities, supra note 216, 724; Art 3, ILC, ‘Draft Articles on Prevention of Transboundary Harm from Hazardous Activities’ (2001) UN Doc A/56/10, ch V.

Thus, a reasonable argument can be made that a state—being the home state of the investor or in fact any state other than the host state—has an obligation to assess the impacts of an investment project on World Heritage sites when a decision is taken by that state to finance a project near a World Heritage site abroad or to provide any other kind of non-financial support (e.g. the export-authorizations of machinery needed for the investment activity abroad). In particular, financial support in the form of aid or loans clearly constitutes a ‘deliberate measure’ under Article 6(3) WHC. Accordingly, both the wording of Article 6(3) WHC and the practice/discussions in the Committee suggest that a state may not take such active steps supporting an investment project abroad when the project poses a risk to a World Heritage site in the foreign state.

VII. Conclusion

World Heritage and investment activities are often at odds. The interest in preserving a World Heritage site because of its outstanding natural or cultural value may collide with the interest in economically exploiting the site. As has been shown in this article, investment tribunals have taken into account the WHC in various disputes involving World Heritage sites. While the WHC does not create direct obligations for investors to respect and protect World Heritage, an investor may lose access to investment arbitration or no breaches of investment laws may be identified if the standards of the WHC, domestic laws implementing the WHC or the existence of a World Heritage site are disregarded. Host states of investments have a certain latitude in how

\(^{219}\) See, however, ICEL/IUCN Draft International Covenant on Environment and Development: Implementing Sustainability, supra note 214, 95 note 272 ('This obligation refers largely to transboundary harm, but also to the activities of transnational corporations and the provision of foreign aid.').

\(^{220}\) See supra note 212. See also ICEL/IUCN Draft International Covenant on Environment and Development: Implementing Sustainability, supra note 214, 95 note 272.

\(^{221}\) *Ha Long Bay* (Vietnam) [1996] supra note 175; *Kamchatka Volcanoes* (Russian Federation) [1998] supra note 177. See also *Mt. Nimba Nature Reserve (Côte d’Ivoire/Guinea) [1991]* supra note 201, where the US delegate ‘[informed] the Committee that his Government was not involved in the mining project by direct activity or financing. Hence, the Delegate concluded that even if the mining project were to proceed, the United States would not breach its obligations as specified in Article 6 (3).’
much protection to offer to World Heritage sites under the WHC. Conversely, the language of the WHC and decisions by the World Heritage Committee suggest that home states of investors may have a stricter obligation vis-à-vis World Heritage sites located in another state. While it remains difficult to argue that home states of investors have a duty under the WHC to regulate private investment activities occurring in another state, providing (financial) assistance to an investment, which threatens a World Heritage site abroad, could breach the WHC.

In conclusion, the WHC has a role to play in ensuring that investment activities do not contravene the environmental and cultural policies of a state and the desire of the international community as a whole to preserve unique cultural and natural sites. Although it may be a limited role, scholars, tribunals and states should pay close attention to the WHC when investment activities and investment disputes involve World Heritage sites. In addition, the manner in which investment tribunals approach the rules contained in the WHC may be relevant for investment disputes revolving around climate policies and the Paris Agreement.