

**Conflictive delisting process of a World Heritage Site in
Germany:
the case of the Dresden Elbe Valley**

A thesis approved by the Faculty of Mechanical, Electrical and Industrial Engineering at the Brandenburg University of Technology in Cottbus in partial fulfilment of the requirement for the award of the academic degree of Doctor of Philosophy (Ph.D.) in Heritage Studies

by

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Day of the oral examination: 30 January 2014

“Dresden - a wonderful city, full of art and history but still not a museum lived-in accidentally by Dresden's inhabitants. The past and the present live together in harmony. Or I should rather say polyphony. And together with its surroundings, with the Elbe, the bridges, the hilly slopes, the stretches of forests and mountains on the horizon, one could even speak of a whole symphony. History, art and nature waft over the city and the valley like a chord enchanted by its own harmony.”

Erich Kästner,

Als ich ein kleiner Junge war (1957, p.51)

(Translation: Karina Schumann)

Abstract

This research comprises an analysis concerning the conflict between the State Party Germany to the World Heritage Convention and UNESCO in the case of the Dresden Elbe Valley. Through a historical and legal analysis, this research aims to ascertain the reasons for this conflict, as well as the impossibility of finding a compromise. First, the conflict in the core of the Dresden Elbe Valley World Heritage Site caused by the construction of the *Waldschlößchenbrücke*, which is the object of study in this research, is anchored in its context of the City of Dresden. Thus, the object of the conflict, the *Waldschlößchenbrücke*, is presented in its historical and geo-spatial context in order to shed light on the elements that triggered the conflict. Secondly, the conflict is anchored within the German legal context through the analysis of the legal procedures concerning the binding effects of the World Heritage Convention for the Federal Republic of Germany and the environmental concerns rendered by the construction of the *Waldschlößchenbrücke*. Based on legal commentaries of the courts' decisions, a discussion on the non-transposition of the World Heritage concepts in the Federal Republic of Germany is implemented. Thirdly, the State Party Germany to the World Heritage Convention and UNESCO are confronted. A review of the concept of cultural landscape in the context of the World Heritage Convention, adapted to the case of the Dresden Elbe Valley, is first implemented. Subsequently, a commentary on the legally binding effects for the States Parties to the World Heritage Convention is elaborated upon, as well as a deconstruction of the step-by-step decisions from the inscription to the delisting of the Dresden Elbe Valley from the World Heritage List. Fourthly, an evaluation is developed concerning the concept of Historic Urban Landscape as an action plan capable of solving the conflict between urban development and heritage protection, and adapted to the German context. Finally, as a conclusion to this research, recommendations are drawn based on the conflict opposing UNESCO and the State Party Germany to the World Heritage Convention towards the Dresden Elbe Valley. These recommendations are addressed to the City of Dresden, the Free State of Saxony, the Federal Republic of Germany and UNESCO.

Zusammenfassung

Diese Dissertation umfasst eine Analyse über den Konfliktfall zwischen der Bundesrepublik Deutschland als Vertragsstaat der Welterbekonvention und der UNESCO in dem Fall des Dresdner Elbtals. Anhand einer geschichtlichen und rechtlichen Analyse, auf die diese Forschung abzielt, wird versucht, die Gründe dieses Konfliktes und die Unmöglichkeit eines Kompromisses aufzuzeigen. Der Konflikt wurde durch den Bau der im Herzen der Dresdner Weltkulturerbestätte liegenden *Waldschlößchenbrücke* verursacht. Im ersten Abschnitt wird dieser Konflikt – das Untersuchungsobjekt dieser Dissertation – im Kontext der Stadt Dresden erläutert. Die *Waldschlößchenbrücke*, als Ursache des Konfliktes, wird zunächst in ihrem geschichtlichen und räumlichen Kontext beleuchtet um den eigentlichen Auslöser des Konfliktes zu identifizieren. Im zweiten Abschnitt wird der Konflikt im Kontext der deutschen Gesetzgebung betrachtet. Durch den Bau der *Waldschlößchenbrücke* wurden zwei Rechtsverfahren eingeleitet – eines über die bindenden Wirkungen der Welterbekonvention mit der Bundesrepublik Deutschland und ein anderes über Umweltanliegen. Auf der Grundlage von Kommentaren über Gerichtsentscheidungen wurde eine Debatte über die Nichtumsetzung der Welterbe-Konzepte in der Bundesrepublik Deutschland ausgelöst. Der dritte Abschnitt zeigt die Widersprüchlichkeiten zwischen der Bundesrepublik Deutschland als Vertragsstaat der Welterbekonvention und der UNESCO auf. Eine Übersicht des Kulturlandschaftskonzeptes der Welterbekonvention, bezogen auf den Fall des Dresdner Elbtals, wird erstmals angefertigt. Eine Erläuterung zur rechtlich bindenden Wirkung der Vertragsstaaten der Welterbekonvention sowie das Nachvollziehen der schrittweisen Entscheidungen über die Ein- und Austragung des Dresdner Elbtals in die bzw. aus der Welterbeliste, werden ausgearbeitet. Im vierten Abschnitt wird eine Bewertung des Konzeptes der historischen Stadtlandschaft vorgenommen. Zur Überwindung des Konfliktes zwischen Stadtentwicklung und Denkmalschutz wird dieser Aktionsplan im deutschen Rechtskontext bewertet. Zum Abschluss dieser Forschungsarbeit werden Verbesserungsvorschläge aufgezeigt, die dabei helfen können, Konflikte wie den des Dresdner Elbtals, in Zukunft zu vermeiden. Die Verbesserungsvorschläge, die auf den Ergebnissen dieser Forschungsarbeit beruhen, richten sich an die Stadt Dresden, den Freistaat Sachsen, die Bundesrepublik Deutschland und die UNESCO.

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List of abbreviations

BBR	Bundesamt für Bauwesen und Raumordnung
BMVBS	Bundesministerium für Verkehr, Bau und Stadtentwicklung
CC	City Council
EIA	Environmental Impact Assessment
FFH	Flora Fauna Habitat
FRG	Federal Republic of Germany
GDR	German Democratic Republic
GG	Grundgesetz
HD	Habitats Directive
HDA	Habitats Directive Assessment
HUL	Historic Urban Landscape
ICCROM	International Centre for the Study of the Preservation and Restoration of Cultural Property
ICJ	International Court of Justice
ICOMOS	International Council on Monuments and Sites
IFLA	International Federation of Landscape Architects
IUCN	International Union for the Conservation of Nature
OG	Operational Guidelines for the Implementation of the World Heritage Convention
OUV	Outstanding Universal Value
RC	Regional Council
RWTH	Rheinisch-Westfälische Technische Hochschule
SS	Schutzstaffel

Standing Conference	Standing Conference of the Ministers of Education and Cultural Affairs of the <i>Länder</i> in the Federal Republic of Germany
UNESCO	United Nations Educational, Scientific and Cultural Organization
VIS	Visual Impact Study
WHC	World Heritage Convention
WHS	World Heritage Site

CHAPTER 1

INTRODUCTION

To introduce this research, an overview is presented in order to contextualise the phenomenon under consideration. After having described the context, the next part of this introduction details the aim, objectives and questions of the research conducted. Based on this presentation, the conceptual framework and methodology applied in the research are detailed. Finally, the structure of this thesis is outlined.



Figure 1: View of the Dresden Elbe Valley with the *Albertbrücke* and the Church of our Lady (*Frauenkirche*) in the background (middle). Source: B. Gaillard, 7 May 2011

1.1. Overview

This research is dedicated to the analysis of a conflict between the State Party Germany to the *1972 Convention Concerning the Protection of the World Cultural and Natural Heritage*¹ – also known as the World Heritage Convention (henceforth WHC) – and the United Nations Educational, Social and Cultural Organization (henceforth UNESCO). In fact, the study focuses on the Dresden Elbe Valley (Figure 1), the first World Heritage Site (henceforth WHS) to be delisted without the consent² of the State Party to the WHC, and the second³ ever delisted WHS. It comprises an exploratory research, given that this thesis is based on a recent case that little research has been conducted about to date.

¹ World Heritage Convention [WHC], adopted by the General Conference of UNESCO at its 17th session, 16 November 1972, Paris

² The necessity of the consent or not of the State Party for the delisting of a WHS on its territory from the World Heritage List is discussed in the section 4.2.3 of this thesis

³ The first ever delisted WHS is the “Arabian Oryx Sanctuary”, Oman, in 2007, Decision 31 COM 7B.11 adopted at the 31st session of the World Heritage Committee, Christchurch, New Zealand. For more information see sections 4.2.3 and 4.3 of this thesis



Figure 2: View of the Dresden Elbe Valley with the *Waldschlößchenbrücke* in the background.
Source: B. Gaillard, 7 May 2011

Following its inscription on the World Heritage List in July 2004⁴ and transfer to the List of World Heritage in Danger in July 2006,⁵ the Dresden Elbe Valley was subsequently delisted from the World Heritage List⁶ in June 2009 due to the construction of a bridge in the core of the protected area: the *Waldschlößchenbrücke* (Figure 2). Accordingly, the World Heritage Committee argued that such a construction destroyed the integrity of the site and the Outstanding Universal Value (henceforth OUV) for which the cultural landscape Dresden Elbe Valley had been originally inscribed on the World Heritage List.

UNESCO was created on 16 November 1945 by 37 countries at the end of a two-week United Nations Conference for the establishment of an educational and cultural organisation (ECO/CONF) in London. Following this first step, the Constitution of UNESCO, signed on 16 November 1945, came into force following the signature of 20 nation-states on 4 November 1946. The Federal Republic of Germany (henceforth FRG) became a UNESCO Member on 11

⁴ Decision 28 COM 14B.40 adopted at the 28th session of the World Heritage Committee, Suzhou, China

⁵ Decision 30 COM 7B.77 adopted at the 30th session of the World Heritage Committee, Vilnius, Lithuania

⁶ Decision 33 COM 7A.26 adopted at the 33rd session of the World Heritage Committee, Sevilla, Spain

July 1951, while the German Democratic Republic (henceforth GDR) – within whose territory the City of Dresden was located – joined UNESCO on 24 November 1972.

The WHC was adopted by the UNESCO General Conference during its 17th session in Paris on 16 November 1972. As seen with the accession to the UNESCO Membership, both German States ratified the WHC: the FRG on 23 November 1976 and the GDR on 12 December 1988. Following the ratification of the WHC by the FRG, this Convention was promulgated on 2 February 1977 in the Federal Law Gazette on 26 February 1977.⁷ Nevertheless, the WHC has not been transferred in German national law⁸ through an inner state ratification,⁹ as should have occurred according to art. 59 para. 2 Basic Law.¹⁰

Subsequent to the downfall of the Berlin Wall on 9 November 1989 and the German reunification on 3 October 1990, the five new *Länder* that were part of the GDR and thus the City of Dresden accessed the FRG and consequently the Basic Law. Thus, the two former German states united and have subsequently formed one sovereign state. This implies that “the Contracting Parties to the Unification Treaty “have agreed that the treaties and agreements to which the Federal Republic of Germany is a contracting party ... remain in force and that their respective rights and obligations ... be applied” to the whole territory of Germany”.¹¹

As of July 2013, the State Party Germany to the WHC has 38 sites on the World Heritage List, including 35 cultural and three natural sites. In addition, none of the WHS located on the German territory are inscribed on the List of World Heritage in Danger. Since the first inscription of a WHS, the Aachen Cathedral, in 1978, two sites have been inscribed on the List of World

⁷ Fed. Law Gazette II, p.213

⁸ Ringbeck, B., 2008. Die Welterbekonvention – Rechtliche Rahmenbedingungen und Verpflichtungen. In: U. Schädler-Saub, ed. *Weltkulturerbe Deutschland, Präventive Konservierung und Erhaltungsperspektiven*. Regensburg: Verlag Schnell & Steiner, p.24

⁹ Von Schorlemer, S., 2008. Compliance with the UNESCO World Heritage Convention: Reflections on the Elbe Valley and the Dresden Waldschlösschen Bridge. *German Yearbook of International Law*, Volume 51, p.356

¹⁰ Grundgesetz [GG] [Basic Law], Basic Law for the Federal Republic of Germany, 23 May 1949, last amended by the Act of 21 July 2010 (Fed. Law Gazette I p. 944), art. 59 para. 2 “Treaties that regulate the political relations of the Federation or relate to subjects of federal legislation shall require the consent or participation, in the form of a federal law, of the bodies responsible in such a case for the enactment of federal law. In the case of executive agreements the provisions concerning the federal administration shall apply mutatis mutandis.”

¹¹ UNESCO, 2012. *States Parties: Ratification Status*. [Online] Available at: <http://whc.unesco.org/en/statesparties/> [Accessed: 1 September 2012].

Heritage in Danger. First, the Cologne Cathedral,¹² initially inscribed on the World Heritage List in 1996, was transferred to the List of World Heritage in Danger in 2004 and subsequently removed from the same list in 2006. Secondly, the Dresden Elbe Valley was transferred to the List of World Heritage in Danger in 2006 and delisted from the World Heritage List in 2009.

The Dresden Elbe Valley WHS consisted of an 18 km long cultural landscape along the Elbe River, from the Übigau Palace to the Pillnitz Palace, including the historic centre of Dresden. While the natural features of this cultural landscape include hills, vineyards, parks, gardens and meadows, the cultural features are represented by villas, palaces, churches and bridges. There are five bridges on the segment of the former Dresden Elbe Valley cultural landscape. As shown in Figure 3, which represents a part of the former WHS¹³ the sixth bridge, the *Waldschlößchenbrücke*, is located in the core of the former WHS, approximately 4 km from the historic centre of the City of Dresden towards the South-East. The *Waldschlößchenbrücke* has a long history of several failed projects dating back to 1862.¹⁴ The case under consideration raises the question of the threat of urban development to heritage and more specifically WHS.

In cases such as the Arabian Oryx Sanctuary in Oman or the Dresden Elbe Valley in Germany, the existence of a provision in the WHC to delist a site from the World Heritage List is questionable, despite being regulated in the *Operational Guidelines for the Implementation of the World Heritage Convention* – also known as Operational Guidelines (henceforth OG).¹⁵ The process of delisting refers to the removal of a site from the World Heritage List, in the case that the State Party to the WHC on whose territory the site is located and the international community fail to protect the site's integrity, authenticity and OUV.

¹² Decision 28 COM 15B.70 adopted at the 28th session of the World Heritage Committee, Suzhou, China. The integrity of the Cologne Cathedral WHS was threatened by the construction of several high-rise buildings on the other side of the Rhine River in the district of Cologne-Deutz, opposite the Cologne Cathedral

¹³ For an exact map of the boundaries of the Dresden Elbe Valley, see Figure 26 in the section 2.2.3 of this thesis

¹⁴ For more information on the history of the *Waldschlößchenbrücke* see section 2.1.1 of this thesis

¹⁵ UNESCO, 2013. *Operational Guidelines for the Implementation of the World Heritage Convention*. Paris: UNESCO World Heritage Centre, paras. 192-198, for more information on this issue see section 4.2 of this thesis

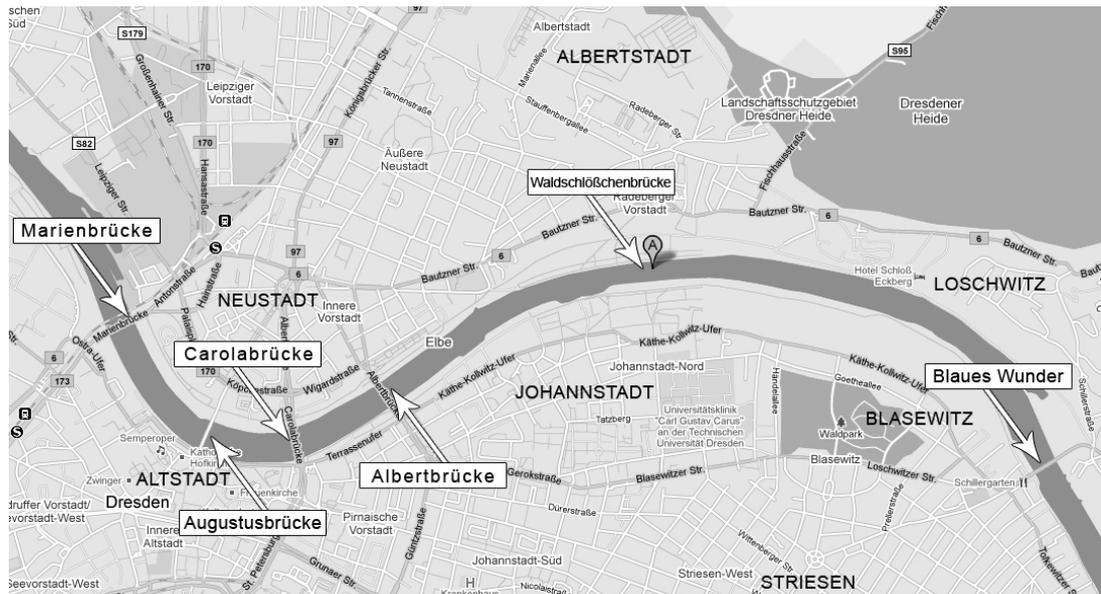


Figure 3: Location of the Waldschlößchenbrücke (A) in the City of Dresden. Source: Google map view from 19 December 2010 (with own addition)

1.2. Research aim, objectives and questions

This research aims to analyse the conflictive process of the delisting of the Dresden Elbe Valley from the World Heritage List while investigating this conflict from a historical and legal perspective.

In order to achieve this aim, a set of objectives is deployed throughout this research, with each objective corresponding to a particular chapter of this thesis.

A first objective proposes highlighting the trigger of the conflict between UNESCO and the State Party Germany to the WHC while historically and geographically contextualising the object of this conflict – the *Waldschlößchenbrücke* – within the City of Dresden.

A second objective foresees investigating the reasons for the conflict from the German legal context in order to determine the legal arguments that impeded the possibility of protecting the integrity and OUV of the Dresden Elbe Valley.

A third objective pursued involves ascertaining the legal background of the failure of UNESCO and the State Party Germany to the WHC to protect the integrity and OUV of the Dresden Elbe Valley.

A fourth objective intends to evaluate the potential of the recently-developed concept of Historic Urban Landscape (henceforth HUL) to solve conflicts between urban development and heritage protection in the context of World Heritage.

A fifth objective aims to draw recommendations to the City of Dresden, the Free State of Saxony, the FRG and UNESCO based on the case of the Dresden Elbe Valley.

A central question applies to the whole research:

- What were the reasons for the conflict between UNESCO and the State Party Germany to the WHC concerning the Dresden Elbe Valley?

A set of questions refers to the research objectives:

- What are the elements of the trigger of the conflict related to the *Waldschlößchenbrücke* and the Dresden Elbe Valley?
- Which legal arguments were invoked during the legal procedure related to the *Waldschlößchenbrücke*?
- Why did the World Heritage Committee and the State Party Germany to the WHC fail to protect the integrity and OUV of the Dresden Elbe Valley?
- Does the concept of HUL have the potential to solve the conflict between urban development and heritage protection in the context of World Heritage?
- What lessons can be learned by UNESCO and the State Party Germany to the WHC regarding the conflict involving the Dresden Elbe Valley?

1.3. Conceptual framework

In 40 years of existence of the WHC, spanning the presence of 981 sites on the World Heritage List as of July 2013, the Dresden Elbe Valley represents the second WHS to be delisted. Given

that this delisting took place in June 2009 and this research was started in September 2010, little research has been conducted exclusively¹⁶ on this topic since the delisting of the Dresden Elbe Valley. The need for research based on this case study is justified by the necessity to discuss the decisional and institutional mechanisms of the State Party Germany to the WHC and UNESCO while investigating this conflict. In addition, the elaboration of the concept of HUL by UNESCO and the conflict concerning the Dresden Elbe Valley took place during the same timeframe. Accordingly, this research assesses the potential of this new concept to solve the conflict between urban development and heritage protection.

In this context, the added-value of this research consists in the implementation of a detailed analysis based on a “zoom out” approach towards the conflict between the State Party Germany to the WHC and UNESCO from the perspective of the City of Dresden, the FRG and UNESCO.

1.4. Methodology

This research can be considered a qualitative research, given that it focuses on a case study in order to ascertain the reasons, or in other terms the why and the how, of a specific phenomenon, namely the conflictive delisting process of the Dresden Elbe Valley from the World Heritage List.

As expressed by VanWynsberghe and Khan,¹⁷ case study research is conceptualised as “a transparadigmatic and transdisciplinary heuristic that involves the careful delineation of the phenomena for which evidence is being collected (event, concept, programme, process, etc)”.¹⁸ In addition, the authors argue that case studies permit defining the circumscription of the unit of analysis developed in a research while providing detailed information about the context of the case, its spatial and temporal boundaries, and interrelations between the case and its unit of

¹⁶ A detailed research was consecrated to this conflict from the perspective of the theory of organisations and path dependence, see Berthod, O., 2011. *On Institutions, Paths, and Routes Set in Stone: the Construction of a Bridge as a Case of Path Instantiation*. Doctoral Dissertation. Berlin: Freie Universität Berlin

¹⁷ VanWynsberghe, R. & Khan, S., 2007. Redefining Case Study. *International Journal of Qualitative Methods*, 6(2), pp.82-83

¹⁸ VanWynsberghe & Khan, p.90 (note 17)

analysis.¹⁹ The scheme presented in Annex I of this thesis shows how the case study, here the Dresden Elbe Valley, can be found in the intersection between UNESCO and the State Party Germany to the WHC. While the spatial boundaries of the case study are the City of Dresden, the Free State of Saxony and the FRG, the temporal boundaries can be defined between 2004 and 2009, namely between the inscription of the Dresden Elbe Valley on the World Heritage List and its delisting from the same list.

1.5. Structure of the thesis

This research is elaborated as a “zoom out” approach towards the reasons for the conflict between the State Party Germany to the WHC and UNESCO in the case of the Dresden Elbe Valley (chapters 2 to 4). Subsequently, chapter 5 attempts to reconcile urban development and heritage protection, while chapter 6 seeks to draw recommendations for the institutions of the State Party Germany to the WHC and UNESCO involved in the conflict over the Dresden Elbe Valley.

First, the conflict in the core of the Dresden Elbe Valley WHS triggered by the construction of the *Waldschlößchenbrücke*, i.e. the object of study of this research, is anchored in its context, the City of Dresden. Thus, the object of the conflict between the State Party Germany to the WHC and UNESCO, the *Waldschlößchenbrücke*, is presented in its historical and geo-spatial context in order to shed light on the elements of the conflict’s trigger. While the contextualisation of the *Waldschlößchenbrücke* is described in a first part, the elements of the trigger of the conflict are discussed in a second part.

Secondly, contradictory decisions of the Dresden Administrative Court, the Higher Administrative Court in Bautzen, the Constitutional Court of the Free State of Saxony in Leipzig and the Federal Constitutional Court in Karlsruhe have been given concerning the *Waldschlößchenbrücke* and the Dresden Elbe Valley. The analysis of these legal decisions concerning the binding effects of the WHC for the FRG and the environmental concerns prompted by the construction of the *Waldschlößchenbrücke* permits contextualising the conflict

¹⁹ VanWynsberghe & Khan, p.90 (note 17)

within the German legal context. Based on legal commentaries of the courts decisions, a discussion on the bindingness of the WHC for the FRG is implemented.

Thirdly, the State Party Germany to the WHC and UNESCO, opposed in the conflict related to the Dresden Elbe Valley, are confronted. This includes a review of the concept of cultural landscape in the context of the WHC, adapted to the case of the Dresden Elbe Valley. A commentary on the legally binding effects for the States Parties to the WHC is also elaborated within this chapter, as well as a deconstruction of the step-by-step decisions from the inscription to the delisting of the Dresden Elbe Valley from the World Heritage List.

Fourthly, an evaluation of the concept of HUL as an action plan capable of solving the conflict between urban development and heritage protection is developed in this research and adapted to the German context. This concept, developed with a view to integrating contemporary architecture within the HUL, seems to represent a possible answer to the problems of urban development encountered in WHS.

Fifthly, as a conclusion to this research, recommendations are drawn based on the conflict between UNESCO and the State Party Germany to the WHC related to the Dresden Elbe Valley. Accordingly, the recommendations based on the results of this research are addressed to the City of Dresden, the Free State of Saxony, the FRG and UNESCO.

CHAPTER 2

CONTEXTUALISATION OF THE OBJECT OF STUDY IN THE CITY OF DRESDEN

The object of study of this research is the conflict between UNESCO and the State Party Germany to the WHC concerning the former WHS Dresden Elbe Valley cultural landscape. Moreover, the object of this conflict is materialised by the construction of the *Waldschlößchenbrücke* in the core of the former protected area.

Therefore, the objective of this chapter is to describe the object of study in its local context of the City of Dresden, in order to shed light on the elements of the conflict that are further developed in the following chapters of this thesis. This chapter seeks to ascertain the background of the conflict from a historical perspective.

First, a presentation of the object of the conflict between UNESCO and the State Party Germany to the WHC, namely the *Waldschlößchenbrücke*, is implemented. In a second phase, attention is given to the object of study while describing the elements that contributed to the trigger of this conflict.

2.1. The Waldschlößchenbrücke in its context

This section presents the object of the conflict between UNESCO and the State Party Germany to the WHC concerning the Dresden Elbe Valley in its context in order to ascertain the elements of the conflict's background. First, the historical context of the project of the *Waldschlößchenbrücke* is presented, given that it first emerged 150 years ago. Subsequently, the development of the current controversial project is introduced. In a third step, the design of the *Waldschlößchenbrücke* is compared to the eight other Elbe bridges in Dresden, because its

physical structure represents an element of the conflict. Finally, the area of *Waldschlößchen* is depicted with its natural and cultural features, as the integrity and OUV²⁰ of the Dresden Elbe Valley were threatened by the construction of the *Waldschlößchenbrücke* at this specific location.

2.1.1. History of the failed projects since 1862

An Elbe crossing at the location of *Waldschlößchen* has been mentioned in several general development plans for the City of Dresden since 1862. The idea of the city planners to develop the City of Dresden in three circular zones is linked with the elaboration of the road connection plans, which included an Elbe crossing at the location of *Waldschlößchen*. As the argument concerning the historical need of an Elbe crossing at this location was brought about during the conflict between UNESCO and the State Party Germany to the WHC related to the *Waldschlößchenbrücke*, these several failed projects are presented in this section.

²⁰ For more information on the integrity and OUV related to cultural landscapes in the context of the WHC, see sections 4.1.2 and 4.1.3 of this thesis

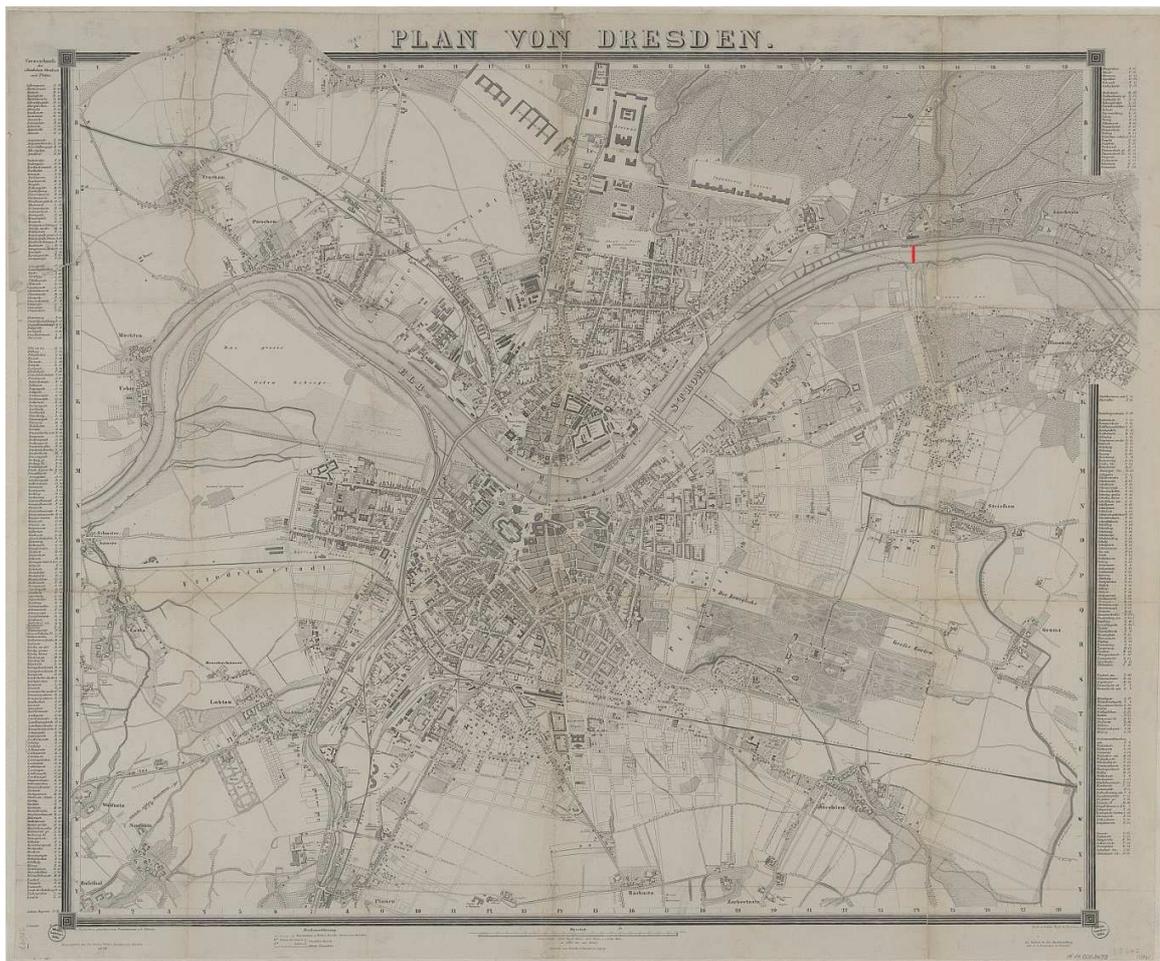


Figure 4: Map of the City of Dresden, 1: 11 000, 1876, with the location of the *Waldschlößchenbrücke* (red mark). Source: German photographic archives (and own addition)

First, an Elbe crossing at the location of *Waldschlößchen* was foreseen in the General Construction Plan of 1859-1862 (Figure 4, the red mark shows the location of the actual *Waldschlößchenbrücke* built between 2007 and 2013). The districts that were supposed to be connected with this Elbe crossing on both sides of the Elbe River were mostly still independent at the time; indeed, only the district of the *Radeberger Vorstadt*, located in the Northern part of the Elbe River, had already been part of the City of Dresden (since 1836).



Figure 5: Map of the City of Dresden, 1: 12 500, Lithography, around 1905, with the location of the *Waldschlößchenbrücke* (red mark). Source: German photographic archives (and own addition)

Secondly, when the project of the Elbe crossing at *Waldschlößchen* appeared again by 1934-1937, the districts of *Johannstadt* and *Blasewitz* in the Southern part of the Elbe River had been incorporated in the City of Dresden, in 1877 and 1921 respectively. Likewise, the district of *Blasewitz* in the Northern part of the Elbe River was incorporated in the City of Dresden in 1921. This further Elbe crossing had been planned in Paul Wolf's River Banks Layout Plan of 1934 and the Transport Route Plan of 1937. The general development plan elaborated by Paul Wolf and

provided before the planning of the Reich motorway (*Reichsautobahn*) included comprehensive roads and new bridges building projects, including a continuous Elbe bank road as well as a bridge at *Waldschlößchen*. In 1937, the road planning passing by in the West of the *Reichsautobahn* was voted. A middle ring that would be tangent to the motorway (junction of *Dresden-Neustadt*) and cross the Elbe River at *Waldschlößchen* has since continually emerged in the Dresden traffic concepts.²¹



Figure 6: Map of the City of Dresden, 1: 12 000, around 1930, with the location of the *Waldschlößchenbrücke* (red mark). Source: German photographic archives (and own addition)

Thirdly, the project of an Elbe crossing at the location of *Waldschlößchen* appeared several times during the GDR. The first such occasion was in 1967, when a six-lane bridge was foreseen, while

²¹ Lerm, M., 2000. *Abschied vom alten Dresden, Verluste historischer Bausubstanz nach 1945*. Rostock: Hinstorff Verlag GmbH, p.19

the project involved an eight-lane bridge for the second time, in 1978-1979. Finally, when the project arose for the third time it was to organise a competition for the design of the bridge in 1988.

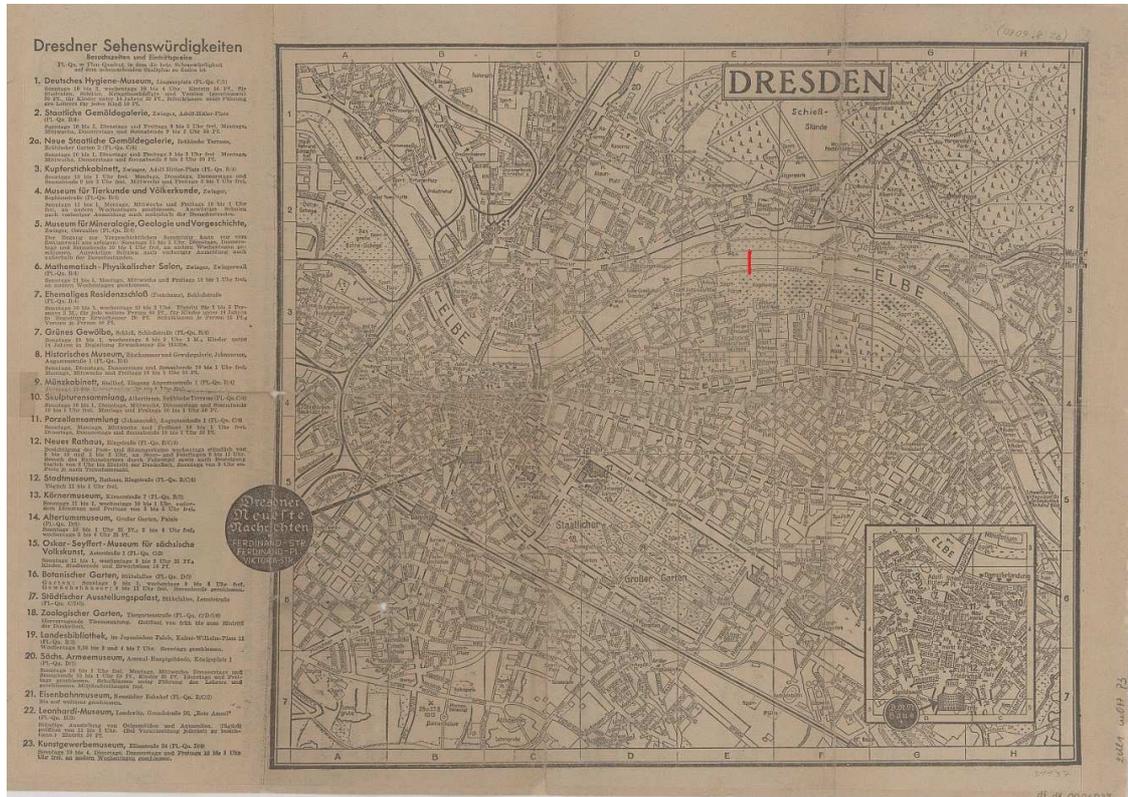


Figure 7: Map of the City of Dresden, 1: 22 000, around 1937, with the location of the *Waldschlößchenbrücke* (red mark). Source: German photographic archives (and own addition)

Officially, these projects were never concretised, either due to economic reasons, the beginning of World War II or the collapse of the GDR. Nevertheless, the technical difficulty due to the exceptional wideness of the Elbe meadows at this location and the connection of the bridge to the road network on both sides of the Elbe River might have also played a role in the constant postponement of the project of an Elbe crossing at the location of *Waldschlößchen*. This series of failed projects of construction of an Elbe crossing at the location of *Waldschlößchen* since 1862 contributed to reinforcing the idea of an urgent need for this construction during the conflict towards the Dresden Elbe Valley WHS.

2.1.2. Overview of a controversial project

Following the German reunification, the question of whether to build a tunnel or bridge at the location of *Waldschlößchen* arose during 1992-94. Subsequently, a traffic concept plan for the city, which comprised the renovations of some of the Elbe bridges, appeared in February 1994.²² Furthermore, the alternative idea of building several small rather than one large bridge also emerged at this time.

On 28 and 29 May 1996, a bridge workshop prepared by the department of urban planning of the City of Dresden took place in Dresden, during which the issue of several bridges possibilities at the location of *Waldschlößchen*, *Thomas-Müntzer-Platz*, *Niederpoyritz*, *Erfurter Straße* or a third *Marienbrücke* were discussed. Furthermore, the alternative of a tunnel was also raised in the discussion.²³ Following this workshop, it was suggested that research into a tunnel alternative should be undertaken.²⁴ However, despite the concerns raised regarding the impact of a bridge at the location of *Waldschlößchen* on the landscape,²⁵ 17 of the 28 workshop participants who were invited to vote did so for the project of the *Waldschlößchenbrücke*.²⁶ Consequently, an international competition for the project of the *Waldschlößchenbrücke* was launched in 1997.

According to the City Council and its urban planners, the bridge is needed to both reduce traffic congestion in the inner city and lighten traffic on the historical bridges. Table 1 from the provisional study supports this argument:

²² Lühr, H.-P., 2008. Die Waldschlösschenbrücke, Eine Chronik von Planung und öffentlicher Auseinandersetzung. In: H. Lühr, ed. *Dresdner Elbbrücken in acht Jahrhunderte. Dresdner Hefte. Heft 94/2*. Dresden: Dresdner Geschichtsverein e.V., p.70

²³ City of Dresden, 1996. *Niederschrift zum Workshop Dresdner Elbbrücken am 28./29. Mai 1996* [Minutes of the Workshop Dresden Elbe Bridges on 28-29 May 1996], pp.18; 30; 45

²⁴ City of Dresden, 2012. *Verkehrszug Waldschlößchenbrücke*, [Online] Available at: <http://www.dresden.de/de/08/01/brennpunkte/waldschloesschenbruecke.php> [Accessed on 21 November 2012]. For more information on the tunnel alternative, see Albert, M.-T. & Gaillard, B., 2012. The Dresden Elbe Valley: an example for conflicts between political power and common interests in a World Heritage Site. In: K. Taylor & J. Lennon, eds. *Managing Cultural Landscapes*. London: Routledge, pp.335-336

²⁵ City of Dresden, pp.11; 17; 33; 36-39 (note 23)

²⁶ City of Dresden, p.47 (note 23)

Bridges	Without the <i>Waldschlößchenbrücke</i>	With the <i>Waldschlößchenbrücke</i>	
	In the year 2015	In the year 2015	In the year 2020
<i>Augustusbrücke</i>	9.000	8.000	7.000
<i>Marienbrücke</i>	34.000	33.000	31.000
<i>Albertbrücke</i>	49.000	37.000	29.000
<i>Loschwitzer Brücke (Blaues Wunder)</i>	37.000	33.500	26.500
<i>Carolabrücke</i>	58.500	51.000	42.000
<i>Flügelwegbrücke</i>	43.500	42.500	42.500
<i>Waldschlößchenbrücke</i>	-	45.500	44.000
Total	231.000	250.500	222.000

Table 1: Provisional Average Daily Traffic Volume in Vehicles per 24 hours. Source: City of Dresden (note 24)

Therefore, according to this provisional average daily traffic volume, the existing historical monuments of the city, consisting of the historical bridges and the inner city centre, may be sustainably²⁷ preserved with the added construction of the *Waldschlößchenbrücke*. For example, the daily traffic on the oldest bridge of the city, the *Augustusbrücke*, should be reduced by 2000 vehicles per day from 2015 to 2020. Furthermore, the three bridges dating from the 19th century, the *Marienbrücke*, *Albertbrücke* and *Loschwitzer Brücke*, might also be considerably lightened in terms of their current traffic volumes. However, arguing in favour of the *Waldschlößchenbrücke* because it is expected to greatly relieve four historical bridges in Dresden and reduce the traffic

²⁷ For more information concerning the cultural and environmental sustainability of the *Waldschlößchenbrücke*, see Gaillard, B., 2011. The Dresden Elbe Valley, First Cultural Property to be Delisted from the World Heritage List: why and how? Exception or future tendency? *The International Journal of Environmental, Cultural, Economic and Social Sustainability*, 7(5). p.392

in the inner city, the results of this study should be interpreted with caution, given that they are only predictions. Furthermore, even if the bridge brought about the decongestion of the historical city centre and its valuable historical bridges, it ignores other aspects. For instance, it does not take into account the negative impact that such a proposed bridge, the longest in Dresden, would have on the cultural landscape and thus the environment within the city. In addition, the results of the provisional average daily traffic volume in vehicles per 24 hours (Table 1) prompt another question: is the bridge needed at all? In fact, the table shows a daily vehicle reduction of 26.000 on all the bridges between 2015 without the *Waldschlößchenbrücke* and 2015 with the *Waldschlößchenbrücke*, and the *Waldschlößchenbrücke* brings 45.500 vehicles. However, there is a total increase of only 19.500 vehicles in 2015, with or without the *Waldschlößchenbrücke*. Therefore, 26.000 vehicles daily are no longer driving in the City of Dresden. Similarly, between 2015 and 2020 with the *Waldschlößchenbrücke*, a decrease of 28.500 vehicles is observed. In this case, if a decrease of vehicles is foreseen with or without the *Waldschlößchenbrücke*, its need to relieve the historical centre and bridges can be called into questioned.

The Elbe River is 127 metres wide at the location of the *Waldschlößchenbrücke*, and the Elbe meadows are between 200 and 400 metres wide. It is situated approximately 4 km from the historical centre on its South-Eastern side. The *Waldschlößchenbrücke* stands in the middle of two historical bridges: the *Albertbrücke* (2 km of the *Waldschlößchenbrücke*, towards the West) and the *Blaues Wunder (Loschwitzer Brücke)* (3 km of the *Waldschlößchenbrücke*, towards the East). This Elbe crossing enables connecting the Southern part of the City of Dresden, i.e. the districts of *Johannstadt*, *Riesen* and *Blasewitz*, with its Northern parts, i.e. the districts of *Radeberger Vorstadt*, as well as further North, with industrial settlements in the vicinity of the airport.²⁸

The competition first prize of 75,000 DM was awarded to E.S.K.R Ingenieure + Architekten, with the four winners of the project, Eisenloffel, Sattler, Kolb and Ripke, suggesting that “the design of the bridge, which combines road, tramway, bicycle lane and pedestrian path, is to be conceived as an interpretation of the historic arched bridges of Dresden without the attempt to

²⁸ Stritzke, J., 1998. *Realisierungswettbewerb Waldschlößchenbrücke Dresden*, 8. *Dresdner Brückenbausymposium*. Dresden: TU Dresden, p.63

copy them. The form is conservative, only the crossing of the river Elbe is stressed by the elevation of the arch over the bridge”.²⁹ The *Waldschlößchenbrücke* has a length of 636 metres, and is thus the longest Elbe bridge in the City of Dresden, and has a width of 29 metres.



Figure 8: View of the middle part of the *Waldschlößchenbrücke* from the Northern bank of the Elbe River. Source: B. Gaillard, 7 Mai 2011

Despite the ground-breaking ceremony allowing the construction of the bridge taking place on 29 November 2000, the actual construction of the bridge started on 19 November 2007. The seven year gap from the ceremony to the actual building of the bridge was due to the controversy surrounding the project. For this reason, a referendum was organised on 27 February 2005,

²⁹ E.S.K.R., 1997. *Elbebrücke am Waldschlößchen*. [Online] Available at: <http://www.eskr.de/wettbewerbe/ebw/index.htm> [Accessed on 21 November 2012], „Die Gestaltung der Straßen-, Straßenbahn-, Fuß- und Radwegbrücke ist als moderne Interpretation der historischen Bogenbrücken Dresdens zu verstehen, ohne dass jedoch versucht wird diese nachzuahmen. Die Form ist zurückhaltend, nur die Elbquerung wird durch das Heraustreten des Bogens über die Brückenplatte inszeniert.“ (personal translation)

during which 50.8% of the eligible voters participated. From this small yet sufficient majority, 67.92% of the voters were in favour of the bridge's construction. The question raised was stated as follows and accompanied a traffic plan: "Are you for the construction of the *Waldschlößchenbrücke*? – including the traffic course in the mapped representation –".³⁰ The *Waldschlößchenbrücke* has been officially inaugurated on 24 and 25 August 2013 at the occasion of a *Brückenfest* (bridge festival) and opened for traffic on 26 August 2013.³¹

³⁰ „Sind Sie für den Bau der Waldschlößchenbrücke? – einschließlich des Verkehrszuges der abgebildeten Darstellung –“ (personal translation)

³¹ City of Dresden, 2013. *Dresdner Waldschlößchenbrücke wird am 24./25. August mit Brückenfest eröffnet*. [Online] Available at: http://www.dresden.de/de/02/035/01/2013/06/pm_200.php [Accessed 16 June 2013]

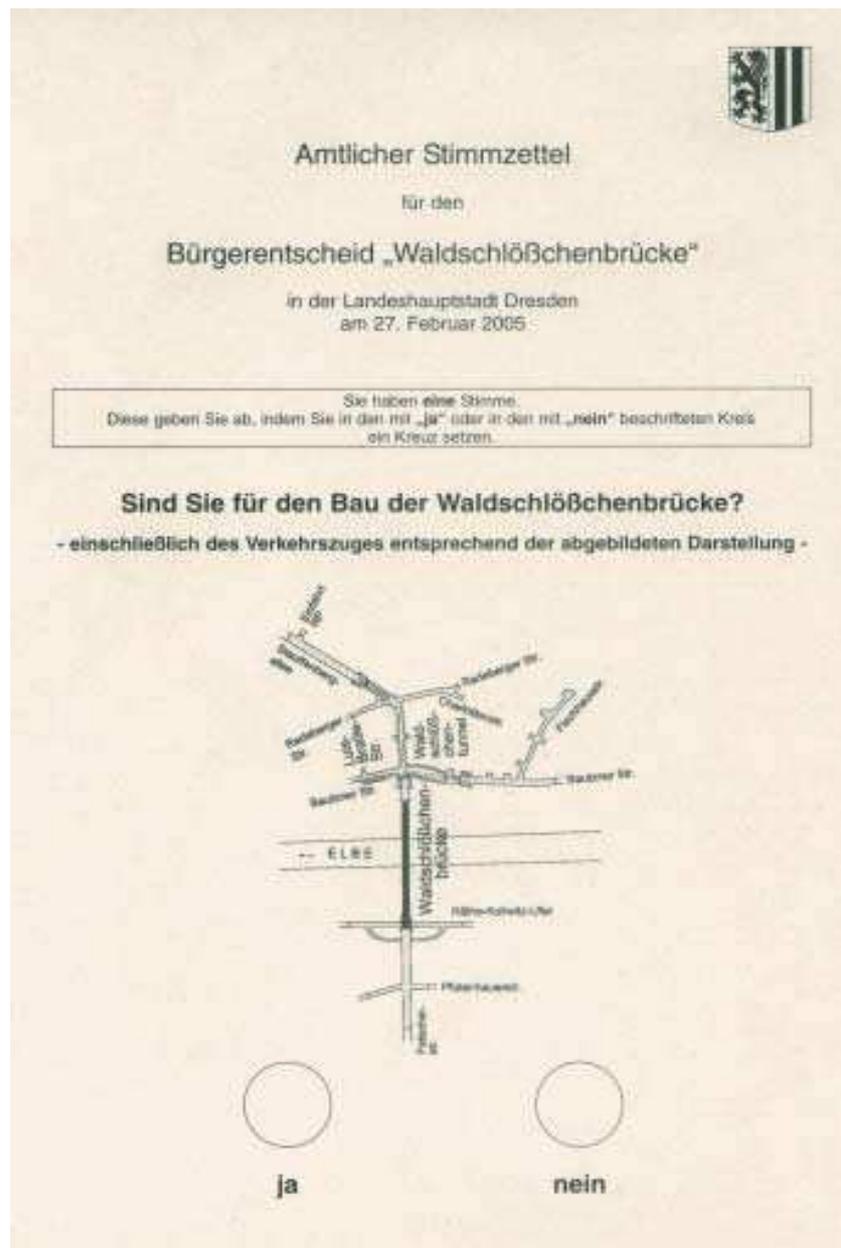


Figure 9: Official ballot paper for the referendum “Waldschlößchenbrücke”. Source: City of Dresden

Therefore, after a series of failed projects for an Elbe crossing at the location of *Waldschlößchen* since 1862, the project of the *Waldschlößchenbrücke* acknowledged by the result of the referendum organised on 27 February 2005 was set to be implemented. Nevertheless, the results

of the Visual Impact Study (henceforth VIS)³² conducted by the Institute of Urban Design and Regional Planning of the RWTH Aachen University, followed by the decision³³ of the World Heritage Committee to transfer the Dresden Elbe Valley to the List of World Heritage in Danger in 2006, delayed the beginning of the construction of the *Waldschlößchenbrücke*.

2.1.3. Rupture with the physical typology of the other Elbe bridges

One of the conclusions of the VIS concerning the impact of the *Waldschlößchenbrücke* on the integrity and OUV of the Dresden Elbe Valley refers to the rupture of the physical typology of the *Waldschlößchenbrücke* with the other Elbe bridges. Without the *Waldschlößchenbrücke*, the City of Dresden has eight Elbe bridges, which can be split across three periods of construction. First, the *Augustusbrücke* ensures the connection between the *Altstadt* (Old Town) and the *Neustadt* (New Town). Made of stones, this Elbe crossing has existed since 1287.³⁴ It was destroyed and reconstructed several times, and remained the unique connection between the two sides of the City of Dresden until the 19th century. During the industrialisation period, most of the Elbe bridges were planned and constructed, before two further Elbe bridges were built during the first half of the 20th century. The bridges are succinctly presented in their order of appearance above the Elbe River in order to identify the physical typologies of the Elbe bridges in Dresden and compare them to the *Waldschlößchenbrücke*.

Augustusbrücke

The *Augustusbrücke* (Figure 10) was renovated by Pöppelmann and Fehre from 1727-1731, and was newly constructed by Kreis and Klette as the *Friedrich-August-Brücke* in 1907-1910.³⁵ Modifications of the bridge became necessary due to increased traffic, as well as shipping on the

³² For more information on the VIS, see section 4.1.2 of this thesis

³³ Decision 30 COM 7B.77 (note 5), for more information see section 4.3.2 of this thesis

³⁴ Löffler, F., 1999. *Das alte Dresden, Geschichte seiner Bauten*. Leipzig: E.A. Seemann Verlag, p.446

³⁵ Löffler, pp.449 and 451 (note 34)

Elbe River.³⁶ Accordingly, the sandstone bridge passed from 18 arches to nine arches with a length of 390 metres and a width of 18 metres. This bridge takes car and tramway traffic and has sidewalks for pedestrians on both sides. In addition, seven terraces on both sides of the bridge are included on top of the sandstones pillars, enabling people to admire the panoramic view.

Marienbrücke (two bridges: auto + train)

The *Marienbrücke* (Figure 10) consists of two bridges located next to each other on the Western side of the *Augustusbrücke*. The road bridge was built by Lohse in 1846-1852, while the railway bridge dates from 1898-1901 and permitted connecting the Saxon-Silesian and Saxon-Bohemian railway line between the *Wilsdruffer Vorstadt* and *Antonstadt*. The road bridge has a length of 440 metres and a width of 11 metres, while the railway bridge is 200 metres long and 6 metres wide. In terms of the road bridge, the closest to the *Augustusbrücke*, it is a stone arched construction on twelve segmental arches,³⁷ taking car and tramway traffic as well as pedestrians on both sides. Furthermore, it has 13 terraces on top of the sandstones pillars that support the bridge, albeit smaller than those on the *Augustusbrücke*.

³⁶ Hübner, U., 2008. Der Neubau der Augustusbrücke von 1910. In: H. Lühr, ed. *Dresdner Elbbrücken in acht Jahrhunderten. Dresdner Hefte. Heft 94/2*. Dresden: Dresdner Geschichtsverein e.V., p.35

³⁷ Helas, V., 1991. *Architektur in Dresden, 1800-1900*. Dresden: Verlag der Kunst, p.193



Figure 10: View on the *Augustusbrücke* (right) and the *Marienbrücke* (background) from the tower of the **Church of our Lady. Source: B. Gaillard, 23 July 2007**

Albertbrücke

The *Albertbrücke* (Figure 11) is located on the Eastern side of the *Augustusbrücke*, after the *Carolabrücke*. It was constructed in 1875-1877 by Manck, in terms of the engineering work, and by Lisske and Strunz concerning the artistic decoration. It is a sandstone road bridge between the *Antonstadt* and *Johannstadt* with fourteen segmental arches. This bridge is 330 metres long and 19 metres wide. It takes car and tramway traffic and includes sidewalks for pedestrians. In addition, there are terraces on top of seven of its pillars, enabling people to enjoy the view.



Figure 11: View of the *Carolabrücke* (foreground) and the *Albertbrücke* (background) from the tower of the Church of our Lady. Source: B. Gaillard, 23 July 2007

Loschwitzer Brücke (Blaues Wunder)

The *Loschwitzer Brücke* (Figure 12) is located approximately 6 km on the Eastern side of the *Augustusbrücke*. The construction of the fourth Dresden bridge, the so-called *Blaues Wunder* (“Blue Wonder”) due to its steel infrastructure, is a different type of bridge to the three previous ones. Designed by Köpcke and Krüger, it is an iron suspension bridge above two shore pillars.³⁸ It connects the then districts of *Blasewitz* and *Loschwitz*, which were still independent at the time of its construction in 1891-1893. The construction of this bridge required solving the problem of the architecture of bridgeheads.³⁹ It has a length of 295 metres and a width of 12 metres. This bridge solely takes car traffic and does not have terraces for the view, but the sidewalks on both sides of the bridge are outside the steel infrastructure. Nonetheless, it stands on two sandstone pillars, which remind of the three previous sandstone bridges.

³⁸ Helas, p.193 (note 37)

³⁹ Helas, p.94 (note 37)



Figure 12: View of the *Loschwitzer Brücke* from the *Schloß Albrechtsberg*. Source: B. Gaillard, 7 May 2011

Carolabrücke

The *Carolabrücke* (Figure 11) is situated between the *Augustusbrücke* and the *Albertbrücke*, East of the *Augustusbrücke*.



© Deutsche Fotothek - Preview Scan

Figure 13: Dresden view from the *Neustadt* Elbe River banks above the *Carolabrücke* to the *Altstadt*, 1936. Source: German photographic archives

The first *Carolabrücke* (Figure 13) was built in 1892-1895 following the plans of Klette and Köpcke as a pendant to the *Augustusbrücke* at the end of the Brühl Terrace.⁴⁰ It was a six stoned arched bridge with a length of 340 metres and width of 16 metres. At the end of World War II, four arches of the bridge were damaged by SS forces.⁴¹ The first post-war years involved extrication of the steel rubble, which lay within the riverbed under the main span. However, this was a complicated process and the reconstruction work came to a standstill owing to a lack of steel construction for the restoration of the two destroyed bridge arches. The reconstruction was scrapped in favour of a new and efficient bridge construction. “With 26 meters width the Dr.-Rudolf-Friedrichs-Brücke⁴² will be the most modern and most efficient bridge”, wrote Leucht, already on 31 March 1948.⁴³ Consequently, the second *Carolabrücke* (Figure 11) was built between 1967 and 1971 by the winners of the competition for the project Spoelgen and

⁴⁰ Fiedler, E., 2008. Brücken der Stadterweiterung, Albertbrücke – Carolabrücke – Flügelwegbrücke. In: H. Lühr, ed. *Dresdner Elbbrücken in acht Jahrhunderten. Dresdner Hefte. Heft 94/2*. Dresden: Dresdner Geschichtsverein e.V, p.53

⁴¹ Fiedler, p.55 (note 40)

⁴² The *Carolabrücke* was called *Dr.-Rudolf-Friedrichs-Brücke* during the GDR

⁴³ Lerm, p.63 (note 21) “ Mit 26 m Breite wird die Dr.-Rudolf-Friedrichs-Brücke die modernste und leistungsfähigste Brücke werden.“ (personal translation)

Thürmer.⁴⁴ It is a 395 metre long prestressed concrete bridge with four prestressed concrete pillars that take car and tramway traffic, and has a width of 32 metres.

Flügelwegbrücke

The *Flügelwegbrücke* (Figure 14) is located approximately 5 km on the Western side of the *Augustusbrücke*. It was constructed in 1929-1930, and was the longest steel composite bridge in Europe at that time, with five composite pillars. It was designed by Koch and includes four spans, has a length above the Elbe River of 115 metres and a width of 17 metres, and solely takes car traffic.



Figure 14: *Flügelwegbrücke*. Source: *Flügelwegbrücke in Dresden* [Online] Available at: <http://www.dresden.city-map.de/02051400> [Accessed on 6 December 2012]

Autobahnbrücke

The *Autobahnbrücke* (Figure 15) is situated approximately 7 km on the Western side of the *Augustusbrücke*, near *Kaditz*. It was built in 1935-1936 and comprises a steel framework construction with six composite and bricks pillars. It has a length of 496 metres and a width of 43 metres and solely takes car traffic.

⁴⁴ Fiedler, p.55 (note 40)



Figure 15: Autobahnbrücke. Source: *Autobahnbrücke* [Online] Available at: <http://www.rolf-uwe-hochmuth.de/IBH-BAB-DD.htm> [Accessed on 6 December 2012]

To conclude, the Elbe bridges in the City of Dresden follow three different typologies. First, the *Augustusbrücke*, *Marienbrücke* and *Albertbrücke*, located in the core of the former WHS, are sandstone bridges with arches, and the top of their pillars form terraces offering panoramic views. Secondly, the *Loschwitzer Brücke*, also located in the core of the former WHS in the Eastern part of the *Waldschlößchen* area, is an iron suspension bridge with two sandstone pillars on the shores of the Elbe River. Thirdly, the *Carolabrücke*, which formerly followed the first typology (sandstone bridge with arches) and is located in the core of the former WHS, is currently a prestressed concrete bridge with concrete pillars, like the *Flügelwegbrücke* and the *Autobahnbrücke*, which are both located outside the former WHS.

Therefore, a relative harmony can be found in the physical typology of the Elbe bridges located in the former WHS, namely sandstone bridges with arches and terraces. However, the *Waldschlößchenbrücke* follows another typology. It is a steel bridge carried by a total of ten steel arches, including two steel arches above the bridge where the Elbe River flows. Nevertheless, despite the rupture with the physical typology, i.e. sandstone vs. steel, an attempt to recall the arches of the sandstone bridges has been undertaken.

2.1.4. The *Waldschlößchen* location: a green area in the core of the City of Dresden

The *Waldschlößchenbrücke* is the ninth Elbe bridge, located in the core of what remains a green area of the City of Dresden, a sensible area where cultural and natural features were protected as part of the Dresden Elbe Valley former WHS. The few buildings constructed in the 18th and 19th centuries and the recreational area predominated by the nature that contribute to the harmony of this cultural landscape were also threatened by the construction of the *Waldschlößchenbrücke*.

Waldschlößchen

The *Waldschlößchen* (Figure 16) was built between 1785 and 1790 at the *Radeberger Straße* 60. It was a manor house of a dairy, constructed by Schade for Anna O’Kelly, the wife of the Count Camillo Marcolini, who was the powerful cabinet Minister of Friedrich August I and Director General of the academy of arts as well as the porcelain factory.⁴⁵ In its dimension and character, it tends more to a manor house than a villa, and originated where the *Dresdner Heide* forest touched the Elbe lowland.⁴⁶

⁴⁵ Helas, p.160 (note 37)

⁴⁶ Hammer, M., 1989. *Der Stadtbezirk Nord der Stadt Dresden, Ein Beitrag zu einer baulichen Entwicklung und seinen Baudenkmalen*. Dresden: Rat des Stadtbezirkes Nord der Stadt Dresden, Abteilung Kultur, p.20



© Deutsche Fotothek – Preview-Scan

Figure 16: *Waldschlößchen (Marcolinischlößchen)*, 1954. Source: German photographic archives

Waldschlößchen-Brauerei

The *Waldschlößchen-Brauerei* (Figure 17) is a brewery built in 1837-1838. With the production of lager beer in Saxony in Bavarian style for the first time, it was possible to renounce the previous extensive imports.⁴⁷ It remains a brewery today.

⁴⁷ Hammer, p.63 (note 46)



Figure 17: Waldschlößchen-Brauerei, unknown photographer, after 1919. Source: German photographic archives

Wasserwerk Saloppe

The *Wasserwerk* (Figure 18) located at *Saloppe* was built in 1871-1875 by Salbach (Technique) and Friedrich (Architecture). The unique waterworks in Dresden until 1896 (when the *Tolkewitz* waterworks were constructed) holds particular value for its design and is situated in the middle of the landscape near the Elbe River.⁴⁸ It used to be the main waterworks and was constituted of a hall above dressed pedestals. The narrow side through the staircase and the double tower façade with high hipped roofs, here motivic reminiscence of the Middle Age fortification architecture, distinguished the sidewalls with stylistic neutral arches covers.⁴⁹

⁴⁸ Hammer, p.64 (note 46)

⁴⁹ Helas, p.193 (note 37)



© Deutsche Fotothek - Preview Scan

Figure 18: *Wasserwerk Saloppe*, 1986. Source: German photographic archives

Schloß Albrechtsberg

The *Schloß Albrechtsberg* (Figure 19), situated in *Bautzner Straße* 130, was built from 1850 to 1854 as permanent residential castle for the Prince Albrecht of Prussia by Lohse, a student of Schinkel.⁵⁰ The design of the park was elaborated by Neidle and Neumann. The construction of the building took place on the vineyard of Lord Findlater and the execution of the construction work was followed by Borstell.⁵¹ Essentially, the Old Town Guardhouse and the *Schloß Albrechtsberg* from Lohse represented the architecture of big gestures during the classicism as other outside buildings. The *Schloß Albrechtsberg* displays an almost brittle, majestic design. This building, as well as the adjacent *Villa Stockhausen*, was artistically imported and belongs to the architecture of the Potsdam residency landscape of the students of Schinkel. The buildings

⁵⁰ Stuhrberg, A., 2009. *Faszination Deutschland, Dresden Elbtal*. München: Verlag Wolfgang Kunth, p.107

⁵¹ Helas, p.133 (note 37)

from Thormeyers tend to remove friendly courtesy; austerity and pathos kept them faraway.⁵² The stately palace complex with its terrace system, which largely remains unimplemented, belongs to the Prussian history of architecture of the Schinkel followers. It stood external to a cultural landscape, which little affinity with the Prussian architecture was prepared to develop due to its political past and cultural traditions. The specific structure of the castle, portraying coolness and extravagance, as well as the demanding distance scale of the whole complex, constitute characteristics that remained foreign to Saxon architecture.⁵³



Figure 19: Schloß Albrechtsberg, 1801/1900. Source: German photographic archives

Lingnerschloß or Villa Stockhausen

The *Lingnerschloß* or *Villa Stockhausen* (Figure 20), located in *Bautzner Straße* 132, was also built by Lohse as residency for the Chamberlain von Stockhausen⁵⁴ of the Prince, although its

⁵² Helas, V., Pampel, W. & Zadničec, F., 1996. *Das Stadtbild von Dresden*. Dresden: StadtDenkmal und Denkmallandschaft, Landesamt für Denkmalpflege Sachsen, p.204

⁵³ Helas, p.62 (note 37)

⁵⁴ Helas, p.135 (note 37)

possession later passed to the Odol (Trademark of a mouthwash) fabricant Karl August Lingner and became the *Lingnerschloß*.⁵⁵

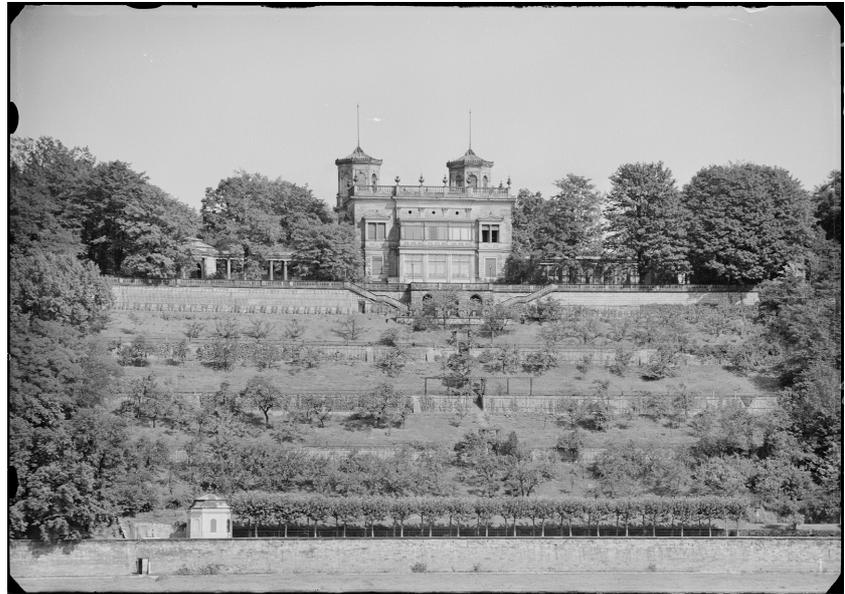


Figure 20: *Lingnerschloß*, before 1945. Source: German photographic archives

Schloß Eckberg or Villa Souchay

The *Schloß Eckberg* or *Villa Souchay* (Figure 21) was built by Arnold for the merchant Johann Daniel Souchay in 1859-1861.⁵⁶ It is located in *Bautzner Straße* 134 and represents the largest neo-gothic secular building of the City of Dresden. It is located East of the *Schloß Albrechtsberg* and the *Villa Stockhausen*, high above the Elbe River. Its design follows the romantic-pictorial building of the English and French Gothic, also foreign to Saxon architecture. Furthermore, the spacious park surroundings stand in the tradition of the romantic English gardens.⁵⁷

⁵⁵ Stuhrberg, p.107 (note 50)

⁵⁶ Stuhrberg, p.107 (note 50)

⁵⁷ Helas, p.69 (note 37)



© Deutsche Fotothek - Preview Scan

Figure 21: *Schloß Eckberg*, 1945. Source: German photographic archives

The six aforementioned monuments are all located on the Northern bank of the Elbe River, which is in the upper part of the river at the location of *Waldschlößchen*. The *Waldschlößchen*, *Waldschlößchen-Brauerei* and *Wasserwerk Saloppe* are valued for their architecture and cultural features, and are located in the vicinity of the Elbe River meadows. The three castles – *Schloß Albrechtsberg*, *Villa Stockhausen or Lingnerschloß* and the *Villa Souchay* or *Schloß Eckberg* – are situated on the hills overhanging the Elbe River meadows. Their architectural value and gardens with vineyards contribute to the equal appreciation and harmonious combination of cultural and natural features.

One of the conclusions of the VIS related to the fact that the *Waldschlößchenbrücke* would obscure some views of the cultural landscape. While walking along the Elbe River meadows from the inner city centre in the direction of the three Elbe castles described above, the *Waldschlößchenbrücke* obscures them, as well as the waterworks (Figure 22). Similarly, while walking from the three Elbe castles in the direction of the inner city centre on the other side of the

Waldschlößchenbrücke, the famous view of the “Florence of the Elbe” (*Elbflorenz*) known in the popular imagination⁵⁸ is obstructed (Figure 23).



Figure 22: Obstructed view of the *Wasserwerk Saloppe* (left under the bridge) and the Elbe River castles (middle in the hills behind the arches) by the *Waldschlößchenbrücke*. Source: B. Gaillard, 7 May 2011

⁵⁸ Goebel, R. J., 2007. *Gesamtkunstwerk* Dresden: Official Urban Discourse and Durs Grünbein’s Poetic Critic. *The German Quarterly*, 80(4), p.494



Figure 23: Obstructed view of the inner City of Dresden by the *Waldschlößchenbrücke*.

Source: B. Gaillard, 7 May 2011

Following the contextualisation of the object of the conflict between UNESCO and the State Party Germany to the WHC – the *Waldschlößchenbrücke* – in the City of Dresden, the elements that contributed to triggering the conflict are discussed in order to contextualise the object of study embodied by the conflict itself.

2.2. Trigger of the conflict

While the previous section focused on the object of the conflict – the *Waldschlößchenbrücke* – this section draws attention to the object of study, which is the conflict between UNESCO and the State Party Germany to the WHC concerning the Dresden Elbe Valley. The elements that contributed to triggering this conflict are discussed in order to frame the background of the

conflict from a historical perspective. First, the contexts of the City of Dresden in 1862 and in 2006 are compared in order to deconstruct the argument of the historical need for the *Waldschlößchenbrücke*. Subsequently, the role of memory in Dresden related to the bombings of February 1945 and the post-war reconstruction of the city are described, before the misconception of the Dresden Elbe Valley as a WHS is analysed. Finally, the contestation of the referendum organised on 27 February 2005 is presented.

2.2.1. A bridge enshrined in the industrialisation period

The first project to build a bridge above the Elbe River at the location of *Waldschlößchen* dates back to 1862. At that time, there were two bridges above the Elbe River in the City of Dresden, the *Augustusbrücke* and *Marienbrücke*. In 1862, there were no other Elbe crossings on the Eastern side of the City of Dresden until the current border with the Czech Republic, representing a length of approximately 45 km.⁵⁹ During the 19th century, the City of Dresden went through the process of industrialisation, in a period identified by Lerm as one of the three steps in the development of the City of Dresden, after the Augustan Age (1694-1763) and preceding the reconstruction post-1945.⁶⁰ During this period, the population of the City of Dresden dramatically increased as shown in Table 2, which presents the demographic evolution of the City of Dresden from 1603 to 2010. From 1871 to 1910, the number of inhabitants in Dresden evolved from 177.089 to 548.308 (Table 2), thus more than tripling during this time, marking Dresden as the fifth largest city of the German Empire. This exceptionally high population growth rate has three sources: (1) flows of immigration from rural areas in Saxony, and particularly following the outbreak of the agricultural crisis in 1873⁶¹; (2) a birth surplus; and (3) the incorporation of suburbs that were previously independent districts or villages (Table 3).

⁵⁹ The *Stadtbrücke* in Pirna dates from 1875 and is approximately 20 km from the *Augustusbrücke* in Dresden and the *Bad Schandauer Straßenbrücke*, former *Carolabrücke* in Bad Schandau, dates from 1877 and is approximately 40 km from the *Augustusbrücke* in Dresden

⁶⁰ Lerm, pp.11-12 (note 21)

⁶¹ Lerm, M., Jarmer, S., 1991. Die bauliche Entwicklung Dresdens von 1871 bis 1918. In: H. Laudel & R. Franke, eds. *Bauen in Dresden im 19. und 20. Jahrhundert*. Dresden: Eigenverlag (in cooperation with Michel Sandstein Verlagsgesellschaft mbH Dresden), p.41

Year	Number of inhabitants
1603 ⁶²	14.800
1699 ⁶³	21.300
1800 ⁶⁴	54.800
1834	73.614
1871	177.089
1890	276.522
1910	548.308
1925	619.157
1939	630.300
1946	467.966
1950	494.187
1964	503.810
1990	493.174
2000	476.543
2010 ⁶⁵	523.058

Table 2: Demography of Dresden since 1603. Source: Digitales Historisches Ortsverzeichnis von Sachsen

⁶² Schumann, P., 1919. *Dresden und das Elbgebäude*. Dresden: Verein zur Förderung Dresdens und des Fremdenverkehrs, p.16

⁶³ Schumann, p.16 (note 62)

⁶⁴ Schumann, p.1 (note 62)

⁶⁵ Deutscher Städtetag, 2012. *Städte von A bis Z*. [Online] Available at: <http://www.staedtetag.de/mitglieder/index.htm> [Accessed on 21 November 2012]

Year	Districts incorporated to the City of Dresden
1866	Neudorf
1892	Strehlen, Striesen
1897	Pieschen, Trachenberge
1899	König-Albert-Park (formerly Forstrevier)
1901	Gruna
1902	Räcknitz, Seidnitz, Zschertnitz
1903	Cotta, Kaditz, Löbtau, Mickten, Naußlitz, Plauen, Trachau, Übigau, Wölfnitz
1912	Tolkewitz
1913	Reick
1921	Blasewitz, Briesnitz, Bühlau, Coschütz, Groß- and Kleindobritz, Gostritz, Kaditz, Kemnitz, Kleinpestitz, Kleinzschachwitz, Laubegast, Leuben, Leutewitz, Leubnitz-Neuostra, Loschwitz, Mockritz, Nieder- and Obergorbits, Prohlis, Rochwitz, Stetzsch, Torna, Weißer Hirsch
1930	Lockwitz, Omsewitz, Wachwitz
1945	Dölzschen, Gittersee, Albertstadt (formerly Gutsbezirk)
1949	Dresdner Heide (formerly Forstreviere Klotzsche, Langebrück, Weißer Hirsch)
1950	Hellerau, Hosterwitz, Klotzsche, Nieder- and Oberpoyritz, Pillnitz, Niedersedlitz, Söbrigen, Wilschdorf, Zschachwitz, Zschieren
1997	Altfranken, Cossebaude, District Kauscha associated to rural community Bannewitz
1999	Gompitz, Langebrück, Mobschatz, Schönfeld-Weißig, Weixdorf

Table 3: Chronological incorporation of villages in the City of Dresden. Source: Digitales Historisches Ortsverzeichnis von Sachsen

Therefore, the inclusion of villages in the City of Dresden (Table 3) also played a role in the rapid growth of the city, which is currently the fourth⁶⁶ largest urban district area in km² in the FRG, after Berlin, Hamburg and Cologne, and the twelfth largest German city, among 14 counting more than 500.000 inhabitants.⁶⁷ Furthermore, the City of Dresden considers itself one of the greenest European cities, with 62% (approximately 50 km²) of forests and green areas.⁶⁸

Accordingly, the first project of the construction of an Elbe crossing at the location of *Waldschlößchen* occurred during the industrial revolution, when the City of Dresden was developing and modernising. The rapid population growth, enlargement of the City of Dresden due to the incorporation of surrounding villages within the city and the general movement of urbanisation contributed to considering the need for a further Elbe crossing at a time when there were only two Elbe bridges.

However, when the project re-appeared on several occasions, there were already four (*Loschwitzer Brücke, Albertbrücke, Carolabrücke, Flügelwegbrücke*) and almost five (*Autobahnbrücke*) further Elbe bridges in the City of Dresden. In addition, while the population increased dramatically between 1862 and 1934-1937 when the project appeared for the second time, the population has remained rather stable since 1946, when the project was further discussed (1967, 1978-1979, 1988).

In the years following the German reunification, the current project of the *Waldschlößchenbrücke* appeared once again when the traffic situation in the City of Dresden represented an important issue. However, the Dresden Elbe Valley was inscribed on the World Heritage List when the final decision concerning the bridge was about to be made in 2006, and thus the location at *Waldschlößchen* was protected at the international level based upon its cultural and natural heritage.

While the first project of the bridge dates back to the industrial revolution period, the current project dating from the end of the 20th century and beginning of the 21st century belongs to the

⁶⁶ Statistisches Jahrbuch Deutschland, 2013. *Bevölkerung, die größten Städte Deutschlands 2011*. Wiesbaden: Statistisches Bundesamt, p.30

⁶⁷ Statistisches Jahrbuch Deutschland, p.30 (note 66)

⁶⁸ City of Dresden, 2012. *Grüne Stadt Dresden*. [Online] Available at: http://www.dresden.de/de/02/06/c_04.php [Accessed on 30 October 2012]

era of sustainable development. In this context, the construction of the *Waldschlößchenbrücke* reinforced by the argument of historical need should have been called into question regarding its irreversible damage imposed on the cultural landscape.

Furthermore, even though the City of Dresden grew rapidly from the second half of the 19th century until the first half of the 20th century, the Elbe River meadows have always remained a green area, especially at the location of *Waldschlößchen* (Figures 4 to 7), owing to a construction ban foreseen by the city planners, as well as the risk of water flooding.⁶⁹ Within the elaboration of the general development plan of 1862, it was already considered important to have a good aeration of the densely overbuilt parts of the city through the conservation of the unconstructed areas in the sector of the Elbe River as a good source of ventilation for the inner city and the creation of green and recreational areas.⁷⁰ Also during the GDR, the areas of absolute building ban ranked the *Großer Garten*, the *Bürgerwiese* and the meadows of the Elbe River.⁷¹

However, despite the role of the recreational and green area of the Elbe River meadows in the City of Dresden, a discussion took place concerning the Elbe River banks as rubble place following the destruction of Dresden in February 1945. Consequently, it was agreed in 1946 to shape the rubble mounts organically and phase out in the direction of the *Blasewitz* landscape.⁷² Subsequently, between 10 and 16 million cubic metres of rubbles were cleared, with more than a half million cubic metres distributed at the Elbe River meadows between *Johannstadt* and *Blasewitz*.⁷³

2.2.2. The role of memory in Dresden

The City of Dresden went through a long period of reconstruction – completed in 2005 with the reconstructed Church of our Lady (*Frauenkirche*) – after its almost entire destruction of 13-15 February 1945 (Figure 24). In this context, it can be argued that the inscription of the Dresden

⁶⁹ As shown in August 2002 and more recently in June 2013

⁷⁰ Helas, pp.41-42 (note 37)

⁷¹ Helas, Pampel & Zadniček, p.57 (note 52)

⁷² Lerm, p.51 (note 21)

⁷³ Lerm, p.152 (note 21)

Elbe Valley on the World Heritage List, including the historical centre of the City of Dresden, might have been seen as international recognition of the recovered beauty of Dresden. Therefore, memory in the City of Dresden plays a significant role in the attachment of the people in Dresden to their city, as observed by their involvement during the conflict between UNESCO and the State Party Germany to the WHC.



Figure 24: The City of Dresden after the allied bombings of 13-15 February 1945. Source: Federal Archives

The City of Dresden remained untouched by the bombings almost until the end of World War II, and was one of the last German cities to be attacked.⁷⁴ At the time, there was hope that it would be one of the few German cities⁷⁵ to survive the war and its bombings.⁷⁶ However, the first bombings took place in autumn 1944 with five air raids, including three heavy ones.⁷⁷

⁷⁴ Potsdam was bombed on 14 April 1945

⁷⁵ Heidelberg was not bombed

⁷⁶ Löffler, p.425 (note 34)

⁷⁷ Lerm, p.27 (note 21)

Subsequently, from 13 to 15 February 1945, two months before the end of World War II, Dresden was bombed by the British and American forces during which “from 50.000 upwards”⁷⁸ people were killed according to some sources, while other accounts suggest that the numbers vary greatly between 25.000 and 250.000.⁷⁹ In addition, another attack took place in March 1945, largely affecting the Inner New Town (*Innere Neustadt*). The damaged area represented a bigger size than the built city area of 1890.⁸⁰ 15 km² of the city was destroyed during the bombings, and there was no house left on the way from *Albertplatz* in the New Town (*Neustadt*) to the main railway station (*Hauptbahnhof*), which represents a walk of approximately 40 minutes through the historical centre.⁸¹

The reconstruction of Dresden started between the end of World War II on 8 May 1945 and the creation of the GDR on 7 October 1949, after it had been heavily destroyed by the bombings of February 1945, and was encouraged by Herbert Conert during his address at the occasion of the first anniversary of the “death” of Dresden: “New life has always blossomed from ruins! [...] The hardness of war life has brought us to be factual people. We do not close ourselves to the past. We carry the heritage of time on our shoulders”.⁸²

Herbert Conert, Head of the City Planning Office before 1945, presided over the first building authorities after the destruction until his death on 7 June 1946, and developed – derived from the existing designs – key objectives for the reconstruction of the city.⁸³ In 1946, Conert promoted the idea of restoring the historical centre, namely the main historical monuments and streets. Of the 700 monuments of the Old Town (*Altstadt*), 500 were completely destroyed, while all others were heavily damaged. The exhibition “*Das neue Dresden*” (the new Dresden) took place from July to October 1946, during which ideas and discussions were shared on what to restore and

⁷⁸ Sheehy, D., 1995. Dresden Plus 93 Days. *History Today*, 45(5), p.7

⁷⁹ Gemma, P. B., 2005. ‘The Sky Was On Fire’, Sixty Years after the Destruction of Dresden, Questions Still Linger. *The Occidental Quarterly*, 5(1), p.107

⁸⁰ Lerm, p.29 (note 21)

⁸¹ Lerm, p.30 (note 21)

⁸² Lerm, p.31 (note 21) „Immer hat neues Leben aus den Ruinen geblüht [...] Die Härte des Kriegslebens hat uns zu Tatsachen-Menschen erzogen. Wir verschließen uns der Vergangenheit nicht. Wir tragen das Erbe der Zeiten auf unseren Schultern.“ (personal translation)

⁸³ Lerm, p.25 (note 21)

how to reconstruct the city. The question involved determining whether to preserve the historical monuments or construct an entirely new city based on other plans.⁸⁴

The first reconstruction plan of Dresden was presented to the public on 5 January 1946. The urban planning, which did not exist at all at that time, essentially constituted, enlarged to several streets breakthrough, a take-over of the pre-war state. However, the representatives of this direction, Paul Wolf, Herbert Conert, Richard Konwiarz and Hoswin Hempel, found themselves exposed to a growing flow with the objective of a radical redesign of the city, dismissing the old structures.⁸⁵

The damage plan of the Urban Planning Office for the City of Dresden from 10 November 1949 expelled approximately half of 25 to 75% of destroyed and non-destroyed areas. In accordance with the “16 principles of urban development”⁸⁶ – as § 7 Part of the Construction Act⁸⁷ – representative reconstruction of the inner city in particular was carried out. Moreover, the general development and traffic plan of the City of Dresden from 5 April 1967 provided the application of industrial construction methods with flow production character for the necessary reconstruction and sanitary measures in the old housing areas of the City of Dresden.⁸⁸

Until the middle of the 1960s, many more-or-less heavily damaged historical buildings that could have been reconstructed with economically justifiable expense were eliminated against the objections of the State Office for the Preservation of Monuments, later the Institute for the Preservation of Monuments.⁸⁹ After the Regulation for the Conservation and Maintenance of the about the Maintenance and the Protection of Monuments from 28 September 1961⁹⁰, the Act for the Conservation of Monuments in the GDR (Monuments Maintenance Act) was adopted on 19

⁸⁴ Helas, p.88 (note 37)

⁸⁵ Lerm, p.43 (note 21)

⁸⁶ „16 Grundsätze des Städtebaues“ (Ministerial Gazette of the GDR, Nr. 25 from 16 September 1950, p.153)

⁸⁷ Gesetz über den Aufbau der Städte in der Deutschen Demokratischen Republik und der Hauptstadt Deutschlands [Aufbaugesetz] [Construction Act] 6 September 1950 (Law Gazette of the GDR, Nr. 104 from 14 September 1950, pp.365-367)

⁸⁸ Helas, V., 1994. *Denkmaltopographie Bundesrepublik Deutschland, Denkmale in Sachsen, Stadt Dresden, Friedrichstadt*. Dresden & Basel: Verlag der Kunst, p.15

⁸⁹ Helas, p.101 (note 37)

⁹⁰ Verordnung über die Pflege und den Schutz der Denkmale [Ordinance about the conservation and protection of the monuments] 28 September 1961 (Law Gazette of the GDR II, Nr. 72 from 23 October 1961, p.475)

June 1975⁹¹. However, at the moment of the German Reunification, apart from a few privileged and particularly valuable, protected monuments, an important part of the historical buildings' substance presented a deplorable state.⁹²

The "Call for Dresden" took place for the 45th commemoration of the destruction of Dresden on 13 February 1990, which constituted an urgent appeal from citizens of Dresden to the world for the reconstruction of the Church of our Lady (*Frauenkirche*).⁹³ This call was heard and the reconstruction was completed for the 800 years of the City of Dresden in 2006.

Therefore, the memory of the bombings that heavily destroyed the city and the memory of the reconstruction of Dresden might have played a considerable role in the involvement of the Dresden citizens during the conflict between UNESCO and the State Party Germany to the WHC with the view to preserving the international recognition represented by the World Heritage Committee's decision to inscribe the Dresden Elbe Valley on the World Heritage List.

2.2.3. Misconception of the Dresden Elbe Valley

The City of Dresden is commonly known for its culture and beauty, and is often called the "Florence of the Elbe"⁹⁴ owing to its cityscape mainly recognisable for the Church of our Lady (*Frauenkirche*, 1726-1736⁹⁵) and its baroque monuments. Figure 25 illustrates a typical view towards the "Florence of the Elbe".

⁹¹ Gesetz zur Erhaltung der Denkmale in der DDR [Denkmalpflegegesetz] [Monument Conservation Act] 19 June 1975 (Law Gazette of the GDR I, Nr. 26 from 27 June 1975, pp.458-460)

⁹² Lerm, p.175 (note 21)

⁹³ Stuhrberg, p.27 (note 50)

⁹⁴ Goebel, p.494 (note 58)

⁹⁵ Löffler, p.449 (note 34)



Figure 25: View of the City of Dresden from the New Town bank of the Elbe River. Source: Perrine Deruelles, 15 September 2008

Prior to the proposal of nomination of the Dresden Elbe Valley for inscription on the World Heritage List, another attempt to inscribe the heritage of Dresden had already taken place.⁹⁶ Prepared during the GDR, this nomination consisted of single baroque monuments that had been reconstructed after the bombings of February 1945. However, due to the post-war reconstruction, these monuments' lack of authenticity⁹⁷ prevented Dresden from accessing the World Heritage List.

⁹⁶ For more information, see section 4.3 of this thesis

⁹⁷ Authenticity is defined as follows in para. 82 of the OG (2013) "Depending on the type of cultural heritage, and its cultural context, properties may be understood to meet the conditions of authenticity if their cultural values (as recognized in the nomination criteria proposed) are truthfully and credibly expressed through a variety of attributes including: form and design; materials and substance; use and function; traditions, techniques and management systems; location and setting; language, and other forms of intangible heritage; spirit and feeling; and other internal and external factors." However it can be noted that the "Historic Centre of Warsaw" (Poland), also heavily destroyed during World War II, has been inscribed on the World Heritage List in 1980. Consequently, the decision in 1988 not to inscribe the historic centre of Dresden might appear as inconsistent. But a comparison between the definitions of authenticity in the OG (1980) and OG (1988) shows a clear change in the conception of authenticity by the World Heritage Committee: para. 9 of the OG (1980) "In addition, the property should meet the test of authenticity in design, materials, workmanship and setting; authenticity does not limit consideration to original form and structure but includes all consequent modifications and additions, over the course of time, which in themselves possess artistic or historical values." and para. 24. b. i. of the OG (1988) "meet the test of authenticity in design, materials,



Figure 26: Aerial photograph of the Dresden Elbe Valley including the location of the *Waldschlößchenbrücke* (yellow), the protected area (red) and the buffer zone (white).

Source: City of Dresden

When the City of Dresden finally received the World Heritage status following its inscription on the World Heritage List as a cultural landscape – Dresden Elbe Valley – a focus was still placed on the famous view of the “Florence of the Elbe”. Nevertheless, the protected area showed by Figure 26 has a length of 19.5 km⁹⁸ along the Elbe River. This protected area certainly includes the baroque monuments of the historical centre, although this is only a part of the WHS. While the totality of the protected area is located in the City of Dresden, the cultural landscape of the Dresden Elbe Valley comprises a combination of cultural and natural features. The cultural features are represented by villas and castles, including the monuments depicted in section 2.1.4 of this thesis, while the natural features refer to the Elbe River, meadows, hills, vineyards and

workmanship or setting (the Committee stressed that reconstruction is only acceptable if it is carried out on the basis of complete and detailed documentation on the original and to no extent on conjecture).” Furthermore this position is reinforced in para. 86 of the OG (2013) “In relation to authenticity, the reconstruction of archaeological remains or historic buildings or districts is justifiable only in exceptional circumstances. Reconstruction is acceptable only on the basis of complete and detailed documentation and to no extent on conjecture.”

⁹⁸ Nomination file, 2003. *Dresden Elbe Valley (Germany) No. 1156*. Paris: UNESCO World Heritage Centre, p.1

forests. In order to demonstrate the misconception related to the Dresden Elbe Valley, elements of characterisation of the Dresden Elbe Valley taken from the nomination file prepared by the State Party Germany to the WHC, the International Council on Monuments and Sites (henceforth ICOMOS) evaluation and the discussion of the World Heritage Committee concerning the inscription of the Dresden Elbe Valley on the World Heritage List are presented.

First, a holistic description of the property was elaborated in the nomination file for the Dresden Elbe Valley, including all the cultural and natural features present in the cultural landscape, as the following quotation shows:

“The 18th and 19th century cultural landscape of Dresden Elbe Valley extends some 18 km along the river from Übigau Palace and Ostragehege fields in the northwest to the Pillnitz Palace and the Elbe River Island in the southeast. It features low meadows, and is crowned by the Pillnitz Palace and the centre of Dresden with its numerous monuments and parks from the 16th to the 20th centuries. The landscape also features 19th and 20th century suburban villas and gardens and valuable natural features. Some terraced slopes along the river are still used for viticulture and some old villages have retained their historic structure and elements from the industrial revolution: notably the 147 m Blue Wonder steel bridge (1891-1893), the single-rail suspension cable railway (1898-1901), and the funicular (1894-1895). The passenger steamships (the oldest from 1879) and shipyard (ca 1900) are still in use.”⁹⁹

However, the nomination file contained an illustration of the view towards Dresden by Canaletto, while several books dedicated to Canaletto were quoted in the bibliography.

Secondly, an exhaustive description of the property was elaborated upon in the ICOMOS evaluation, taking into account the cultural and natural aspects of the cultural landscape: meadows, *Ostragehege*, Elbe Island, Elbe hillsides, vineyards, *Schönfelder Hochland*, *Elbehänge Dresden-Pirna* Protected landscape area, *Pillnitz*, *Dinglinger* vineyards, old villages, bourgeois villas, gardens and parks, *Preussisches Viertel*, *Loschwitz*, *Blasewitz*, *Loschwitz Hill*, *Schloß Albrechtsberg*, *Villa Stockhausen*, *Eckberg Palace*, *Tolkewitz* Crematorium, steel bridge “Blue Wonder”, suspension cable railway, funicular railway, steamships, shipyard, historic centre of Dresden, *Frauenkirche*, *Hofkirche*, *Semperoper*, *Neustadt*, Japanese Palace, *Pillnitz* Palace, garden, horticultural, *Übigau* Palace. However, the ICOMOS evaluation and recommendation mainly focused on Dresden, as opposed to the remaining elements of the cultural landscape.

⁹⁹ Nomination file, first page of the document non numerated (note 98)

Furthermore, there was repeated reference to the view of the “Florence of the Elbe” depicted by Canaletto (“monumental centre of Dresden and the Pillnitz Palace with its gardens, well illustrated in the panoramas of Canaletto”¹⁰⁰; “The city obtained its characteristic landscape, illustrated by painters such as Canaletto in the 18th century”¹⁰¹; and “The river landscape was used as an essential artistic element already in town planning in the 18th century, as recorded by celebrated painters, such as Bernardo Bellotto called Canaletto, as well as by writers and poets. The Elbe Valley was also important in the development of Romantic landscape painting in the 19th century.”)¹⁰²

Thirdly, the valley, cultural and natural aspects of the property were acknowledged (“importance of the valley’s cultural and natural aspects”¹⁰³) during the discussion of the World Heritage Committee related to the inscription of the Dresden Elbe Valley on the World Heritage List in 2004. However, an insistence on the reconstruction of the historical centre can be perceived (“drama and reconstruction of an entire town and people”¹⁰⁴; “urban cultural landscape with a long and complex history”¹⁰⁵ and “important historic event associated with the property, which had been heavily reconstructed”¹⁰⁶).

Accordingly, the sole focus on the view of the “Florence of the Elbe” while referring to the Dresden Elbe Valley former WHS would represent a biased perspective. Indeed, such a perspective contributed to under-estimating the impacts of the project of the *Waldschlößchenbrücke* for the OUV and integrity of the WHS during the conflict between UNESCO and the State Party Germany to the WHC.

¹⁰⁰ ICOMOS, 2003. *Evaluation in nomination file, Dresden Elbe Valley (Germany) No. 1156*. Paris: UNESCO World Heritage Centre, p.85

¹⁰¹ ICOMOS, p.85 (note 100)

¹⁰² ICOMOS, p.88 (note 100)

¹⁰³ UNESCO, 2004. *Convention Concerning the Protection of the World Cultural and Natural Heritage, World Heritage Committee Twenty-eighth Session, Suzhou, China, 28 June – 7 July 2004: WHC-04/28.COM/26*. Paris: UNESCO World Heritage Centre, p.218

¹⁰⁴ WHC-04/28.COM/26, p.217 (note 103)

¹⁰⁵ WHC-04/28.COM/26, p.218 (note 103)

¹⁰⁶ WHC-04/28.COM/26, p.218 (note 103)

2.2.4. The contested referendum of 27 February 2005

As previously mentioned, a referendum took place in the City of Dresden on 27 February 2005, which was organised following a citizens' initiative¹⁰⁷ created by, among others, the German automobile club (ADAC-*Allgemeiner Deutscher Automobil-Club e.V.*). This initiative conducted a petition (Figure 27) requesting a referendum concerning the construction of the *Waldschlößchenbrücke*, collecting 69.487 signatures.

The image shows a petition form titled "Bürgerbegehren Waldschlößchenbrücke". The main heading asks: "Die Unterschriften beantragen einen **Bürgerentscheid** zu folgender Frage: **Sind Sie für den Bau der Waldschlößchenbrücke?** – einschließlich des Verkehrsziuges entsprechend der abgebildeten Darstellung –". To the left of the text is a technical drawing of the bridge. Below the text are two columns of smaller text: "Wichtiges Info" and "Bürgerentscheidungsfrage". At the bottom of the page is a large table with six columns and several rows, intended for collecting signatures and names.

Zeichnung	Name	Ort	Unterschrift	Ort	Zeichnung

Figure 27: Petition for the organisation of a referendum concerning the construction of the *Waldschlößchenbrücke*. Source: City of Dresden

Furthermore, the City of Dresden published a brochure¹⁰⁸ in February 2005 dedicated to the referendum, which included argumentation for and against the project of the

¹⁰⁷ Verein Bürgerbegehren Waldschlößchenbrücke e.V.

¹⁰⁸ City of Dresden, 2005. *Bürgerentscheid Waldschlößchenbrücke 27. Februar 2005*. Dresden: Landeshauptstadt Dresden

Waldschlößchenbrücke. The first part of the brochure was consecrated to the argumentation for the construction of the *Waldschlößchenbrücke*, first stating the argument of the historical need and wish for the bridge, insisting on the urgent necessity to fill the gap in the main traffic connection of the city. Secondly, the argument of the need of the *Waldschlößchenbrücke* for the discharge of the *Carolabrücke*, *Albertbrücke* and *Loschwitzer Brücke* (“*Blaues Wunder*”) was enunciated. Thirdly, it was argued that the *Waldschlößchenbrücke* would lead to an environmental relief for the entire city, given that it would enable shortening the routes for the road users. Fourthly, it was also argued that the *Waldschlößchenbrücke* could ensure traffic in the Eastern part of the city in the case of an accident or damage on the *Albertbrücke* or *Loschwitzer Brücke*. Fifthly, the argument of the financing of the *Waldschlößchenbrücke* was mentioned to highlight that most of the costs were supported by the Free State of Saxony rather than the City of Dresden. Sixthly, it was declared that the *Waldschlößchenbrücke* would not be used for long distance traffic such as to Berlin or Prague, which would continue to take the roads A 17/B 170. Seventhly, it was showed that the roads in the city centre would be relieved, with the exception of the *St. Petersburger Straße* and the *Schillerplatz*, while the following bridges would also be discharged: *Albertbrücke*, *Carolabrücke*, *Loschwitzer Brücke*, *Augustusbrücke* and *Marienbrücke*. Eighthly, it was argued that increased traffic would be minimised in the district of *Johannstadt*, located directly in the Southern part of the Elbe River at the location of the *Waldschlößchenbrücke*. Furthermore, an allusion to the Dresden Elbe Valley was made to declare that the WHS had been taken into account in the traffic course of the *Waldschlößchenbrücke*. Ninthly, the argument of the contribution of the *Waldschlößchenbrücke* for the future-viable mobility of the citizens and an attractive transport infrastructure for the economy was advanced.

The second part of the brochure was dedicated to the arguments against the construction of the *Waldschlößchenbrücke*. Firstly, it was argued that the *Waldschlößchenbrücke* is too expensive, given that the city’s budget could alternatively be used for children and youth, culture, sport, kindergarten and school renovations and the refurbishment of roads. Secondly, it was advanced that the *Waldschlößchenbrücke* would not solve the traffic problems but rather bring new ones, because the *Waldschlößchenbrücke* would bring new vehicles into the city. Thirdly, the argument was presented of having a motorway in the city in order to gain five minutes, given that the *Waldschlößchenbrücke* would shorten the way by creating an interconnection between two

motorways: the A 17 and A 4. Fourthly, it was argued that the *Waldschlößchenbrücke*, as the most expensive city bridge in Germany, would represent an unaffordable gift, because despite the Free State of Saxony supporting most of the construction costs, the significant remaining amount has to be paid by the City of Dresden, as well as the maintenance costs, which would be almost as high as for the rest of the Elbe bridges together. Fifthly, the argument that a unique landscape would be sacrificed was also enunciated, highlighting that it has been recognised as a WHS since 2004. Sixthly, the argument of living in traffic noise was suggested due to air and noise pollution, not only produced around the *Waldschlößchenbrücke* but also along the access roads. Seventhly, the argument of the sand in the economy gear was brought, showing that rather than being a necessity for the city, the *Waldschlößchenbrücke* would not bring more tourists in the city, with one quarter of the citizens working in tourism. Eighthly, the argument of the preservation of the *Blaues Wunder* was refuted, given that the *Waldschlößchenbrücke* would not connect *Blasewitz* and *Loschwitz*, and hence would not be a substitute for the *Blaues Wunder*. Ninthly, the risk that this process would continue forever was conveyed, because the financing of the *Waldschlößchenbrücke* was not ensured and would be decided at the court, which would thus take some more time.

Despite the information provided concerning the organisation of the referendum and the arguments for and against the construction of the *Waldschlößchenbrücke* contained in the brochure, only 50.8% of the voters took part in the referendum, 67.92% of whom voted for the construction of the *Waldschlößchenbrücke*. However, the results of the referendum vary considerably by district, as shown in Figures 28 and 29.

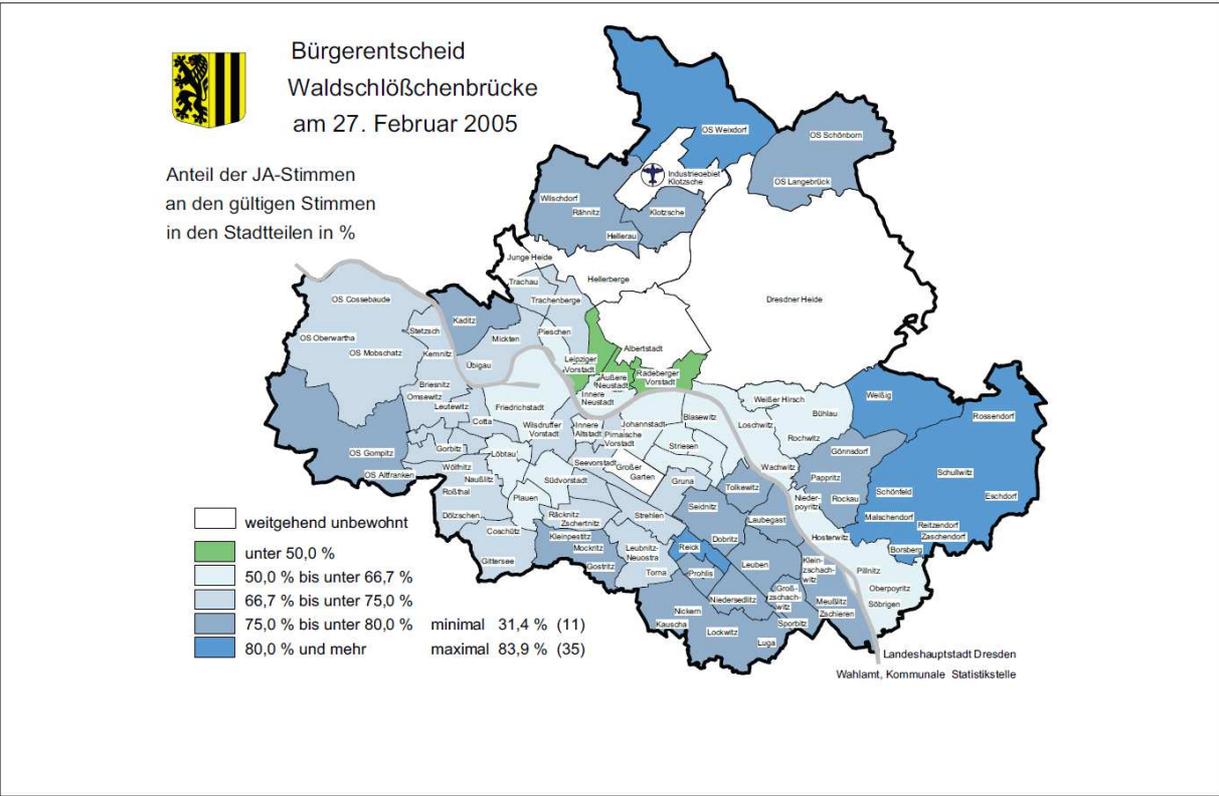


Figure 28: Percentage of the “yes” votes in the city districts in %. Source: City of Dresden

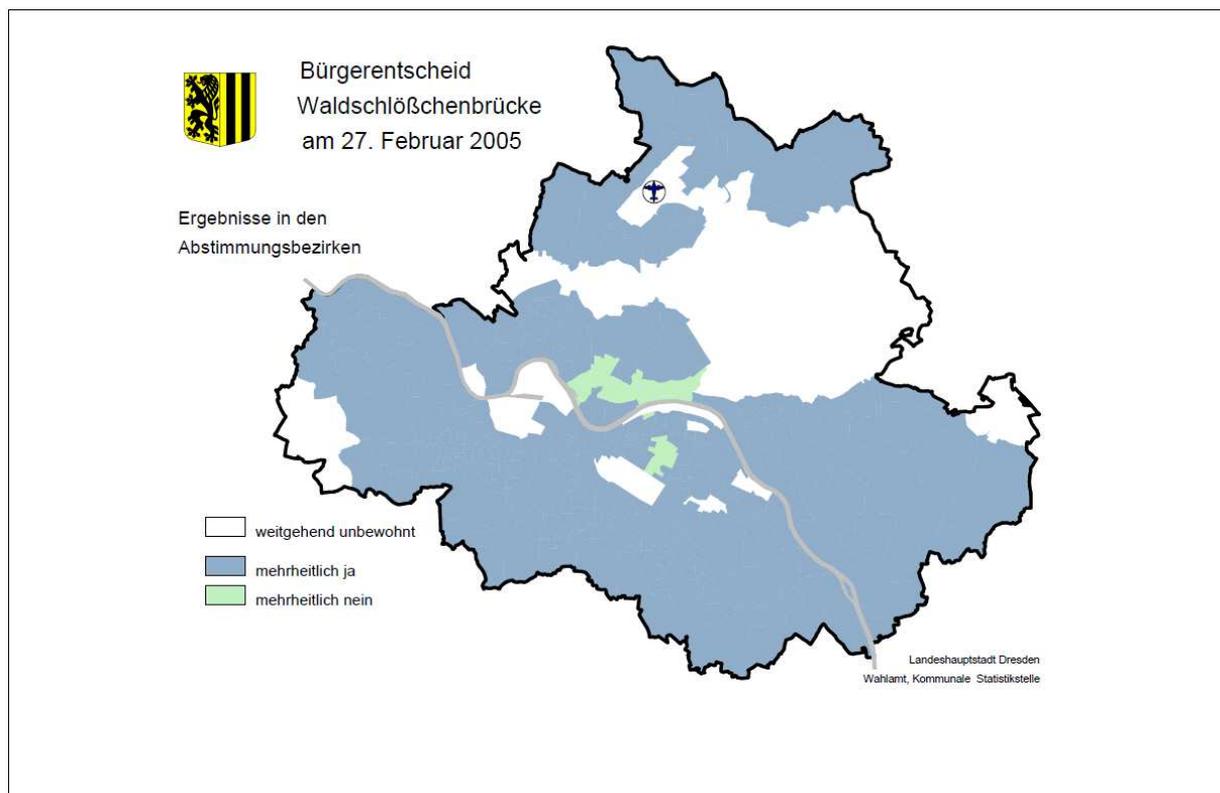


Figure 29: Results in the city districts. Source: City of Dresden

Considering the result of the referendum, the City of Dresden was legally bound to conduct the project of constructing the *Waldschlößchenbrücke*. Nevertheless, a year later, in 2006, the conflict was triggered between UNESCO and the State Party Germany to the WHC concerning the *Waldschlößchenbrücke* located in the core area of the Dresden Elbe Valley. When the World Heritage Committee decided to transfer the Dresden Elbe Valley to the List of World Heritage in Danger in June 2006, with the view to delisting the WHS in the event that the bridge would be built, the conflict between the pros and cons *Waldschlößchenbrücke* continued in the City of Dresden. Another citizens' initiative¹⁰⁹ organised a petition for a further referendum that would ask the Dresden citizens the following question: "Are you for that the Elbe crossing at *Waldschlößchen* be constructed in the form of a tunnel instead of the started combination of

¹⁰⁹ Bürgerbegehren Tunnelalternative am Waldschlößchen e.V.

bridge and tunnel?”¹¹⁰ While 46.776 valid signatures were collected through this petition, no further referendum¹¹¹ was organised and the construction of the *Waldschlößchenbrücke* started in 2007, within the legal limit of three years for the implementation of a referendum.

2.3. Summary

The construction of the *Waldschlößchenbrücke* in the core area of the Dresden Elbe Valley former WHS represents the object of the conflict between UNESCO and the State Party Germany to the WHC. In this chapter, the adoption of a historical perspective enabled contextualising the object of this conflict in the City of Dresden, before subsequently shedding light on the elements triggering this conflict.

With the contextualisation of the *Waldschlößchenbrücke*, the long history of failed projects since 1862 has been presented in order to comprehend the prevalent argument of the historical need of an Elbe crossing at the location of *Waldschlößchen*. Furthermore, the development of the current project of the *Waldschlößchenbrücke* was presented, which was already controversial prior to the inscription of the Dresden Elbe Valley on the World Heritage List in 2004. Moreover, the *Waldschlößchenbrücke* was compared to the other Elbe bridges, demonstrating that the *Waldschlößchenbrücke* creates a rupture with the physical typology of the other Elbe bridges and thus represents a threat for the OUV and integrity of the Dresden Elbe Valley, in accordance with the decision of the World Heritage Committee. Finally, the location of *Waldschlößchen* was described, including the cultural features – monuments and castles – and natural features – Elbe River, meadows, hills, vineyards and forests – in order to emphasise that this location has remained a green area until now, used as a recreational area whose integrity and OUV is threatened by the *Waldschlößchenbrücke*.

¹¹⁰ „Sind Sie dafür, dass die Elbquerung am Waldschlößchen in Form eines durchgängigen Tunnels anstelle der begonnenen Kombination aus Brücke und Tunnel gebaut wird?“ (personal translation)

¹¹¹ VG Dresden [Verwaltungsgericht Dresden] [Dresden Administrative Court] Decision from 20.05.2008, 7 L 259/08, JurionRS 2008, 17429. The Dresden Administrative Court decided to reject the petition because it argued that in the frame of an interim measure solely the provisional approval of a petition would be permissible

Following the contextualisation of the object of the conflict, it was possible to analyse the elements that triggered the conflict between UNESCO and the State Party Germany to the WHC. Firstly, it was shown that the city's needs had changed between the industrialisation period in 1862 when the project of an Elbe crossing at the location of *Waldschlößchen* first appeared, and when the current project of the *Waldschlößchenbrücke* was decided in 1996, particularly with consideration to sustainable development. Secondly, the role played by memory in Dresden due to the reconstruction of the city after the bombings of February 1945 was described, given that the international recognition represented by the inscription of the Dresden Elbe Valley on the World Heritage List also takes part in the conflict against the loss of the World Heritage status. Thirdly, the misconception of the Dresden Elbe Valley owing to the image of the “Florence of the Elbe” was analysed in the nomination file for the Dresden Elbe Valley, the ICOMOS evaluation and the discussion of the World Heritage Committee related to the inscription of the Dresden Elbe Valley on the World Heritage List. From this analysis, it could be deduced that a biased perspective of the Dresden Elbe Valley as a whole and an under-estimation of the impact of the *Waldschlößchenbrücke* had taken place. Fourthly, the referendum organised in the City of Dresden on 27 February 2005 and subsequently contested also represents a trigger of the conflict, which was solved at several German administrative and constitutional courts.

Finally, the historical contextualisation of the object of the conflict between UNESCO and the State Party Germany to the WHC enables analysing this conflict from a legal perspective in the following chapters of this thesis.

CHAPTER 3

LEGAL PROCEDURE RELATED TO THE OBJECT OF THE CONFLICT IN THE FEDERAL REPUBLIC OF GERMANY

This chapter focuses on the conflict between UNESCO and the State Party Germany to the WHC from the perspective of the legal battle that took place within the FRG. The decision to build the *Waldschlößchenbrücke* and the transfer of the Dresden Elbe Valley to the List of World Heritage in Danger¹¹² with the view to its subsequent delisting if the bridge was constructed constituted the trigger of this legal battle. The objective of this chapter is to investigate the reasons for the conflict from the German legal context in order to determine the legal arguments that impeded the possibility of protecting the OUV and integrity of the Dresden Elbe Valley.

Accordingly, the first part of this chapter is dedicated to legal commentaries of courts decisions taken by the Dresden Administrative Court, the Saxon Higher Administrative Court in Bautzen, the Constitutional Court of the Free State of Saxony in Leipzig and the Federal Constitutional Court in Karlsruhe. Given that the legal dispute concerning the construction of the *Waldschlößchenbrücke* involved the question of the bindingness of the WHC in the FRG, as well as environmental concerns, the legal procedure is discussed in two parts¹¹³. Therefore, for these two respective disputes, the legal commentaries include a summary of the facts as described in the respective courts' decisions, the procedure, the arguments of the opposing parties, the decision of the court and the legal question behind.

Subsequently, based on these legal commentaries, the second part of this chapter is consecrated to the development of a reflection on the non-transposition of the WHC in German law. In this respect, the aspect of the federalism in the conflict is elaborated upon, while considering the

¹¹² Decision 30 COM 7B.77 (note 5) For more information, see section 4.3.2 of this thesis

¹¹³ For a scheme of the legal procedure, see Annex II of this thesis

incompatibility between the Saxon Constitution and the German Constitution (Basic Law) with the WHC. The separation of culture and nature protection also comes into focus, by looking at the repartition of the legislative competences on these matters between the Free State of Saxony and the FRG. The reflection is then extended to the concept of cultural landscape to ascertain its possible need for better protection within German law. Finally, some perspectives for the transformation of the WHC in German law are presented.

3.1. The courts' decisions

The controversial project of the *Waldschlößchenbrücke* built above the Elbe River in the core of the WHS Dresden Elbe Valley provoked various administrative and constitutional courts' decisions at three levels (local, regional, federal). The legal battle concerning the bindingness of the WHC in the FRG started shortly after the decision of the World Heritage Committee to transfer the Dresden Elbe Valley to the List of World Heritage in Danger in July 2006.¹¹⁴ All appeal decisions of the courts favoured the construction of the *Waldschlößchenbrücke*, which complicated the search for an alternative solution with UNESCO and thus participated in the process that led to the delisting of the Dresden Elbe Valley from the World Heritage List. However, the legal battle concerning the environmental concerns already started in 2005, without success for the associations for nature protection that had initiated it.

Furthermore, the starting point of the legal dispute concerning both the bindingness of the WHC in the FRG and the environmental concerns is the planning approval decision¹¹⁵ to build the bridge on base of art. 1 Administrative Procedure Act of the Free State of Saxony¹¹⁶ from

¹¹⁴ Decision 30 COM 7B.77 (note 5)

¹¹⁵ Regierungspräsidium, 2005. *Planfeststellung für das Bauvorhaben Neubau des Verkehrszuges Waldschlößchenbrücke*, 25. Februar 2004, 41-0513.27/10-WSB, Dresden: Regierungspräsidium [Dresden Regional Council, Planning Permission for the building project new construction of the traffic course Waldschlößchenbrücke, 25 February 2004]

¹¹⁶ *Verwaltungsverfahrensgesetz für den Freistaat Sachsen [SächsVwVfG]* [Administrative Procedure Act of the Free State of Saxony] 10 September 2003 (Saxon Law and Ordinance Gazette, p.614), art. 1 "The Administrative Procedure Act from 25 May 1976 (BGBl. I p. 1253), last amended by art. 7 para. 3 of the Act from 12 September 1990 (BGBl. I p. 2002) according to its respectively effective version, is valid for the public-legal administrative activity of the authorities of the Free State of Saxony and the public bodies, institutions and foundations subject to

10.09.2003 (GVBl., p.614), last amended by Act from 19.05.2010 (GVBl., p.142) in conjunction with art. 74 Administrative Procedure Act¹¹⁷. This planning approval decision was taken on 25 February 2004 by the Dresden Regional Council (henceforth RC), several months prior to the inscription of the Dresden Elbe Valley on the World Heritage List, yet a year after the preparation and submission of the nomination file for the Dresden Elbe Valley. Among others, the Saxon State Office of Environment and Geology, the Saxon State Office for Monument Protection, the

their supervision, insofar as not stipulated otherwise. Art. 61 para. 2 clauses 2 and 3 Administrative Procedure Act is also valid, if an authority is contractor in the sense of clause 1.” (personal translation)

¹¹⁷ Verwaltungsverfahrgesetz [VwVfg] [Administrative Procedure Act] 25 May 1976, last amended on 14 August 2009 (Fed. Law Gazette I, p.2827), art. 74 “(1) The planning authority shall consider and decide on the plan (planning approval decision). The provisions concerning decisions and contesting decisions in formal administrative proceedings (sections 69 and 70) shall apply. (2) The planning approval decision shall contain the decision of the planning approval authority concerning the objections on which no agreement was reached during discussions before the hearing authority. It shall impose upon the project developer the obligation to take measures or to erect and maintain structures or facilities necessary for the general good or to avoid detrimental effects on the rights of others. Where such measures or facilities are impracticable or irreconcilable with the project, the person affected may claim reasonable monetary compensation. (3) Where it is not yet possible to make a final decision, this shall be stated in the planning approval decision; the project developer shall at the same time be required to submit in good time any documents still missing or required by the planning approval authority. (4) The planning approval decision shall be sent to the project developer, those people known to be affected by the project and those people whose objections have been dealt with. A copy of the decision, together with advice on legal remedies and a copy of the plan as approved, shall be open for inspection in the communities concerned for two weeks, the place and time at which the plan may be inspected being made known in accordance with local custom. With the end of the inspection period, the other parties affected shall be regarded as having been notified, which fact shall be made known in the announcement. (5) If apart from the project developer more than 50 notifications have to be made under paragraph 4, this may be replaced by public announcement. Public announcement shall be effected by publishing the operative part of the decision of the planning approval authority, as well as advice on legal remedies and a reference to the fact that the plan is open to public inspection pursuant to paragraph 4, second sentence, in the official bulletin of the competent authority, and also in local daily newspapers with wide circulation in the district in which the project may be expected to have its effect. Any impositions shall be indicated. At the end of the period of public inspection, those affected by the decision and those who have lodged objections to it shall be regarded as having been notified, which fact shall be indicated in the public announcement. Between the time of the public announcement and the end of the period during which legal remedies may be sought, those affected by the decision and those who have lodged objections may make written requests for copies of the decision; this shall likewise be indicated in the public announcement. (6) Planning consent may be issued in place of a planning approval decision where 1. there is no impairment of the rights of others or where those affected have declared in writing that they consent to the utilisation of their property or of some other right, and 2. agreement has been reached with those public agencies whose spheres of competence are affected. Planning consent has the same legal effects as planning approval except for the predetermining legal effect with regard to later expropriation; the granting of such consent shall not be governed by the provisions on planning approval procedures. Re-examination in preliminary proceedings is not required prior to the filing of an action with the administrative court. Section 75, paragraph 4 applies mutatis mutandis. (7) Planning approval and planning consent are not required in cases of minor significance. Such cases are deemed to exist where 1. no other public concerns are affected, or the required decisions on the part of authorities have already been taken and are not in conflict with the plan, and 2. rights of others are not affected, or the relevant agreements have been reached with those affected by the plan.” (translation of the Federal Ministry of the Interior)

Saxon State Office for Archaeology and several environmental associations¹¹⁸ took part in the decisional procedure. Moreover, a Habitats Directive Assessment (henceforth HDA) and an Environmental Impact Assessment (henceforth EIA) were also implemented¹¹⁹, with their results figuring in the planning approval decision. The HDA concluded that the considered habitat types such as wild flora and fauna would not suffer any significant or sustained adverse effects due to the planned construction of the bridge.¹²⁰ Furthermore, the EIA concluded that the planned project was environmentally compatible, despite it being demonstrated that the planned project has negative human, noise, soil, water, biotope potential and landscape effects. Despite such negative effects, the argumentation in favour of the bridge's construction – to be found in the planning approval decision – concerns the supposed necessity of the project in order to reach the planning objectives pursued by the project's carriers. According to the conclusion of the EIA, planning alternatives with less negative effects on the environment had not occurred, and the negative effects reported in the EIA could be partly settled. Concerning the impossibility of compensating the interventions given their type and scale, substitutions measures outside of the construction work are included. Finally, the EIA also concluded that after the implementation of all protection, reduction, design, compensation and substitution measures, it can be expected that

¹¹⁸ Grüne Liga Sachsen e.V.; Schutzgemeinschaft Deutscher Wald e.V., Landesverband Sachsen; Naturschutzbund Deutschland, Landesverband Sachsen e.V.; Bund für Umwelt und Naturschutz Deutschland, Landesverband Sachsen e.V.

¹¹⁹ For construction projects an Environmental Impact Assessment is required according to Sächsisches Straßengesetz [SächsStrG] [Saxon Traffic Act] 21 January 1993, last amended on 2 April 2014 (Saxon Law and Ordinance Gazette, p.234), art. 39 para. 2 “(2) Necessity and implementation of the environmental impact assessment shall be determined by the provisions of the Environmental Impact assessment Act (UVPG) in the version of the publication of 5 September 2001 (BGBl I p.2350), amended by Article 2 of the Act of 18 June 2002 (BGBl I p.1914, 1921), as well as the Environmental Impact Assessment Act in the Free State of Saxony (SächsUVPG) of 1 September 2003 (SächsGVBl, p.418), in the respective applicable versions.” and art. 3 para. 1 Gesetz über die Umweltverträglichkeitsprüfung [UVPG] [Environmental Impact Assessment Act] 12 February 1990, last amended on 18 August 1997 (Fed. Law Gazette I, p.2081), “(1) This Act shall apply to the projects listed in Annex 1. The Federal Government shall be empowered, by means of statutory ordinance with the consent of the Bundesrat, 1. to include in Annex 1 projects which in view of their type, scale or location may have significant impacts on the environment, 2. to exclude from Annex 1, having regard to the legal acts of the Council or Commission of the European Communities, projects which, according to present findings, do not give reason to fear any significant impacts on the environment. Insofar as use is made of these powers, the Federal Government shall also be empowered to make necessary follow-up alterations to references made in the provisions of this Act to certain projects listed in Annex 1. Statutory ordinances issued on the basis of these powers shall require the consent of the Bundestag. Consent shall be deemed to have been granted if the Bundestag has not refused its consent within three session weeks after receipt of the submission by the Federal Government.” (personal translation)

¹²⁰ Regierungspräsidium, p.51 (note 115)

the required compensation in the nature conservation legislation for the unavoidable interventions is formally achieved.¹²¹

Nevertheless, this planning approval decision for the construction of the *Waldschlößchenbrücke* was later contested by the Capital City of Dresden in the procedure concerning the bindingness of the WHC in the FRG, and by associations for nature protection in the procedure related to the environmental concerns. Accordingly, this constitutes the starting point of the legal dispute that is commented upon in this section.

3.1.1. The bindingness of the World Heritage Convention in the Federal Republic of Germany

The courts' decisions are mentioned chronologically in each of the following sections since the Dresden Administrative Court gave a decision (decision 12 K 1768/06¹²², 30 August 2006), which was modified by the Saxon Higher Administrative Court in Bautzen (decision 4 BS 216/06¹²³, 9 March 2007). Consequently, there was an appeal of the decision of the Saxon Higher Administrative Court to the Constitutional Court of the Free State of Saxony in Leipzig (decision Vf. 53-IV-07 (HS) / Vf. 54-IV-07 (e.A.)¹²⁴, 3 May 2007) and subsequently to the Federal Constitutional Court in Karlsruhe (decision 2 BvR 695/07¹²⁵, 29 May 2007).

¹²¹ Regierungspräsidium, pp.60-61 (note 115)

¹²² VG Dresden [Verwaltungsgericht Dresden] [Dresden Administrative Court] Decision from 30.08.2006, 12 K 1768/06, JurionRS 2006, 33262

¹²³ SächsOVG [Sächsisches Oberverwaltungsgericht] [Saxon Higher Administrative Court] Decision from 9.03.2007, 4 BS 216/06, DÖV 2007, 564

¹²⁴ SächsVerfGH [Verfassungsgerichtshof des Freistaates Sachsen] [Constitutional Court of the Free State of Saxony] Decision from 3.05.2007, Vf. 53, 54-IV-07, LKV 2007, 511

¹²⁵ BVerfG [Bundesverfassungsgericht] [Federal Constitutional Court] Decision from 29.05.2007, 2 BvR 695/07, LKV 2007, 509

3.1.1.1. Summary of the facts

As a result of several discussions, the City Council (henceforth CC) of the claimant, here the Capital City of Dresden, decided in August 1996 to build a new bridge above the Elbe River, namely the “*Waldschlößchenbrücke*”, between the districts of *Johannstadt* and *Rabeburger Vorstadt*. The first considerations of building a bridge in this sector date back to the 19th century, as seen in section 2.1.1 of this thesis. Following the implementation of a workshop (“*Workshop Elbebrücken*”) at the beginning of 1996, the claimant held an international competition with the winners entrusted with the further planning. Following several modifications through the claimant, whose CC decided upon the construction of the planned bridge on 10 November 2000, the Dresden RC remitted a planning approval decision for the “*Traffic Waldschlößchenbrücke*”, with an application submitted in February 2003 with notification from 25 February 2004. Nevertheless, the planning approval decision was not yet definitive at this time. This enforceable planning approval decision is supported by art. 39 Saxon Traffic Act.¹²⁶ Furthermore,

¹²⁶ Sächsisches Straßengesetz [SächsStrG] [Saxon Traffic Act], art. 39 “(1) State roads and district roads may only be constructed or altered if the plan is established previously. The same applies to municipal roads and other public roads, if an environmental impact assessment according to paragraph 2 is necessary. (2) Necessity and implementation of the environmental impact assessment shall be determined by the provisions of the Environmental Impact assessment Act (UVPG) in the version of the publication of 5 September 2001 (BGBl I p.2350), amended by Article 2 of the Act of 18 June 2002 (BGBl I p.1914, 1921), as well as the Environmental Impact Assessment Act in the Free State of Saxony (SächsUVPG) of 1 September 2003 (SächsGVBl, p.418), in the respective applicable versions. (3) For the planning permission the affected public and private issues by the project are to be balanced. The §§ 72 to 78 Administrative Procedure Act are valid, unless otherwise provided in the following paragraphs. (4) A planning approval procedure modifying a state road, a district road, a municipal road or another public road about to be executed, may be waived following a formal discussion in the sense of § 73 para. 6 Administrative Procedure Act and of § 9 para. 1 clause 2 UVPG. Before the completion of the planning approval procedure the opportunity is given to the objectors to submit their comments. § 4 SächsUVPG shall otherwise remain unaffected. (5) Instead of a planning approval decision a planning consent in accordance with the § 74 para. 6 clause 1 and 3 Administrative Procedure Act can be granted. The granting of a planning consent is also admissible, if rights of others are not substantially affected. The planning consent has the legal effects of the planning permission; for its granting the rules concerning the planning approval procedure are not applicable. Shall a planning consent be granted for a project, for which an environmental impact assessment according to paragraph 2 should be implemented, the general public is to be included in accordance with § 9 para. 3 UVPG. Permission’s requirements of the agreement of another authority are to be decided by the agreement within a month after transmission of the draft decision. After fruitless expiration of the limit of time the agreement is considered as issued. (6) Planning permission and planning consent are cancelled in cases of minor significance according to the § 74 para. 7 Administrative Procedure Act. The decision about this is taken by the road building authority. A case of minor significance does not apply if an environmental impact assessment is required. (7) Development plans after § 9 Building Code (BauGB) in the version of 27 August 1997 (BGBl I p.2141, 1998 I p.137), last amended by Article 12 of the Act of 23 July 2002 (BGBl I p.2850, 2852), in the respective applicable version, replace the planning permission. Is a supplement necessary or shall be deviated from the specifications of a development plan, the planning permission or the planning consent is in this respect to be

controversies arose concerning the project of the bridge construction at the municipal level, and following a successful public petition, a referendum was organised on 27 February 2005 (see section 2.2.4 of this thesis). In the referendum, 67.92% of the participants voted for the construction of the *Waldschlößchenbrücke*, and the appellant subsequently announced the award of construction contracts.

On 2 January 2003, the claimant, Capital City of Dresden, proposed a nomination for the inscription on the World Heritage List to the defendant, here the Free State of Saxony, which it transmitted to the Federal Foreign Office through the Standing Conference of the Ministers of Education and Cultural Affairs of the *Länder* in the FRG (henceforth Standing Conference) on 2 April 2003. Following this, the FRG applied for the inscription of the Dresden Elbe Valley on the World Heritage List, and on 2 July 2004, the World Heritage Committee decided to inscribe the Dresden Elbe Valley as a “continuing cultural landscape” to a length of approximately 20 km – with the *Waldschlößchenbrücke* included in this area – on the World Heritage List. In addition, during the evaluation of the Dresden Elbe Valley by experts on behalf of UNESCO in September 2003, the location of the *Waldschlößchenbrücke* and its design became known and were specified in the report.

However, following the requirement for further documentation, during its 30th session (Vilnius, 2006), the World Heritage Committee decided to transfer the Dresden Elbe Valley to the List of World Heritage in Danger on 11 July 2006 because it considered that the construction of the *Waldschlößchenbrücke* would irreversibly damage the value and integrity of the cultural landscape. At the same time, the state and municipal authorities were requested to halt the construction of the bridge and enter into discussions with all stakeholders in order to find an alternative solution.

implemented. In these cases the §§ 40, 43 paras. 1, 2, 4 and 5 as well as § 44 Building Code (BauGB) are valid. (8) Is the implementation of the plan not started within ten years following the access of the non-appealability of the planning permission or the planning consent, it ceases to be in force. (9) The Saxon State Directorate is the hearing authorities, planning approval authority and the planning consent authority. This is also valid for the federal highways. The Saxon State Ministry for Economic Affairs, Labour and Transport exercises the functional supervision. (10) The action for annulment of a planning approval or a planning consent has no suspensory effect.” (personal translation)

Consequently, the CC engaged the Mayor on 20 July 2006 to propose a suggestion for the implementation of a referendum to open the possibility of preserving the World Heritage status for the Dresden Elbe Valley, as well as presenting appropriate actions for the safeguard of the World Heritage status in coordination with the World Heritage Centre. The Mayor was later requested to suspend the awarding of construction contracts and the start of the bridge's construction, as well as reducing possible obligations to pay compensation resulting from this suspension. Finally, the Mayor received the request to initiate measures for the realisation of the traffic course *Waldschlößchenbrücke*, only with the consent of UNESCO.

The CC adjourned the proposals submitted for the awarding of construction contracts, and on 20 July 2006 decided to stop the construction of the *Waldschlößchenbrücke* until an agreement with UNESCO was found. It also objected the duty to implement the referendum, which took place on 27 February 2005, with the result favouring the construction of the *Waldschlößchenbrücke*. After the representative of the Mayor contradicted the decisions of the CC, given that they contravene the barrier effect of the referendum according to art. 24 para. 4 Saxon Municipal Code¹²⁷, on 10 August 2006 the CC repeated its decision from 20 July 2006. Consequently, the representative of the Mayor voted against, and in accordance with art. 52 para. 2 clause 5 Saxon Municipal Code¹²⁸, invited the RC as the legal supervisory authority for the decision.

Therefore, in its notification (*Bescheid*) of 14 August 2006, the Dresden RC stated that the decision of the Dresden CC was unlawful and ordered the CC to make the award decisions (*Vergabeentscheidungen*). However, on 24 August 2006, the Dresden CC decided that the application for zoning approval of the *Waldschlößchenbrücke* was not legally enforceable because it contravenes the WHC. On 25 August 2006 the Dresden RC repeated its order of award decisions to the Dresden CC in its notification.

¹²⁷ Sächsische Gemeindeordnung [SächsGemO] [Saxon Municipal Code] 3 March 2014, last amended on 2 April 2014 (Saxon Law and Ordinance Gazette, p.234), art. 24 para. 4 clause 2 "He can within three years be modified only through another new referendum." (personal translation)

¹²⁸ Sächsische Gemeindeordnung [SächsGemO] [Saxon Municipal Code] art. 52 para. 2 clause 5 "If according to the opinion of the mayor the new decision is also unlawful, he must contradict it once again and immediately bring about the legality of the decision to the legal supervisory authority." (personal translation)

Subsequently, the City of Dresden raised objections against each appeal of the notifications of the Dresden RC from 14 August 2006 and from 25 August 2006 and applied to the Dresden Administrative Court to restore the suspensive effect¹²⁹.

3.1.1.2. Procedure

In a first step, the Capital City of Dresden represented by its Mayor took legal action at the Dresden Administrative Court against the Free State of Saxony represented by the Dresden RC concerning the communal supervisory order (*kommunalaufsichtlicher Anordnung*) (Waldschlößchenbrücke), upon application of art. 80 para. 5 Code of Administrative Court Procedure.¹³⁰

Subsequently, the Free State of Saxony represented by the Dresden RC decided to appeal at the Saxon Higher Administrative Court against the decision of the Dresden Administrative Court (12 K 1768/06) from 30 August 2006 in the case opposing the Capital City of Dresden represented by

¹²⁹ Suspensive effect is regulated by the Verwaltungsgerichtsordnung [VwGO] [Code of Administrative Court Procedure] 21 January 1960, last amended on 21 July 2012 (Fed. Law Gazette I, p.1577), art. 80 para. 2 “The suspensive effect shall only fail to apply 1. if public charges and costs are called for, 2. with non-postponable orders and measures by police enforcement officers, 3. in other cases prescribed by a federal statute or for *Land* law by *Land* statute, in particular for objections and actions on the part of third parties against administrative acts relating to investments or job creation, 4. in cases in which immediate execution is separately ordered by the authority which has issued the administrative act or has to decide on the objection in the public interest or in the overriding interest of a party concerned. The *Länder* may also determine that appeals do not have a suspensive effect insofar as they address measures taken in administrative execution by the *Länder* in accordance with federal law.” (translation by Neil Mussett, juris GmbH, Saarbrücken, 2012)

¹³⁰ Verwaltungsgerichtsordnung [VwGO] [Code of Administrative Court Procedure], art. 80 para. 5 “On application the court may order suspensory effect, either wholly or in part, in respect of the main cause of action in cases described under para. 2, nos. 1 to 3, or may reinstitute suspensory effect, either wholly or in part, in cases described under para. 2, no. 4. Applications may be lodged prior to a rescissory action being brought. Where at the time at which the decision is made the administrative act has already been executed, the court may order that the execution be set aside. Restitution or suspensory effect may be made contingent upon the lodging of security or some other condition being met. Time limits may be set for the restitution of suspensory effect.” (Mulloy, M., Albrecht, E. & Häntsch, T., 2001. *German Environmental Law*. Berlin: Erich Schmidt Verlag, pp.78-79). Two parallel procedures were ongoing: a preliminary procedure and a main procedure. A preliminary procedure is possible to accelerate procedures, in particular by blocking the suspension effect of an objection against an administrative act (art. 80 para. 1 Code of Administrative Court Procedure). However, the results of the preliminary procedure should not be against the decision in the main procedure. Consequently, the preliminary decisions must be to a significant likelihood finally legal and there must be a reason for the acceleration. In the main procedure, the application to the competent court on base of art. 80 para. 5 Code of Administrative Court Procedure is granted by law to avoid the creation of facts.

its Mayor, claimant and opponent, against the Free State of Saxony represented by the Dresden RC, defendant and appellant, concerning the communal supervisory order (Waldschlößchenbrücke), upon application of art. 80 para. 5 Code of Administrative Court Procedure.¹³¹

A third step in the legal procedure followed, with the Constitutional Court of the Free State of Saxony receiving a constitutional complaint from the Capital City of Dresden directed against the decision of the Saxon Higher Administrative Court from 9 March 2007 (4 BS 216/06) on 2 April 2007, through which the application of the appellant for the restoration of the suspensory effects of its oppositions were rejected against the notifications of the Dresden RC from 14 August 2006 and 25 August 2006.

Finally, the Capital City of Dresden represented by its Mayor complained against the decision of the Saxon Higher Administrative Court from 9 March 2007 and the notifications of the Dresden RC from 14 and 25 August 2006 at the Federal Constitutional Court.

3.1.1.3. Arguments of the opposing parties

At the Dresden Administrative Court, the Capital City of Dresden represented by its Mayor, claimant, requested the suspensive effect of its appeal from 25 August 2006 against the notification of the Dresden RC from 14 August 2006 to be restored, along with the court order of the immediate enforcement from 25 August 2006, as well as the suspensive effect of its appeal from 25 August 2006 against the notification of the Dresden RC from 25 August 2006. The Free State of Saxony represented by the Dresden RC, defendant, requested the application to be rejected. The arguments provided primarily concerned the result of the referendum being valid for a duration of three years, and given that the World Heritage Committee had not yet taken a decision at the time of the referendum, the binding effect of the referendum thus could not be reversed. Only a two-thirds majority of the Dresden CC could decide to implement a new referendum. Secondly, the UNESCO experts who came to Dresden for the evaluation of the

¹³¹ Verwaltungsgerichtsordnung [VwGO] [Code of Administrative Court Procedure], art. 80 para. 5 (note 130)

Dresden Elbe Valley were aware of the location of the *Waldschlößchenbrücke* and its design. Therefore, the decision of the Dresden CC from 10 August 2006 to halt the construction of the bridge until a compromise with UNESCO is found contradicts the obligation to implement the referendum. Thirdly, the defendant, Free State of Saxony, argued that since the WHC is not transposed into German law, it does not bring any binding effect. Accordingly, the World Heritage Committee cannot invoke binding decisions against the State Party. In addition, another argument concerned the idea that no direct relation exists between the claimant and UNESCO.¹³²

Subsequently, at the Saxon Higher Administrative Court, the Dresden RC, defendant and appellant, argued that the Dresden Administrative Court misjudged the binding effects of the lawful referendum, which persists independently from each modification of the situation. The decision of the World Heritage Committee from 11 July 2006 did not establish any new situation, given that the WHC does not establish any strict legal obligations for the authorities of the defendant. The principle underlying the WHC is the direct responsibility of the States Parties, and the WHC was not transposed into German law through a Transformation Act (*Transformationsakt*), contrary to art. 59 Basic Law¹³³. The inherent violation of the Constitution could not be retroactively remedied. An obligation of the *Länder* for international agreements into which the Federation entered is not comprised, if the subject matter of the contract – as here – falls in the legislative capacity of the *Länder*. It is not possible to deduce otherwise from either art. 11 Unification Treaty¹³⁴ or the so-called Lindau Agreement; in addition, art. 34 WHC¹³⁵ also

¹³² For more information concerning the obligation of the Dresden RC and of the Free State of Saxony to follow the WHC, see section 3.2.1 of this thesis

¹³³ Grundgesetz [GG] [Basic Law], art. 59 “(1) The Federal President shall represent the Federation for the purposes of international law. He shall conclude treaties with foreign states on behalf of the Federation. He shall accredit and receive envoys. (2) Treaties that regulate the political relations of the Federation or relate to subjects of federal legislation shall require the consent or participation, in the form of a federal law, of the bodies responsible in such a case for the enactment of federal law. In the case of executive agreements the provisions concerning the federal administration shall apply *mutatis mutandis*.”

¹³⁴ Einigungsvertrag [EinigVtr] [Unification Treaty] 28 September 1990 (Fed. Law Gazette II, p.885), art. 11 “The Contracting Parties proceed on the understanding that international treaties and agreements to which the Federal Republic of Germany is a contracting party, including treaties establishing membership of international organizations or institutions, shall retain their validity and that the rights and obligations arising therefrom, with the exception of the treaties named in Annex I, shall also relate to the territory specified in Article 3 of this Treaty. Where adjustments become necessary in individual cases, the all-German Government shall consult with the respective contracting parties.”

¹³⁵ World Heritage Convention [WHC], art. 34 “The following provisions shall apply to those States Parties to this Convention which have a federal or non-unitary constitutional system: 1. with regard to the provisions of this Convention, the implementation of which comes under the legal jurisdiction of the federal or central legislative

comprises a so-called federal clause. The Dresden Administrative Court's presumption that the claimant pursues to produce a consensus with UNESCO with its efforts misjudges the facts. The majority of the CC refused any bridge construction and apparently blocked the implementation of the referendum, which is incompatible with the principle of the efficient and economical budgeting (art. 72 para. 2 Saxon Municipal Code¹³⁶), particularly since the planning costs had already risen to an amount of 28 Mio. € and a claim for damages was threatening. The Dresden RC discretionarily intervened because the defendant is not bound to the regulations of the WHC, neither directly nor indirectly, while the Capital City of Dresden, claimant, defended the contested decision. With its pleadings from 28 August 2006 and 12 October 2006, it claimed with detailed explanations that the realisation of another proposal than the planned bridge does not violate the referendum. Art. 24 para. 4 clause 2 Saxon Municipal Code¹³⁷ does not comprise any period of realisation, but rather a mere development freeze. The threatening deprivation of the World Heritage title rendered a modification of the situation, which if interpreted in conformity with the Constitution must enable a new decision-making of the claimant. The defendant is constrained to the principles of loyalty and friendliness to public international law, and thus does not practice its municipal supervisory competences in a way that would turn the Federation in a risk of infringement of contract law. Such a breach of contract threatens in the event of the deprivation of the World Heritage title against a violation of art. 4 and 5 WHC¹³⁸. Furthermore,

power, the obligations of the federal or central government shall be the same as for those States parties which are not federal States; 2. with regard to the provisions of this Convention, the implementation of which comes under the legal jurisdiction of individual constituent States, countries, provinces or cantons that are not obliged by the constitutional system of the federation to take legislative measures, the federal government shall inform the competent authorities of such States, countries, provinces or cantons of the said provisions, with its recommendation for their adoption."

¹³⁶ Sächsische Gemeindeordnung [SächsGemO] [Saxon Municipal Code], art. 72 para. 2 "The budget is to be efficiently and economically conducted." (personal translation)

¹³⁷ Sächsische Gemeindeordnung [SächsGemO] [Saxon Municipal Code], art. 24 para. 4 clause 2 (note 127)

¹³⁸ World Heritage Convention [WHC], art. 4 "Each State Party to this Convention recognizes that the duty of ensuring the identification, protection, conservation, presentation and transmission to future generations of the cultural and natural heritage referred to in Articles 1 and 2 and situated on its territory, belongs primarily to that State. It will do all it can to this end, to the utmost of its own resources and, where appropriate, with any international assistance and co-operation, in particular, financial, artistic, scientific and technical, which it may be able to obtain." and art. 5 "To ensure that effective and active measures are taken for the protection, conservation and presentation of the cultural and natural heritage situated on its territory, each State Party to this Convention shall endeavor, in so far as possible, and as appropriate for each country: (a) to adopt a general policy which aims to give the cultural and natural heritage a function in the life of the community and to integrate the protection of that heritage into comprehensive planning programmes; (b) to set up within its territories, where such services do not exist, one or more services for the protection, conservation and presentation of the cultural and natural heritage with an appropriate staff and possessing the means to discharge their functions; (c) to develop scientific and technical studies

the planned bridge violates the Saxon Monument Protection Act and the Saxon Water Act, given that the respective consideration does not adequately take the World Heritage status into account. It was argued that the measures of the defendant were disproportionate, or rather vitiated.

In a third step, the appellant, the Capital City of Dresden, pleaded at the Constitutional Court of the Free State of Saxony with the constitutional complaint related to the infringement of its rights to be heard by a court and its access to justice (art. 78 para. 1 and 2 Saxon Constitution¹³⁹ in conjunction with art. 84 para. 1 clause 1 Saxon Constitution¹⁴⁰), as well as its general freedom of action (art. 15 Saxon Constitution¹⁴¹ in conjunction with art. 37 para. 3 Saxon Constitution¹⁴²).

Finally, with its constitutional appeal from 2 April 2007 complemented with the pleading document from 11 May 2007, the appellant, Capital City of Dresden, reproached a violation of the fundamental rights of art. 2 para. 1 Basic Law¹⁴³ and art. 19 para. 4 Basic Law¹⁴⁴ at the Federal Constitutional Court, as well as the right “to be heard” (art. 101 para. 1 clause 2 Basic Law¹⁴⁵ and art. 103 para. 1 Basic Law¹⁴⁶) and the access to justice.

and research and to work out such operating methods as will make the State capable of counteracting the dangers that threaten its cultural or natural heritage; (d) to take the appropriate legal, scientific, technical, administrative and financial measures necessary for the identification, protection, conservation, presentation and rehabilitation of this heritage; and (e) to foster the establishment or development of national or regional centres for training in the protection, conservation and presentation of the cultural and natural heritage and to encourage scientific research in this field.”

¹³⁹ Sächsische Verfassung [SächsVerf] [Saxon Constitution] 27 May 1992, last amended on 11 July 2013 (Saxon Law and Ordinance Gazette, p.502), art. 78 paras. 1 and 2 “(1) No one shall be deprived from his/her legally competent judge. Courts of exception are inadmissible. (2) Each person is entitled to a fair hearing before the court.” (personal translation)

¹⁴⁰ Sächsische Verfassung [SächsVerf] [Saxon Constitution], art. 84 para. 1 clause 1 “The municipalities are in their area the carriers of the public functions, insofar as no determined functions for the public benefit are delegated by law to other bodies.” (personal translation)

¹⁴¹ Sächsische Verfassung [SächsVerf] [Saxon Constitution], art. 15 “Everyone has the right to free development of his/her personality, insofar as he/she does not violate any rights of others nor the constitutional order or the moral law.” (personal translation)

¹⁴² Sächsische Verfassung [SächsVerf] [Saxon Constitution], art. 37 para. 3 “The fundamental rights are also valid for juristic persons based in the Federal Republic of Germany, insofar as they are applicable by virtue of their nature.” (personal translation)

¹⁴³ Grundgesetz [GG] [Basic Law], art. 2 para. 1 “Every person shall have the right to free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral law.”

¹⁴⁴ Grundgesetz [GG] [Basic Law], art. 19 para. 4 “Should any person’s rights be violated by public authority, he may have recourse to the courts. If no other jurisdiction has been established, recourse shall be to the ordinary courts. The second sentence of paragraph (2) of Article 10 shall not be affected by this paragraph.”

¹⁴⁵ Grundgesetz [GG] [Basic Law], art. 101 para. 1 clause 2 “No one may be removed from the jurisdiction of his lawful judge.”

3.1.1.4. Decisions of the courts

The Dresden Administrative Court (12 K 1768/06) decided to restore the suspensive effect of the appeal of the claimant from 25 August 2006 against the notification of the Dresden RC from 14 August 2006, along with the court order of the immediate enforcement from 25 August 2006, as well as the suspensive effect of the appeal of the claimant against the notification of the Dresden RC from 25 August 2006. With the decision of 30 August 2006 (12 K 1768/06), the Dresden Administrative Court allowed the request with the justification that the suspensive interest of the appellant prevailed the enforcement interest of the Free State of Saxony, due to the notifications of 14 August 2006 and 25 August 2006 being presumably presented as unlawful. Against this decision the Free State of Saxony deposited a complaint on 31 August 2006 and justified it with a pleading document from 19 September 2006.

In a public hearing conducted on 8 November 2006, upon a joint request, the Saxon Higher Administrative Court ordered the suspension of the proceedings in order to facilitate discussions towards an amicable solution jointly with UNESCO. However, following this public hearing, no amicable solution could be reached between the interested parties, and thus the Free State of Saxony requested to continue the procedure on 25 January 2007. The Free State of Saxony delivered further statements with consecutive pleading documents from 31 January 2007 and 6 March 2007, and the appellant with a pleading document from 26 February 2007. In the order under appeal from 9 March 2007, the Saxon Higher Administrative Court (4 BS 216/06) decided to modify the decision of the Dresden Administrative Court from 30 August 2006 following the defendant's complaint. The claimant's request for the restoration of the suspensive effect of its opposition to the notifications of the Dresden RC from 14 August 2006 and 25 August 2006 was rejected.

In a third step, the Constitutional Court of the Free State of Saxony (Vf 53-IV-07 (HS) / Vf 54-IV-07 (e.A.)) decided to reject the constitutional complaint of the Capital City of Dresden, which disposes of the motion for a temporary injunction.

¹⁴⁶ Grundgesetz [GG] [Basic Law], art. 103 para. 1 "In the courts every person shall be entitled to a hearing in accordance with law."

Finally, the Federal Constitutional Court (2 BvR 695/07) also decided to reject the constitutional complaint of the Capital City of Dresden as unfounded, which also disposed of the motion for a temporary injunction. In addition, the Federal Constitutional Court found it important to highlight that the WHC was not transposed in German law in accordance with art. 59 Basic Law¹⁴⁷ and therefore does not exert binding force within Germany. For the Federal Constitutional Court, the World Heritage Committee is not qualified to binding decisions towards States Parties under the WHC, because it only administers a World Heritage List as well as a List of World Heritage in Danger, and it examines the compliance of the state obligations to protect by means of state accounts. Given that the CC did not set a time period to the Mayor within which the decision should be brought about by UNESCO, despite the existing possibility of construction, an implementation of the referendum was not foreseeable. For the same reasons, the adjournment of the awarding decisions was unlawful. The order to decide the awarding serves that the appellant complies with its obligation to implement the referendum. Otherwise, there is the risk of the period of validity of the referendum expiring unsuccessfully, with potential claims for compensation arising from involved bidders towards the appellant.

3.1.1.5. Legal question behind

The legal question raised by these four decisions of the Dresden Administrative Court (12 K 1768/06), the Saxon Higher Administrative Court (4 BS 216/06), the Constitutional Court of the Free State of Saxony (Vf 53-IV-07 (HS) / Vf 54-IV-07 (e.A.)) and the Federal Constitutional Court (2BvR 695/07) might be enunciated as follows: does the WHC bring legal obligations to the claimant (City of Dresden) and the defendant (Free State of Saxony)? This question arises in the context of the planning approval decision (*Planfeststellungsbeschluss*) and the referendum from 27 February 2005, both concerning the construction of the *Waldschlößchenbrücke*. The Dresden Administrative Court answered this legal question affirmatively, thus deciding that both the planning approval decision and referendum could not yet be implemented and should

¹⁴⁷ Grundgesetz [GG] [Basic Law], art. 59 (note 133)

consequently be frozen because time was needed for the claimant, City of Dresden, and the World Heritage Committee to find an alternative solution in order to preserve the World Heritage status for the Dresden Elbe Valley. The Dresden Administrative Court based its answer to this legal question on the fact that even though the Federation solely is bound to the WHC as State Party, the Free State of Saxony is kept by the principle of Federal loyalty¹⁴⁸ and the provisions of the Basic Law should be interpreted in a manner that is open to international law (*völkerrechtsfreundlich*).

However, the Saxon Higher Administrative Court took the opposite stance and argued that both the planning approval decision and referendum should be immediately implemented by the claimant, City of Dresden. According to the Saxon Higher Administrative Court, the WHC, which refers to international treaty law (*Völkervertragsrecht*), is not binding for the Free State of Saxony or the Capital City of Dresden because the WHC solely mentions the States Parties in its art. 4 and 5.¹⁴⁹

Since the Constitutional Court of the Free State of Saxony rejected the appeal of the Capital City of Dresden, it negatively answered the question of the bindingness of the WHC for the City of Dresden and the Free State of Saxony, as did the Saxon Higher Administrative Court. The Constitutional Court of the Free State of Saxony argued that a direct obligatory bindingness of the WHC does not exist for the Capital City of Dresden and the Dresden RC. How an indirect – not exclusionary – bindingness could have an effect on the interpretation of federal law and national law for the principal proceedings is to be reserved. With this aim in mind, it is neither obviously unfounded nor obviously promising. The increased weighing-up of interests due to open chances of success assumes the substantial importance of the WHC and the resulting obligations of international treaties for the preservation of protected cultural heritage at the appellant's expense.

¹⁴⁸ The principle of Federal loyalty is defined as follows in a 1954 decision (BVerfGE 1, 299 (315)) of the Federal Constitutional Court: "The constitutional principle of federalism applying in the federal state therefore places a legal obligation on the Federation and all of its constituent states to be 'pro-federal' in their behavior, that is to say, all members of the constitutional 'alliance' are required to cooperate with one another in a manner compatible with the nature of that alliance and to contribute to its consolidation and to the protection of its interests and the well-considered interests of its members." For more information on the principle of Federal loyalty in the FRG see section 3.2.1.4 of this thesis

¹⁴⁹ World Heritage Convention [WHC], art. 4 and 5 (note 138)

In its court decision, the Federal Constitutional Court rejected the constitutional appeal of the Capital City of Dresden because it also argued that there are no legal obligations for the State Party Germany towards the WHC. It argued that the WHC, which carries the idea of an international protection of cultural and natural heritage, does not call for an absolute protection against any transformation of the WHS. The WHC is part of the international legal framework, while the referendum, which represents an authentic form of democracy, is part of constitutional law. Consequently, the Federal Constitutional Court decided that this official vote representing the citizens' will prevails in the conflict concerning the already-planned development of the cultural landscape.

In this first legal procedure, the legality of the planning approval decision concerning the *Waldschlößchenbrücke* was discussed by the Dresden Administrative Court, the Saxon Higher Administrative Court, the Constitutional Court of the Free State of Saxony and the Federal Constitutional Court regarding the bindingness of the WHC in the FRG. The outcome of this legal procedure led to the City of Dresden's obligation to implement the planning approval decision. Thus, the reflection proposed in the second part of this chapter concerning the incompatibility between the Saxon and German Constitutions with the WHC is further developed based on the arguments rendered during this legal procedure. However, before entering this discussion, the next section of this chapter presents the second legal procedure related to the planning approval decision.

3.1.2. The environmental concerns

Despite the rather negative results of both the HDA and the EIA concerning the impacts of the *Waldschlößchenbrücke*, the planning approval decision was adopted by the Dresden RC on 25 February 2004. Consequently, several associations for the protection of nature twice decided to bring the case to the Dresden Administrative Court (3 K 922/04¹⁵⁰ and 3 K 712/07¹⁵¹). While

¹⁵⁰ VG Dresden [Verwaltungsgericht Dresden] [Dresden Administrative Court] Decision from 7.07.2005, 3K 922/04, NJOZ 2006, 4557

these associations appealed at the Saxon Higher Administrative Court in Bautzen (5 BS 184/05¹⁵²) concerning the first decision of the Dresden Administrative Court (3 K 922/04), the Free State of Saxony appealed at the Saxon Higher Administrative Court in Bautzen (5 BS 336/07¹⁵³) concerning the second decision of the Dresden Administrative Court (3 K 712/07).¹⁵⁴ In both cases, the associations for the protection of nature were unsuccessful in the legal procedure. The commentary of these four decisions is elaborated in this section, following the same structure as in the previous section by including a summary of the facts, the procedure, the arguments of the opposing parties, the decision of the court and the legal question behind.

3.1.2.1. Summary of the facts

The following facts are related as they were presented in the courts' decisions. The Capital City of Dresden wrote a letter to the Dresden RC dated 24 April 2003, in which it explained that it was against the planned project because the traffic concept *Waldschlößchenbrücke* was considered inappropriate and would destroy the unique Dresden Elbe landscape, in this view harming the inhabitants of Dresden. In addition, it was argued that this traffic course would create a problem with the habitat concerning several types of bats: the greater mouse-eared bat (*Myotis myotis*), the barbastelle bat (*Barbastella barbastellus*) and the lesser horseshoe bat (*Rhinolophus hipposideros*). Furthermore, the physical typology of the bridge was highlighted, due to concerns encountered related to the planned V-pillars¹⁵⁵. In this context, it was feared that the bridge would have to be changed architecturally for flood protection purposes and thus the landscape scenery as well as the Elbe floodplain would be even further affected.

¹⁵¹ VG Dresden [Verwaltungsgericht Dresden] [Dresden Administrative Court] Decision from 9.08.2007, 3K 712/07, LKV 2008, 86

¹⁵² SächsOVG [Sächsisches Oberverwaltungsgericht] [Saxon Higher Administrative Court] Decision from 8.12.2005, 5 BS 184/05, LKV 2006, 364

¹⁵³ SächsOVG [Sächsisches Oberverwaltungsgericht] [Saxon Higher Administrative Court] Decision from 12.11.2007, 5 BS 336/07, LKV 2008, 127

¹⁵⁴ For a scheme of the legal procedure, see Annex III

¹⁵⁵ See the form of the pillars of the *Waldschlößchenbrücke* on Figures 2 and 8

Nonetheless, the Free State of Saxony expressed doubts concerning the results of the HDA, which it considered inaccurate in content and unclear in terms of the methodology used. It was declared that the main concern of the Habitats Directive (henceforth HD) and the Birds Directive¹⁵⁶ were insufficiently considered in the planning documents. Since the most important ecological function of the Elbe River and its banks areas relates to its trans-regional ecological connective function, it was considered that the intended ecological fragmentation would not only effect an isolation of the present population. Regarding the Corn Crane (*Crex crex*), which is worldwide threatened¹⁵⁷ with extinction, bird protection studies were lacking concerning an actual or at least potential breeding area at the planned location of the bridge. However, the HDA negates their long-term considerable impairment.

Furthermore, it was presented that the lacking verification of a tunnel variant contravened the Saxon Nature Conservation Act. In this respect, the planning approval decision contravened the compensation rule of the Federal Nature Conservation Act through permitting obligatory compensation interventions without compensation. Therefore, compensation or substitution measures for the interventions in the habitat of the Corn Crane and the protected bats were missing. It was suggested that habitat securing preventive measures, a control of visitor movements and a late mowing after the breeding season for the Corn Crane at the Dresden Elbe meadows outside the bridge's sphere of influence could be taken into consideration by way of compensation. In addition, the planning approval decision was suspected of containing errors in the assessment, because the traffic forecast study and expected traffic load were perceived as incorrect. It was considered that the inaccurate basis and results of the traffic survey were passed uncritically and that a two-lane variant of the bridge would sufficiently achieve the pursued planning objectives.

¹⁵⁶ Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009, *Official Journal of the European Union L 20*, 26 January 2010, pp.7-25

¹⁵⁷ IUCN, 2012. *The IUCN Red List of Threatened Species*. [Online] Available at: <http://www.iucnredlist.org/details/106002878/0> [Accessed on 12 May 2013]

3.1.2.2. Procedure

In the decision of the Dresden Administrative Court from 7 July 2005 (3 K 922/04¹⁵⁸), some associations for nature protection¹⁵⁹ were opposed to the Free State of Saxony, represented by the Dresden RC, joined by the Capital City of Dresden, represented by the Mayor, concerning the application of art. 80 para. 5 Code of Administrative Court Procedure.¹⁶⁰

Subsequently, in the decision of the Saxon Higher Administrative Court from 8 December 2005 (5 BS 184/05¹⁶¹), the associations for nature protection that were opposed to the Free State of Saxony prepared a complaint regarding the decision of the Dresden Administrative Court (3 K 922/04) concerning the application of art. 80 para. 5 Code of Administrative Court Procedure.¹⁶²

In the second procedure, which is in the decision of the Dresden Administrative Court from 9 August 2007 (3 K 712/07¹⁶³), some associations for nature protection were opposed to the Free State of Saxony, represented by the Dresden RC concerning the application of art. 80 para. 7 Code of Administrative Court Procedure.¹⁶⁴

Moreover, in the decision of the Saxon Higher Administrative Court from 12 November 2007 (5 BS 336/07¹⁶⁵), the Free State of Saxony, which was opposed to associations for nature protection, prepared a complaint regarding the decision of the Dresden Administrative Court from 9 August 2007 (3 K 712/07) concerning the application of art. 80 para. 7 Code of Administrative Court Procedure.¹⁶⁶

¹⁵⁸ Not published

¹⁵⁹ The name of these associations does not appear in the documents of the courts decisions due to data protection

¹⁶⁰ Verwaltungsgerichtsordnung [VwGO] [Code of Administrative Court Procedure], art. 80 para. 5 (note 130)

¹⁶¹ http://www.justiz.sachsen.de/ovgentschweb/documents/5BS184_05.pdf

¹⁶² Verwaltungsgerichtsordnung [VwGO] [Code of Administrative Court Procedure], art. 80 para. 5 (note 130)

¹⁶³ Not published

¹⁶⁴ Verwaltungsgerichtsordnung [VwGO] [Code of Administrative Court Procedure], art. 80 para. 7 “The court dealing with the main case may amend or rescind orders regarding requests in accordance with subsection 5 at any time. Each party concerned may request an amendment or rescission because of altered circumstances or because of circumstances not asserted in the original proceedings without fault.” (translation by Neil Mussett, juris GmbH, Saarbrücken, 2012)

¹⁶⁵ http://www.justiz.sachsen.de/ovgentschweb/documents/5BS336_07.pdf

¹⁶⁶ Verwaltungsgerichtsordnung [VwGO] [Code of Administrative Court Procedure], art. 80 para. 7 (note 164)

3.1.2.3. Arguments of the opposing parties

Concerning the decision of the Dresden Administrative Court from 7 July 2005 (3 K 922/04), the claimants, in this way the associations for nature protection, applied to prescribe the suspensive effect of their complaints against the part of the road law of the planning approval decision of the Dresden RC from 25 February 2004 – new construction of the traffic course *Waldschlößchenbrücke* – and to notice that their complaints against the planning approval decision of the Dresden RC have a suspensive effect. The defendant, here the Free State of Saxony, applied to reject the application. On 26 May 2005, it informed that it was pursuing the planning due to the implemented referendum and intended to start construction in 2006. Furthermore, the budget funds for the *Waldschlößchenbrücke* for 2005 had been released.

At the decision of the Saxon Higher Administrative Court from 8 December 2005 (5 BS 184/05), the claimants, the associations for nature protection, based their complaints in reference to various reports and expert opinions. First, they based their complaints on the fact that the administrative court misunderstood the concentration effect of the planning approval according to art. 14 Water Management Act¹⁶⁷, whereby it subjected in the planning approval decision

¹⁶⁷ Wasserhaushaltsgesetz [WHG] [Water Management Act] 31 July 2009, last amended on 8 April 2013 (Fed. Law Gazette I, p.734), art. 14 (1) The authorisation shall be granted only when the water use 1. Cannot be reasonably required by the user without an ensured legal status; 2. Serves a specific purpose which is pursued according to a specific plan, and 3. Is not a use in view of art. 9 para. 1 clause 4 and para. 2 clause 2, except for the reinjection of non-harmful modified works water by power plants. The authorisation shall be granted for a specific reasonable period of time which may exceed 30 years in particular cases. (3) It may be expected that the water use impacts on the right of a third party and raises objections, thus the authorisation may only be granted if the adverse effects are avoided or compensated through content or incidental provisions. If this is not possible, the authorisation may be nonetheless granted if reasons of the welfare of the general public requires it. In the cases of para. 2 the party concerned is to be indemnified. (4) Para. 3 clauses 1 and 2 apply correspondingly if a third party without prejudice of a right has to expect adverse effects as a result that 1. the draining water, the water level or the water quality changes, 2. the use up to now of his property is affected, 3. Is deprived of his water catchment or 4. the incumbent river maintenance by him is complicated. Minor and such adverse effects which would have been avoided if the party concerned would have duly performed his incumbent river maintenance, are ignored. The authorisation may also then be granted if the expected need of intended water use considerably exceeds the expected detriment for the party concerned. (5) Has the party concerned according to para. 3 or para. 4 raised objections against the issuing of the authorisation and cannot be ascertained at the time, if and in which measures adverse effects occur, thus the decision is to be reserved about the content therefore to be determined or incidental provisions and reparations in a subsequent procedure. (6) Could the party concerned according to para. 3 or para. 4 not anticipate adverse effects to the assertion of objections up to the end of the time limit, thus he can demand that subsequently content or incidental provisions be imposed to the user. Can the adverse effects through subsequent content of incidental provisions not be avoided or compensated, thus the party concerned is to indemnify in view of para. 3. The request is permissible only within a period of three years after the time to which the party concerned by the adverse effects has obtained information of

including water law provisions together the applicable regulations for the planning approval procedure. Furthermore, they assumed that while referring to art. 58 Saxon Nature Conservation Act¹⁶⁸ they could attack all the decisions in the planning approval procedure. However, such a preclusion does not exist, especially not according to art. 39 Saxon Traffic Act.¹⁶⁹ It was argued that the planning approval decision suffered a serious deficiency owing to the misjudgement of the matter as an effective protection area at the *Johannstadt* Elbe River meadows due to the sensitive nature of the Corn Crake. It was further added that the project considerably affected three different bat species. In this context, the claimants applied for preliminary rulings according to art. 234 ECT¹⁷⁰ in the version of the Treaty of Nice.

For the second legal procedure, at the decision of the Dresden Administrative Court from 9 August 2007 (3 K 712/07), the claimants, the associations for nature protection, applied to order the suspensive effect of their complaints against the planning approval decision of the Dresden RC from 25 February 2004 – new construction of the traffic course *Waldschlößchenbrücke* – in amendment of the Dresden Administrative Court decision from 7 July 2005 (3 K 922/04) and the decision of the Saxon Higher Administrative Court from 8 December 2005 (5 BS 184/05). The defendant applied to reject the applications to enact a modification of the decision. The defendant advocated the attacked planning approval decision and argued that the decisions of the Dresden Administrative Court from 7 July 2005 and the Saxon Higher Administrative Court from 8 December 2005 were not objectionable. For the defendant, this was considered valid, especially regarding nature conservation legislation considerations.

the authorisation; he is precluded if 30 years have passed after the establishment of the corresponding situation in the authorisation.” (personal translation)

¹⁶⁸ Sächsisches Naturschutzgesetz [SächsNatSchG] [Saxon Nature Conservation Act] 3 July 2007 (Saxon Law and Ordinance Gazette, p.110), art. 58 “(1) In view of the art. 56 recognised associations for nature protection can appeal also against exemptions from prohibitions and requirements for the protection of biosphere reserves and areas of natural monuments according to the conditions designated in art. 64 Federal Nature Conservation Act. (2) Complaints and rights to request are not precluded by the fact that instead of in art. 64 Federal Nature Conservation Act and para. 1 named decisions are wrongly issued for which the act does not provide participation of recognised associations for nature protection.” (personal translation)

¹⁶⁹ Sächsisches Straßengesetz [SächsStrG] [Saxon Traffic Act], art. 39 (note 126)

¹⁷⁰ Treaty establishing the European Community [ECT], art. 234 “The Court of Justice shall have jurisdiction to give preliminary rulings concerning: (a) the interpretation of the Treaty; (b) the validity and interpretation of acts of the institutions of the Community and of the ECB; (c) the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide.”, *Official Journal of the European Union C 325*, 24 December 2002. Meanwhile this provision is regulated in the Treaty on European Union [TEU]

At the decision of the Saxon Higher Administrative Court from 12 November 2007 (5 BS 336/07), the defendant, here the Free State of Saxony, confronted the assessment of the Dresden Administrative Court on presentation of a supplementary nature conservation assessment in its raised complaint from 10 August 2007 and justified complaint from 27 August 2007. Concerning an area that was registered as a Flora Fauna Habitat (henceforth FFH), but not yet listed, it was argued that less stringent requirements for the habitat protection should be provided than those concerning an already-listed area. Additionally, the argument that considerable impairments of the protected bats species, especially the lesser horseshoe bat, were still not expected, was brought. Despite the already-existing Elbe bridges, the existing population was seen as stable. It was added that the assessment prepared before the planning approval decision did not conclude in unquestionable terms that a migration of the lesser horseshoe bat was not prevented through vibrations and traffic noise. It was suggested that the risk through the “falling effect” could be practically reduced to zero through the use of insect-friendly sodium vapour lamps. The results of recent studies advocating that the lesser horseshoe bat is photophobia were pointed out and additional expert assessments were presented by the defendant during the course of the proceedings.

3.1.2.4. Decision of the court

The Dresden Administrative Court decided on 7 July 2005 (3K 922/04) that the applications had failed. According to art. 80 para. 1 Code of Administrative Court Procedure,¹⁷¹ suspensive effect has contradiction and action for annulment. This is not applicable according to art. 80 para. 2 clause 3 Code of Administrative Court Procedure¹⁷² in the provided cases by Land Law (art. 11

¹⁷¹ Verwaltungsgerichtsordnung [VwGO] [Code of Administrative Court Procedure], art. 80 para. 1 “An objection and a rescissory action shall have suspensive effect. This shall also apply to constitutive and declaratory administrative acts, as well as to administrative acts with a double effect (section 80a).” (translation by Neil Mussett, juris GmbH, Saarbrücken, 2012)

¹⁷² Verwaltungsgerichtsordnung [VwGO] [Code of Administrative Court Procedure], art. 80 para. 2 clause 3 “in other cases prescribed by a federal statute or for Land law by Land statute, in particular for objections and actions on the part of third parties against administrative acts relating to investments or job creation” (translation by Neil Mussett, juris GmbH, Saarbrücken, 2012)

Saxon Code of Administrative Court Procedure¹⁷³). With competence for the main proceedings, the court can prescribe the suspensive effect of a legal remedy upon application in accordance with art. 80 para. 5 clause 1 Code of Administrative Court Procedure,¹⁷⁴ which prevails if the private interest of the implementation of the concerned administrative act, the consequences of the execution provisionally spared to remain compared with the public interest prescribed by the legislator for the immediate enforcement. The court decided that the applications were valid yet unfounded. The complaints raised by the claimants against the planning approval decision from 25 February 2004 do not develop any suspensory effect, according to art. 39 para. 10 Saxon Traffic Act.¹⁷⁵ This is valid due to the concentration effect according to art. 39 para. 3 Saxon Traffic Act¹⁷⁶ in conjunction with art. 75 para. 1 Administrative Procedure Act,¹⁷⁷ also for the water rights part of the planning approval decision. Insofar the cumulative applications lodged are pertinent there to interpret (art. 88 Code of Administrative Court Procedure¹⁷⁸), since the claimants request the suspensory effect of their complaints against all provisions of the planning approval decision. As the claimants are recognised associations for nature protection in the Free State of Saxony, according to art. 61 para. 1 clause 1 number 2 Federal Nature Conservation Act¹⁷⁹ in conjunction with the transitional provision of art. 69 para. 5 clause 2 Federal Nature

¹⁷³ Sächsisches Verwaltungsvollstreckungsgesetz [SächsVwVG] [Saxon Administrative Enforcement Act] 10 September 2003 (Saxon Law and Ordinance Gazette, p.614), art. 11 “Legal remedies against measures of the administrative enforcement shall not have suspensive effect. Art. 80 paras. 4 until 8 Administrative Enforcement Act shall apply correspondingly.” (personal translation)

¹⁷⁴ Verwaltungsgerichtsordnung [VwGO] [Code of Administrative Court Procedure], art. 80 para. 5 (note 130)

¹⁷⁵ Sächsisches Straßengesetz [SächsStrG] [Saxon Traffic Act], art. 39 para. 10 “The action for annulment of a planning approval or a planning consent has no suspensory effect.” (personal translation)

¹⁷⁶ Sächsisches Straßengesetz [SächsStrG] [Saxon Traffic Act], art. 39 para. 3 “For the planning permission the affected public and private issues by the project are to be balanced. The §§ 72 to 78 Administrative Procedure Act are valid, unless otherwise provided in the following paragraphs.” (personal translation)

¹⁷⁷ Verwaltungsverfahrensgesetz [Vwvfg] [Administrative Procedure Act], art. 75 para. 1 “Planning approval has the effect of establishing the admissibility of the project, including the necessary measures subsequently to be taken in connection with other installations and facilities, having regard to all public interests affected thereby. No other administrative decisions, in particular consent issued under public law, grants, permissions, authorisations, agreements or planning approvals are required. Planning approval legally regulates all relationships under public law between the project developer and those affected by the project.” (unofficial translation by Nico Köppel and Gerhard Dannemann, publication by the Federal Ministry of the Interior, 2009)

¹⁷⁸ Verwaltungsgerichtsordnung [VwGO] [Code of Administrative Court Procedure], art. 88 “The court may not go beyond what is requested in the action, but is not bound by the version of the motions.” (translation by Neil Mussett, juris GmbH, Saarbrücken, 2012)

¹⁷⁹ Bundesnaturschutzgesetz [BNatSchG] [Federal Nature Conservation Act] 29 July 2009, last amended on 6 February 2012 (Fed. Law Gazette I, p.148), art. 61 para. 1 clause 1 number 2 “In undeveloped outskirt areas, no structures may be constructed or significantly modified along Federal waterways and “1st-order streams” (Gewässer erster Ordnung), and along standing water bodies with an area of more than 1 hectare, at a distance of up to 50

Conservation Act,¹⁸⁰ they are authorised to file the application. Interventions in nature and landscape are connected with the construction of the traffic course *Waldschlößchenbrücke*. The claimants also maintain an impairment of a right according to art. 61 para. 2 clause 1 Federal Nature Conservation Act¹⁸¹. They reprove the infringement of legislative provisions that are intended to serve the concerns of the Act for nature protection and landscape conservation – the Council Directive 79/409/EEC¹⁸² (replaced by the Birds Directive from 30 November 2009) and the Council Directive 92/43/EEC¹⁸³ (FFH Directive). The reference of this European Union Directive for nature protection and landscape conservation is derived from art. 33 Federal Nature Conservation Act¹⁸⁴ and following. Furthermore, the additional conditions of 61 para. 2 clause 2 and 3 Federal Nature Conservation Act¹⁸⁵ are fulfilled. Despite the claimants acting within their statute purpose and being authorised to participate in the planning process that they have already used, the court decided that the applications were unfounded.

meters from the shoreline.” (unofficial translation, Federal Ministry for the Environment, Nature Conservation and Nuclear Safety)

¹⁸⁰ Bundesnaturschutzgesetz [BNatSchG] [Federal Nature Conservation Act], art. 69 para. 5 clause 2 “in contravention of Article 3 (1) Sentence 1, introduces a pelt of an animal species mentioned therein, or a good mentioned therein, into the Community” (unofficial translation, Federal Ministry for the Environment, Nature Conservation and Nuclear Safety)

¹⁸¹ Bundesnaturschutzgesetz [BNatSchG] [Federal Nature Conservation Act], art. 61 para. 2 clause 1 “Maintenance of openness of water bodies and shoreline zones shall not apply for structures that had been legally constructed or permitted at the time this Act entered into force” (unofficial translation, Federal Ministry for the Environment, Nature Conservation and Nuclear Safety)

¹⁸² Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds, *Official Journal L 103*, 25 April 1979, pp. 1-18

¹⁸³ Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, *Official Journal L 206*, 22 July 1992, pp.7-50

¹⁸⁴ Bundesnaturschutzgesetz [BNatSchG] [Federal Nature Conservation Act], art. 33 “General provisions pertaining to protection (1) All changes and disturbances that could lead to significant adverse effects on a Natura 2000 site, in the elements of the site that are central to the conservation objectives or protection purpose shall be prohibited. The competent authority for nature conservation and landscape management may, if the conditions set forth by Article 34 (3) through (5) are fulfilled, permit exceptions to the prohibition of Sentence 1 and to prohibitions within the meaning of Article 32 (3). (2) In the case of a site within the meaning of Article 5 (1) of Directive 92/43/EEC, during the consultation phase until the Council's decision, (1) Sentence 1 shall apply mutatis mutandis with regard to the priority natural habitat types and priority species occurring within the site. Articles 34 and 36 shall not apply.” (unofficial translation, Federal Ministry for the Environment, Nature Conservation and Nuclear Safety)

¹⁸⁵ Bundesnaturschutzgesetz [BNatSchG] [Federal Nature Conservation Act], art. 61 para. 2 clause 2 and 3 “Maintenance of openness of water bodies and shoreline zones shall not apply for 2. structures that are constructed or modified in execution of permits or approvals under laws relating to water, or for purposes of monitoring, management, maintenance or widening of a surface water body, 3. structures of the public transport infrastructure, including auxiliary facilities and relevant equipment, of emergency response forces, for coastal protection and flood protection and for defence.” (unofficial translation, Federal Ministry for the Environment, Nature Conservation and Nuclear Safety)

The Saxon Higher Administrative Court decided on 8 December 2005 (5 BS 184/05) to reject the complaints of the claimants against the decision of the Dresden Administrative Court from 7 July 2005 – 3 K 922/04 as unfounded. According to the Saxon Higher Administrative Court, the Dresden Administrative Court rightly rejected the application for order of the suspensive effect of the claimants' complaints against the planning approval decision of the Dresden RC from 25 February 2004 concerning the new construction of the traffic course *Waldschlößchenbrücke* in Dresden. The admissibility of the appeal – as well as the application itself – was not contradicted by the fact that the administrative court had incorrectly supported the authority for the application of the claimants upon art. 61 para. 1 clause 1 number 2 Federal Nature Conservation Act¹⁸⁶ and art. 69 para. 5 clause 2 Federal Nature Conservation Act¹⁸⁷. From art. 61 para. 1 Federal Nature Conservation Act,¹⁸⁸ despite its direct applicability (comparisons art. 11 para. 1 Federal Nature Conservation Act¹⁸⁹), no authority resulted for the application of the claimants because the Saxon Land legislator had not enacted any of the measures of art. 60 paras. 2 and 3 Federal Nature Conservation Act¹⁹⁰ in corresponding transposition rules. As such, the already-revised version of

¹⁸⁶ Bundesnaturschutzgesetz [BNatSchG] [Federal Nature Conservation Act], art. 61 para. 1 clause 1 number 2 (note 179)

¹⁸⁷ Bundesnaturschutzgesetz [BNatSchG] [Federal Nature Conservation Act], art. 69 para. 5 clause 2 (note 180)

¹⁸⁸ Bundesnaturschutzgesetz [BNatSchG] [Federal Nature Conservation Act], art. 61 para. 1 “Maintenance of openness of water bodies and shoreline zones (1) In undeveloped outskirts areas, no structures may be constructed or significantly modified along Federal waterways and “1st-order streams” (Gewässer erster Ordnung), and along standing water bodies with an area of more than 1 hectare, at a distance of up to 50 meters from the shoreline. In derogation of Sentence 1, for coastal water bodies, a relevant distance of at least 150 meters from the mean highwater line must be complied with in the North Sea, and a relevant distance of at least 150 meters from the mean water line must be complied with in the Baltic Sea. More extensive provisions of the *Länder* shall not be affected.” (unofficial translation, Federal Ministry for the Environment, Nature Conservation and Nuclear Safety)

¹⁸⁹ Bundesnaturschutzgesetz [BNatSchG] [Federal Nature Conservation Act], art. 11 para. 1 “Landscape plans and open space structure plans (1) The purposes, requirements and measures of nature conservation and landscape management specified for the local level shall be specified in landscape plans, for the areas of municipalities, and in open space structure plans, for parts of municipal areas; they shall be specified on the basis of landscape master plans. Such plans shall comply with regional planning objectives and shall take account of the principles and other requirements of regional planning. Such plans should contain the information specified in Article 9 (3), where such information is needed for description of the purposes, requirements and measures specified for the local level. Diverging provisions of the *Länder* regarding the content of landscape plans and open space structure plans, and regarding the legally binding nature of such plans, shall not be affected.” (unofficial translation, Federal Ministry for the Environment, Nature Conservation and Nuclear Safety)

¹⁹⁰ Bundesnaturschutzgesetz [BNatSchG] [Federal Nature Conservation Act], art. 60 paras. 2 and 3 “Rights of access do not establish any additional legal duties to take due care or to maintain safety. In particular, no liability shall be recognised for the typical dangers that can arise in nature.” (unofficial translation, Federal Ministry for the Environment, Nature Conservation and Nuclear Safety)

art. 61 Federal Nature Conservation Act¹⁹¹ came into force – art. 58 Saxon Nature Conservation Act¹⁹² could not apply because the representative action in planning approval procedure was only declared admissible if the decision was connected with interventions in nature and landscape in explicitly designed areas, whereas the national legislation did not comprise this territorial limitation. Art. 69 para. 5 clause 2 Federal Nature Conservation Act¹⁹³ helped along just as little as this transitional regulation did not refer to the recognised associations, but rather to the included administrative act in the scope of application of art. 61 Federal Nature Conservation Act¹⁹⁴. However, the stated reasons of the claimants in accordance with art. 146 para. 4 clause 3 Code of Administrative Court Procedure¹⁹⁵ did not provide any cause for a modification of the administrative court’s decision. The reasons for which the senate reached the decision according to art. 146 para. 4 clause 6 Code of Administrative Court Procedure¹⁹⁶ did not justify the acceptance that the administrative court had wrongly refused the application for order of the suspensive effect of the complaints.

¹⁹¹ Bundesnaturschutzgesetz [BNatSchG] [Federal Nature Conservation Act], art. 61 “Maintenance of openness of water bodies and shoreline zones (1) In undeveloped outskirts areas, no structures may be constructed or significantly modified along Federal waterways and "1st-order streams" (Gewässer erster Ordnung), and along standing water bodies with an area of more than 1 hectare, at a distance of up to 50 meters from the shoreline. In derogation of Sentence 1, for coastal water bodies, a relevant distance of at least 150 meters from the mean highwater line must be complied with in the North Sea, and a relevant distance of at least 150 meters from the mean water line must be complied with in the Baltic Sea. More extensive provisions of the Länder shall not be affected. (2) (1) shall not apply for 1. structures that had been legally constructed or permitted at the time this Act entered into force, 2. structures that are constructed or modified in execution of permits or approvals under laws relating to water, or for purposes of monitoring, management, maintenance or widening of a surface water body, 3. structures of the public transport infrastructure, including auxiliary facilities and relevant equipment, of emergency response forces, for coastal protection and flood protection and for defence. More extensive provisions of the Länder regarding exceptions shall not be affected. (3) An exception to the prohibition of (1) may be granted, upon application, if 1. the adverse effects on the natural balance or landscape appearance resulting from the structure, especially with regard to the proper function of water bodies and their shore zones, are minor, or such can be ensured via relevant measures, or 2. such is necessary for imperative reasons of overriding public interest, including such interests that are of a social or economic nature; in such cases, Article 15 shall apply *mutatis mutandis*.” (unofficial translation, Federal Ministry for the Environment, Nature Conservation and Nuclear Safety)

¹⁹² Sächsisches Naturschutzgesetz [SächsNatSchG] [Saxon Nature Conservation Act], art. 58 (note 168)

¹⁹³ Bundesnaturschutzgesetz [BNatSchG] [Federal Nature Conservation Act], art. 69 para. 5 clause 2 (note 180)

¹⁹⁴ Bundesnaturschutzgesetz [BNatSchG] [Federal Nature Conservation Act], art. 61 (note 191)

¹⁹⁵ Verwaltungsordnungsgesetz [VwGO] [Code of Administrative Court Procedure], art. 146 para. 4 clause 3 “It must contain a definite motion, set out the reasoning from which the ruling is to be altered or rescinded, and deal with the impugned ruling.” (translation by Neil Mussett, juris GmbH, Saarbrücken, 2012)

¹⁹⁶ Verwaltungsordnungsgesetz [VwGO] [Code of Administrative Court Procedure], art. 146 para. 4 clause 6 “The Higher Administrative Court shall only review the reasoning submitted.” (translation by Neil Mussett, juris GmbH, Saarbrücken, 2012)

The Dresden Administrative Court subsequently decided on 9 August 2007 (3 K 712/07) that on the amendments of the claimants, the suspensive effect of the complaints against the planning approval decision of the Dresden RC from 25 February 2004 – new construction of the traffic course *Waldschlößchenbrücke* – was ordered in amendment to the decision of the Dresden Administrative Court from 7 July 2005 (3 K 922/04) and the decision of the Saxon Higher Administrative Court from 8 December 2005 (5 BS 184/05). The court decided that the applications were successful according to art. 80 para. 7 clause 2 Code of Administrative Court Procedure¹⁹⁷. According to art. 80 para. 7 clause 2 Code of Administrative Court Procedure,¹⁹⁸ each party can apply for a modification or annulment of a decision on applications against modified or in the initial proceedings without any fault unclaimed circumstances according to art. 80 para. 5 Code of Administrative Court Procedure¹⁹⁹. Accordingly, the applications were declared permitted and founded. The claimants were authorised to file an application in the initial or modified proceedings without any fault unclaimed circumstances, from which at least the possibility of a modification of the earlier accelerated decision results. The interest of the claimants in maintaining the present state until a final decision in the main proceedings prevails the public interest in the immediate enforcement of the planning approval decision. The complaints of the claimants were probably successful after the procedure of the interim measures, whose summary examination of the factual and legal situation is solely possible in consideration of the claimants' current state. Considered in this light, it was deemed necessary to ask the question of whether the planning approval decision presented a procedural error due to the omitted hearing of the claimants to the so-called subsequent deliveries. Subsequently, in all probability it suffered from a radical textual error to which the claimants could refer. However, the modification of the factual situation had no relevant effects as a result that the Elbe valley between *Schöna* and *Mühlberg*, with the exception of the *Johannstadt* Elbe meadows, were determined as European Bird Protection Area. The validated modification of the factual situation

¹⁹⁷ Verwaltungsordnungsgesetz [VwGO] [Code of Administrative Court Procedure], art. 80 para. 7 clause 2 “Each party concerned may request an amendment or rescission because of altered circumstances or because of circumstances not asserted in the original proceedings without fault.” (translation by Neil Mussett, juris GmbH, Saarbrücken, 2012)

¹⁹⁸ Verwaltungsordnungsgesetz [VwGO] [Code of Administrative Court Procedure], art. 80 para. 7 clause 2 (note 197)

¹⁹⁹ Verwaltungsordnungsgesetz [VwGO] [Code of Administrative Court Procedure], art. 80 para. 5 (note 130)

from the claimants in view of the bird protection did not lead to the presumption that the planning approval decision suffered from a significant textual error.

The Saxon Higher Administrative Court decided on 12 November 2007 (5 BS 336/07) to modify the decision of the Dresden Administrative Court from 9 August 2007 (3 K 917/07) following the complaint of the defendant, the Free State of Saxony, with exception of the fixed amount in litigation. The applications were rejected with the following provisions: the defendant ensures until a final adjudication in the main proceedings that the permitted speed limit on the whole planned traffic course at least between 7 p.m. and 7 a.m. in April, between 8 p.m. and 6 a.m. from May until June, as well as between 6 p.m. and 7 a.m. in October be limited to 30 km/h and the compliance with the speed restriction by means of each measuring equipment per direction of traffic be controlled. The admissible complaint of the defendant against the decision of the Dresden Administrative Court from 9 August 2007 was partially successful. The construction of the planned traffic course may start under consideration of the condition contained in the judgement. The claimants are recognised associations for nature protection in Saxony and requested via an amendment of the decision of the Dresden Administrative Court from 7 July 2005 (3 K 922/04) and the decision of the senate from 8 December 2005 (5 BS 184/05) the order of suspensive effect of their complaints against the planning approval decision of the Dresden RC from 25 February 2004 concerning the traffic course *Waldschlößchenbrücke*. The reasons brought forward by the defendant within the complaint period, to whose examination by the Saxon Higher Administrative Court according to art. 146 para. 4 clause 6 Code of Administrative Court Procedure²⁰⁰ was limited, led to an amendment of the decision of the Dresden Administrative Court.

²⁰⁰ Verwaltungsordnungsgesetz [VwGO] [Code of Administrative Court Procedure], art. 146 para. 4 clause 6 (note 196)

3.1.2.5. Legal question behind

The legal question related to the environmental concerns treated in these four administrative courts decisions refers to the legality of the planning approval decision in respect of the protection of the three species of bats and the Corn Crake in view of the results of the EIA and the HDA. Therefore, two consecutive legal procedures ran at the Dresden Administrative Court and the Saxon Higher Administrative Court. In the first procedure, the Dresden Administrative Court argued that the complaints of the nature protection associations did not develop any suspensory effect towards the planning approval decision, and the Saxon Higher Administrative Court supported this decision. However, in the second procedure, the Dresden Administrative Court accepted the suspensory effect and thus amended both previous decisions related to the first legal procedure. Nonetheless, the Saxon Higher Administrative Court overruled this decision, thus allowing the construction of the *Waldschlößchenbrücke*.

Both legal procedures concerning the bindingness of the WHC in the FRG and the environmental concerns were unsuccessful, and consequently the *Waldschlößchenbrücke* could legally be built.

Based on the legal commentaries of these two legal procedures, a reflection on the non-transposition of the WHC or its concepts in German law is implemented in the second part of this chapter.

3.2. The non-transposition of the World Heritage concepts in German law

As described in the first part of this chapter, the legal battle opposing the Dresden CC and the Dresden RC concerning the planning approval decision regarding the construction of the *Waldschlößchenbrücke* focused on the legally binding effects of the WHC in the FRG. The other legal battle, opposing associations for nature protection and the Free State of Saxony concerning the protection of the lesser horseshoe bat, focused in particular on the legality of the planning approval decision in view of the results of the EIA and HDA.

Therefore, a legal perspective towards the conflict between UNESCO and the State Party Germany concerning the Dresden Elbe Valley prompts a constitutional question: does the WHC have effects in the FRG? Moreover, since the Dresden Elbe Valley was inscribed as a cultural landscape on the World Heritage List, the environmental concerns are relevant for the discussion of the protection of cultural landscapes within the German legislation. In order to analyse the legal background of this conflict between UNESCO and the State Party Germany, it is necessary to develop a reflection on the non-transposition of the World Heritage concepts in German law. First, the incompatibility between the Saxon and German Constitutions with the WHC is questioned. Subsequently, the issue of the protection of cultural and natural heritage is discussed, given that the FRG and the *Länder* are both competent for the protection of nature, whereas the *Länder* are solely the competent authorities for the protection of historical monuments. Therefore, the concept of cultural landscape also warrants attention for an assessment of its legal protection in the FRG, as this concept combines both culture and nature. Finally, some perspectives for the transformation of the WHC in German law are presented.

3.2.1. Incompatibility between the Saxon and German Constitutions with the World Heritage Convention

In order to discuss the legal question of the bindingness of the WHC in the FRG, it is necessary to go back to the ratification process of this Convention. As stated in the introduction of this thesis, both German states ratified the WHC. However, it can be considered that only the ratification process of the Convention by the FRG at the time (former West Germany) is relevant, given that the five new *Länder* accessed the legislation of the FRG with the signature of the Unification Treaty²⁰¹ between the FRG and the GDR in Berlin on 31 August 1990.

²⁰¹ Einigungsvertrag [EinigVtr] [Unification Treaty] (note 134)

The consent to the conclusion of the WHC succeeded based on a cabinet decision (*Kabinettsbeschluss*) of 8 July 1976.²⁰² Subsequently, for an international treaty such as the WHC to enter into force in the FRG, it needs to be brought in the inner-state jurisdiction.²⁰³ Therefore, an inner-state act has to be adopted according to 25 Basic Law.²⁰⁴ In addition, art. 59 para. 2 Basic Law²⁰⁵ provides for international law to be valid inner-state.²⁰⁶ However, since the WHC refers both to cultural and natural heritage and nature protection is a concurrent competence of the Federation and the *Länder*, whereas monuments protection is solely a competence of the *Länder*, both entities are affected by the inner-state ratification through an inner-state act. While art. 59 Basic Law²⁰⁷ solely regulates the international representation of the Federation, art. 32 Basic Law²⁰⁸ regulates the repartition of the competences between the Federation and the *Länder* concerning international treaties.²⁰⁹

The WHC entered into force in the FRG on 23 November 1976 as an Administrative Agreement (*Verwaltungsabkommen*) in line with art. 59 para. 2 clause 2 Basic Law²¹⁰ and not as a Contract Act (*Vertragsgesetz*) in line with art. 59 para. 2 clause 1 Basic Law,²¹¹ because at that time it was not thought in the Federal Foreign Office that legislative acts would be necessary.²¹²

²⁰² Bundesregierung, 22 November 2007. *Gutachten der Bundesregierung betreffend die innerstaatliche Bindungswirkung des UNESCO-Übereinkommen zum Schutz des Kultur- und Naturerbes der Welt* [Expert opinion of the Federal Government concerning the internal binding effect of the WHC], p.5

²⁰³ Von Bogdandy, A. & Zacharias, D., 2007. Zum Status der Welterbekonvention im deutschen Rechtsraum – Ein Beitrag zum internationalen Verwaltungsrecht. *Neue Zeitschrift für Verwaltungsrecht*, Heft 5, p.528 and Jarass, H. D. & Pieroth, B., 2011. *Grundgesetz für die Bundesrepublik Deutschland, Kommentar*. 11th ed. Munich: C.H. Beck, Art. 25, para. 1a.

²⁰⁴ Grundgesetz [GG] [Basic Law], art. 25 “The general rules of international law shall be an integral part of federal law. They shall take precedence over the laws and directly create rights and duties for the inhabitants of the federal territory.”

²⁰⁵ Grundgesetz [GG] [Basic Law], art. 59 para. 2 (note 10)

²⁰⁶ Jarass & Pieroth, Art. 25, para. 1a. (note 203)

²⁰⁷ Grundgesetz [GG] [Basic Law], art. 59 (note 133)

²⁰⁸ Grundgesetz [GG] [Basic Law], art. 32 “(1) Relations with foreign states shall be conducted by the Federation. (2) Before the conclusion of a treaty affecting the special circumstances of a *Land*, that *Land* shall be consulted in timely fashion. (3) Insofar as the *Länder* have power to legislate, they may conclude treaties with foreign states with the consent of the Federal Government.”

²⁰⁹ Jarass & Pieroth, Art. 32, para. 7 and Art. 59, para. 1 (note 203)

²¹⁰ Grundgesetz [GG] [Basic Law], art. 59 para. 2 clause 2 “In the case of executive agreements the provisions concerning the federal administration shall apply *mutatis mutandis*.”

²¹¹ Grundgesetz [GG] [Basic Law], art. 59 para. 2 clause 1 “Treaties that regulate the political relations of the Federation or relate to subjects of federal legislation shall require the consent or participation, in the form of a federal law, of the bodies responsible in such a case for the enactment of federal law.”

²¹² Hönes, E.-R., 2008. Zur Transformation des Übereinkommens zum Schutz des Kultur- und Naturerbes der Welt von 1972, *Die Öffentliche Verwaltung*, Heft 2, p.55

Furthermore, according to Ringbeck (2010), the WHC was not transposed in national law in Germany because the Federal Foreign Office assumed that with the measures already adopted in the FRG the purpose of the Convention and the likewise Recommendation concerning the Protection, at National Level, of the Cultural and Natural Heritage²¹³ adopted on 16 November 1972 by the UNESCO General Conference were complied with.²¹⁴

The question of the incompatibility between the Saxon and German Constitutions with the WHC is discussed in this sub-chapter in respect of the Basic Law for the FRG²¹⁵, the Lindau Agreement²¹⁶, the Unification Treaty²¹⁷, the principle of Federal loyalty²¹⁸ and the Federal Clause of the WHC²¹⁹. Furthermore, this discussion is based on several expert opinions and legal expert opinions that were given within the FRG before and during the legal battle described in the first part of this chapter.

3.2.1.1. Basic Law

The Basic Law generally does not refer to culture, despite discussion to add the term “culture” in the Basic Law from 1981 to 1983 and again in 1992-1993, as well as the suggestion in an Enquête-Commission conducted in 2003 to integrate the following provision in art. 20b Basic Law: “the state protects and promotes culture”.²²⁰ Art. 70 Basic Law²²¹ regulates the fundamental

²¹³ UNESCO, 1973. *Records of the General Conference, Seventeenth Session, Resolutions/Recommendations, Paris, 17 October - 21 November 1972*. Paris: UNESCO, pp.146-154

²¹⁴ Ringbeck, B., 2010. Teil A. Einführung. In: D. J. Martin & M. Krautzberger, eds. *Denkmalschutz und Denkmalpflege, 3. Auflage*. München: C.H. Beck:, Rn 183-188

²¹⁵ Grundgesetz [GG] [Basic Law] (note 10)

²¹⁶ Lindauer Abkommen [Lindau Agreement], 14 November 1957

²¹⁷ Einigungsvertrag [EinigVtr] [Unification Treaty] (note 134)

²¹⁸ Federal loyalty between the Federation and the *Länder*

²¹⁹ World Heritage Convention [WHC], art. 34 (note 135)

²²⁰ BMVBS & BBR, 2007. *Kompetenzen und Aufgaben der Raumordnung in der Gestaltung von Kulturlandschaften, Planungs- und rechtswissenschaftliches Gutachten*. 19: BBR-Online Publikation [Competences and tasks of the regional planning in the management of cultural landscapes, planning and legal science report published by the Federal Ministry for Transport, Building and Urban Development and the Federal Office for Building and Regional Planning], pp.3; 17

²²¹ Grundgesetz [GG] [Basic Law], art. 70, “(1) The *Länder* shall have the right to legislate insofar as this Basic Law does not confer legislative power on the Federation. (2) The division of authority between the Federation and the

repartition of competences between the Federation and the *Länder* for the legislation and is a basic rule of the Federation. The first paragraph sets a relationship of rule and exception: the Federation is only assigned competences, with the unnamed remainder (residual competence) delegated to the *Länder*.²²² Therefore, it can be deduced that the protection of cultural heritage is an exclusive competence of the *Länder*, since there is no provision concerning cultural matters in the Basic Law.

Art. 30 Basic Law²²³ regulates the division of authority between the Federation and the *Länder*, stating that the fundamental competences of the *Länder* are only valid insofar as the Basic Law does not provide otherwise.²²⁴ Therefore, culture is a competence of the *Länder* and some mention the term “culture” in their constitution, as is the case for the Free State of Saxony.²²⁵ However, nature protection and landscape management are a concurrent competence of the Federation and the *Länder*.

Art. 83 Basic Law²²⁶ provides the repartition of the administrative competences between the Federation and the *Länder*, setting a double relationship of rule and exception: (1) the Federation is only assigned competences, with the unnamed remainder (residual competence) delegated to the *Länder*; (2) the implementation of the federal law by the *Länder* takes place regularly in the administrative form of the *Länder* own administration, with other administrative forms only permitted on the basis of a regulation in accordance with the Basic Law.²²⁷

Länder shall be governed by the provisions of this Basic Law respecting exclusive and concurrent legislative powers.”

²²² Jarass & Pieroth, Art. 70, para. 1 (note 203)

²²³ Grundgesetz [GG] [Basic Law], art. 30 “Except as otherwise provided or permitted by this Basic Law, the exercise of state powers and the discharge of state functions is a matter for the *Länder*.” While art. 30 Basic Law is the general norm, art. 70 Basic Law is the more specific provision for legislation. Following the principle “*lex specialis derogate leges generalis*”, the ruling provision for legislation is art. 70 as the more specific provision in comparison to art. 30.

²²⁴ Jarass & Pieroth, Art. 30, para. 4 (note 203)

²²⁵ Sächsische Verfassung [Saxon Constitution], art. 1 “The Free State of Saxony is a state of the Federal Republic of Germany. It is a democratic social state based on the rule of law bound to the protection of natural foundations and of culture.” (personal translation)

²²⁶ Grundgesetz [GG] [Basic Law], art. 83 “The *Länder* shall execute federal laws in their own right insofar as this Basic Law does not otherwise provide or permit.”

²²⁷ Jarass & Pieroth, Art. 83, para. 9 (note 203)

Concerning the foreign relations, art. 32 Basic Law²²⁸ regulates the conditions for an international treaty being signed by the Federation, with one of those being that the *Länder* should be consulted before the signature of an international treaty by the Federation.

In addition, art. 72 Basic Law²²⁹ on the definition of the concurrent legislative power of the Federation specifies that the *Länder* have the legislative powers unless the Federation has enacted a law. Art. 72 para. 3 clause 2 Basic Law,²³⁰ which refers to protection of nature and landscape management, is a deviation competence, thereby characterising that the *Länder* – if the Federation has exercised its legislation competence – enact own (formal) acts and thereby may deviate from the national regulations. Therefore, unlike the core competence and the necessary competence, the Federal laws do not have a barrier effect and may also not come immediately into force. Because the deviation competence is not limited to a unique application, the Federation may also enact Federal laws after the enactment of the state law, again under the same conditions. In this respect, there is a double full competence, according to which the respectively last regulation enjoys a precedence of application.²³¹

²²⁸ Grundgesetz [GG] [Basic Law], art. 32 (note 208)

²²⁹ Grundgesetz [GG] [Basic Law], art. 72 “(1) On matters within the concurrent legislative power, the *Länder* shall have power to legislate so long as and to the extent that the Federation has not exercised its legislative power by enacting a law. (2) The Federation shall have the right to legislate on matters falling within clauses 4, 7, 11, 13, 15, 19a, 20, 22, 25 and 26 of paragraph (1) of Article 74, if and to the extent that the establishment of equivalent living conditions throughout the federal territory or the maintenance of legal or economic unity renders federal regulation necessary in the national interest. (3) If the Federation has made use of its power to legislate, the *Länder* may enact laws at variance with this legislation with respect to: 1. hunting (except for the law on hunting licenses); 2. protection of nature and landscape management (except for the general principles governing the protection of nature, the law on protection of plant and animal species or the law on protection of marine life); 3. land distribution; 4. regional planning; 5. management of water resources (except for regulations related to materials or facilities); 6. admission to institutions of higher education and requirements for graduation in such institutions. Federal laws on these matters shall enter into force no earlier than six months following their promulgation unless otherwise provided with the consent of the Bundesrat. As for the relationship between federal law and law of the *Länder*, the latest law enacted shall take precedence with respect to matters within the scope of the first sentence. (4) A federal law may provide that federal legislation that is no longer necessary within the meaning of paragraph (2) of this Article may be superseded by *Land* law.”

²³⁰ Grundgesetz [GG] [Basic Law], art. 72 para. 3 clause 2 “If the Federation has made use of its power to legislate, the *Länder* may enact laws at variance with this legislation with respect to protection of nature and landscape management (except for the general principles governing the protection of nature, the law on protection of plant and animal species or the law on protection of marine life)”

²³¹ Jarass & Pieroth, Art. 72, para. 29 (note 203)

Furthermore, art. 74 Basic Law,²³² which enunciates the subjects of concurrent legislation between the *Länder* and the Federation, mentions some subjects related to the protection of cultural and natural heritage; for example, the protection of nature and landscape management, land distribution, regional planning, management of water resources, the transfer of land, natural resources, and means of production to public ownership or other forms of public enterprise, land law, road traffic, motor transport, construction and maintenance of long-distance highways, as well as the collection of tolls for the use of public highways by vehicles and the allocation of the revenue, non-federal railways. Nature protection and landscape management featured in the

²³² Grundgesetz [GG] [Basic Law], art. 74 “(1) Concurrent legislative power shall extend to the following matters: 1. civil law, criminal law, court organisation and procedure (except for the correctional law of pretrial detention), the legal profession, notaries, and the provision of legal advice; 2. registration of births, deaths and marriages; 3. the law of association; 4. the law relating to residence and establishment of foreign nationals; 4a. (repealed) 5. (repealed) 6. matters concerning refugees and expellees; 7. public welfare (except for the law on social care homes); 8. (repealed) 9. war damage and reparations; 10. war graves and graves of other victims of war or despotism; 11. the law relating to economic matters (mining, industry, energy, crafts, trades, commerce, banking, stock exchanges and private insurance), except for the law on shop closing hours, restaurants, game halls, display of individual persons, trade fairs, exhibitions and markets; 11a. (repealed) 12. labour law, including the organisation of enterprises, occupational health and safety, and employment agencies, as well as social security, including unemployment insurance; 13. the regulation of educational and training grants and the promotion of research; 14. the law regarding expropriation, to the extent relevant to matters enumerated in Articles 73 and 74; 15. the transfer of land, natural resources, and means of production to public ownership or other forms of public enterprise; 16. prevention of the abuse of economic power; 17. the promotion of agricultural production and forestry (except for the law on land consolidation), ensuring the adequacy of food supply, the importation and exportation of agricultural and forestry products, deep-sea and coastal fishing, and preservation of the coasts; 18. urban real estate transactions, land law (except for laws regarding development fees), and the law on rental subsidies, subsidies for old debts, home building loan premiums, miners’ homebuilding and homesteading; 19. measures to combat human and animal diseases which pose a danger to the public or are communicable, admission to the medical profession and to ancillary professions or occupations, as well as the law on pharmacies, medicines, medical products, drugs, narcotics and poisons; 19a. the economic viability of hospitals and the regulation of hospital charges; 20. the law on food products including animals used in their production, the law on alcohol and tobacco, essential commodities and feedstuffs as well as protective measures in connection with the marketing of agricultural and forest seeds and seedlings, the protection of plants against diseases and pests, as well as the protection of animals; 21. maritime and coastal shipping, as well as navigational aids, inland navigation, meteorological services, sea routes, and inland waterways used for general traffic; 22. road traffic, motor transport, construction and maintenance of long-distance highways, as well as the collection of tolls for the use of public highways by vehicles and the allocation of the revenue; 23. non-federal railways, except mountain railways; 24. waste disposal, air pollution control, and noise abatement (except for the protection from noise associated with human activity); 25. state liability; 26. medically assisted generation of human life, analysis and modification of genetic information as well as the regulation of organ, tissue and cell transplantation; 27. the statutory rights and duties of civil servants of the *Länder*, the municipalities and other corporations of public law as well as of the judges in the *Länder*, except for their career regulations, remuneration and pensions; 28. hunting; 29. protection of nature and landscape management; 30. land distribution; 31. regional planning; 32. management of water resources; 33. admission to institutions of higher education and requirements for graduation in such institutions. (2) Laws enacted pursuant to clauses 25 and 27 of paragraph (1) shall require the consent of the Bundesrat.”

framework of the legislative powers of the Federation until 2006. These two elements cannot be separated from one another and are brought together under the term of land conservation.²³³

Based on these provisions of the Basic Law, it can be argued that the FRG is not bound by the WHC, owing to a legal gap due to the WHC not having been transposed in German law. For example, Peine (2006) concluded that the Capital City of Dresden and the Free State of Saxony are not bound by the WHC, and thus the result of the referendum of 27 February 2005 does not violate any eventual obligation from this treaty, which means that the referendum is lawful.²³⁴

In addition, Bogdandy and Zacharias (2007) argue that art. 4 and 5 WHC²³⁵ do not belong to art. 25 Basic Law,²³⁶ which provides the primacy of international law. They also present that the implementation of the WHC through art. 59 para.2 clause 1 Basic Law²³⁷ is unsuccessful due to the absence of the contract act. Concerning art. 59 para. 2 clause 2 Basic Law,²³⁸ they declare that an act of law of the executive is always necessary for an administrative agreement to be valid. Finally, they state that since the WHC only exists as a cabinet decision, which has a quality of internal law, the WHC shares this legal status. After all, since the WHC does not have the same validity as formal federal law, it cannot as such bind the *Länder* or the municipalities.²³⁹

However, some arguments were brought to show that the FRG is bound by the WHC as the Federal Government that adopted a distinct position in the conclusion of its expert opinion, since it says that the WHC only contains obligations of endeavour. According to the Federal Government, given that the FRG excluded the obligation to pay compulsory contributions through a permissible reservation, the ratification was possible without a prior contract act in terms of art. 59 para. 2 clause 1 Basic Law²⁴⁰. Nevertheless, it recognises that through the ratification, the FRG is effectively bound to the compliance of international obligations that emanate from the WHC. Moreover, it also acknowledges that the incorporation of the WHC in

²³³ Jarass & Pieroth, Art. 74, para. 79 (note 203)

²³⁴ Peine, F.-J., 16 August 2006. *Rechtsgutachten zur Rechtmäßigkeit des Stadtrats der Landeshauptstadt Dresden vom 20. Juli 2006 (Beschluss Nr. A0308-SR35-06)* [Legal expert opinion on the legality of the CC of the Capital City of Dresden from 20 July 2006], Frankfurt (Oder): Europa-Universität Viadrina, p.34

²³⁵ WHC [World Heritage Convention], art. 4 and 5 (note 138)

²³⁶ Grundgesetz [GG] [Basic Law], art. 25 (note 204)

²³⁷ Grundgesetz [GG] [Basic Law], art. 59 para. 2 clause 1 (note 211)

²³⁸ Grundgesetz [GG] [Basic Law], art. 59 para. 2 clause 2 (note 210)

²³⁹ Von Bogdandy & Zacharias, p.529 (note 203)

²⁴⁰ Grundgesetz [GG] [Basic Law], art. 59 para. 2 clause 1 (note 211)

German law took place through the cabinet decision of the Federal Government from 8 July 1976 for the domain of the legislative powers of the Federation.²⁴¹

Furthermore, in the conclusion of the expert opinion implemented by the Standing Conference, all obligations and orders that result in the ratification of the WHC are recognised. In addition, it is especially recognised that in art. 5 WHC,²⁴² the aim provides “to adopt a general policy which aims to give the cultural and natural heritage a function in the life of the community and to integrate the protection of that heritage into comprehensive planning programmes”. Furthermore, the Standing Conference recommends the enactment of a contract act for the transposition of the WHC in German law as a precaution, in order to eliminate the emerged legal uncertainty. Therefore, for this purpose it states that it will prepare a corresponding initiative of the Federal Council (*Bundesrat*) and will consequently establish doubtless foundations for the transposition of the WHC in the FRG.²⁴³

Equally, some tempered arguments were also presented as the conclusion of the expert opinion of the Ministry of Justice of Lower-Saxony which stated that the FRG as general government is bound to the WHC under international law, although the decisions of the World Heritage Committee are not bound inner-state. They develop a legal effect as internal law of UNESCO and at most factual effect for a national legal subject to whom the possibility would be taken to emphasise that the concerned world heritage was inscribed on the World Heritage List.²⁴⁴

In terms of the report of the Hessian State Chancellery to the Heads of Government of the *Länder*, it recommends leaving the question of the political decision to initiate a contract act to the Standing Conference. According to this report, the abstract question of an inner-state validity of the WHC can stand, and thus the enactment of a contract act is not necessary. For the

²⁴¹ Expert opinion of the Federal Government, p.14 (note 202)

²⁴² World Heritage Convention [WHC], art. 5 (note 138)

²⁴³ Standing Conference, 6 September 2007. *Stellungnahme der Kultusministerkonferenz zur Bindungswirkung des UNESCO-Übereinkommens zum Schutz des Kultur- und Naturerbes der Welt* [Statement of the Standing Conference about the binding effect of the WHC], Bonn: Standing Conference, p.2

²⁴⁴ Justizministerium, 22 November 2007 and 7 January 2008. *Gutachterliche Stellungnahme Innerstaatliche Verbindlichkeit des UNESCO-Übereinkommens zum Schutz des Kultur- und Naturerbes der Welt in Deutschland* [Expert opinion internal bindingness of the WHC in Germany, Ministry of Justice of Lower-Saxony], Hannover: Niedersächsisches Justizministerium, p.30

achievement of the purposes of the WHC, the respective provisions in force under Land law are exclusively decisive in individual cases.²⁴⁵

Finally, Bogdandy (2006) states in his conclusion that the question concerning whether the WHC should be taken into account in German administrative procedure can be answered affirmatively. However, the consideration is restricted to an interpretation of the relevant inner-state law that is in line with its interpretation in conformity with international law.²⁴⁶

While looking strictly at the Basic Law, it can be concluded that the WHC does not have binding effects for the FRG due to the legal gap created by its non-transposition in German law following art. 25 or 59 Basic Law²⁴⁷.

3.2.1.2. Lindau Agreement

The Lindau Agreement signed on 14 November 1957 between the Federation and its eleven *Länder* at that time regulates the competence of the Federation concerning the signature of international treaties and the transformation of contracts concluded by the Federal Government with other subjects to international law. Art. 3 Lindau Agreement²⁴⁸ regulates cases in which an international treaty signed by the Federation concerns the competences of the *Länder*.

²⁴⁵ Staatskanzlei, 11 February 2008. *Bericht an die Regierungschefs der Länder* [Report to the Heads of Government of the *Länder*, State Chancellery of Hesse], Wiesbaden: Hessische Staatskanzlei, p.8

²⁴⁶ Von Bogdandy, A., 2006. *Gutachten zur Weltkulturerbekonvention, erstattet im Auftrag der sächsischen Landeshauptstadt Dresden* [Expert report on the World Heritage Convention, under the authority of the saxon Capital City of Dresden], Heidelberg, p.52

²⁴⁷ Grundgesetz [GG] [Basic Law], art. 25 (note 204) and art. 59 (note 133)

²⁴⁸ Lindauer Abkommen [Lindau Agreement], art. 3 “Conclusions of international treaties, which in the *Länder*’s view affect their exclusive competence and according to number 2 are not covered by the federal competence, especially therefore by cultural agreement, shall be conducted as follows: insofar as international treaties in fields of the exclusive jurisdiction of the *Länder*, an obligation of the federation or of the *Länder* are to be established, the accordance of the *Länder* should be considered. This accordance shall exist before the obligation is internationally binding. If the federal government submits such a treaty to the Bundesrat in accordance with art. 59 para. 2 Basic Law, the *Länder* will be solicited for the issuing of their consent at least at the same time. For the treaties mentioned in para. 1 clause 1 the *Länder* shall participate as early as possible in the preparations of the conclusion, in any case in due time before the finalisation of the text of the treaty.” (personal translation)

Therefore, the question of the bindingness of the WHC for the FRG and the *Länder* might be discussed in relation with the Lindau Agreement. In the conclusion of its expert opinion on the inner-state bindingness of the WHC, the Federal Government left open the question of whether a separate incorporation through the *Länder* in the domain of their exclusive legislative powers was necessary. In addition, such a separate act of transformation of the (old) *Länder* has to be seen in their declaration of consent after the Lindau Agreement for the cabinet decision.²⁴⁹

Nevertheless, the Lindau Agreement does not directly concern the Free State of Saxony, given that it is one of the five new *Länder* and thus did not belong to the FRG at the time of its ratification of the WHC.

3.2.1.3. Unification Treaty

The Treaty of 31 August 1990 between the FRG and the GDR on the establishment of German unity (Unification Treaty)²⁵⁰ was signed in Berlin between Wolfgang Schäuble, Interior Minister of the FRG and Günther Krause, Junior Minister to Lothar de Maizièrè, Prime Minister of the GDR. In line with art. 3 Unification Treaty,²⁵¹ which regulates the entry into force of the Basic Law, the five new *Länder*, including the Free State of Saxony, accessed the Basic Law of the FRG. In line with art. 11 Unification Treaty²⁵² concerning the international treaties of the FRG, the international treaties signed by the FRG also relate to the five new *Länder*, including the Free State of Saxony.

Accordingly, the WHC ratified by the FRG in 1976 is also related to the five new *Länder* in line with the Unification Treaty. However, according to Brüggem et al. (2006), the WHC does not bind the Free State of Saxony or its structures due to the non-existing legislative powers of the

²⁴⁹ Expert opinion of the Federal Government, p.14 (note 202)

²⁵⁰ Einigungsvertrag [EinigVtr] [Unification Treaty] (note 134)

²⁵¹ Einigungsvertrag [EinigVtr] [Unification Treaty], art. 3 “Upon the accession taking effect, the Basic Law of the Federal Republic of Germany, as published in the Fed. Law Gazette Part III, No. 100-1, and last amended by the Act of 21 December 1983 (Fed. Law Gazette I, p.1481), shall enter into force in the *Länder* of Brandenburg, Mecklenburg-Western Pomerania, Saxony, Saxony-Anhalt and Thuringia and in that part of Land Berlin where it has not been valid to date, subject to the amendments arising from Article 4, unless otherwise provided in this Treaty.”

²⁵² Einigungsvertrag [Einigvtr] [Unification Treaty], art. 11 (note 134)

Federation in the field of culture, the protection and preservation of historical monuments, and thus art. 11 Unification Treaty²⁵³ needs to be interpreted in conformity with the constitution.²⁵⁴ However, given that the WHC does not only refer to culture but also to nature, in this case it relates to the competence of the Federation as well, and thus the Unification Treaty is partly relevant in this matter.

In addition, the Federal Government concluded in its expert opinion on the inner-state bindingness of the WHC that an open question concerns the validity of the extension of the international treaties of the FRG under art. 11 Unification Treaty²⁵⁵ with the (if necessary) incorporation with effect for the new *Länder* at the same time.²⁵⁶

3.2.1.4. Principle of Federal loyalty

The principle of Federal loyalty (*Bundestreue*) refers to the mutual Federal loyalty between the Federation and its *Länder*. While this concept does not appear as such in the Basic Law, the Federal Constitutional Court has referred to it several times; therefore, it can be considered a judicial doctrine accompanied by a jurisprudence, which implies a series of obligations.²⁵⁷ This principle implies that in the exercise of their competences, the *Länder* (and the Federation) must show consideration of the interests of the other parties concerned and the whole, and should stand by one another “in extreme household emergency”.²⁵⁸ The principle of Federal loyalty can be considered as an accessory since it does not create any legal relationship between the Federation

²⁵³ Einigungsvertrag [Einigvtr] [Unification Treaty], art. 11 (note 134)

²⁵⁴ Brüggem, G, Schmid, A. & Jurochnik, D., 12 August 2006. *Kurzgutachten zu den verfassungsrechtlichen, planungsrechtlichen und vergaberechtlichen Gesichtspunkten des Projekts Waldschlößchenbrücke in Dresden* [Short expert report concerning the aspects of the constitutionality, planning law and the awarding regulations of the project *Waldschlößchenbrücke* in Dresden], Dresden: Brüggem Rechtsanwälte, p.7

²⁵⁵ Einigungsvertrag [Einigvtr] [Unification Treaty], art. 11 (note 134)

²⁵⁶ Expert opinion of the Federal Government, p.14 (note 202)

²⁵⁷ Kymlicka, W. & Raviot, J.-R., 1997. *Vie commune: espaces internationaux des fédéralismes. Etudes internationales*, 28(4), p.819

²⁵⁸ Albrecht, E. & Küchenhoff, B., 2011. *Staatsrecht*. 2. Auflage. Berlin: Erich Schmidt Verlag, p.81

and the *Länder* but rather implies that the principle of unanimity is valid between the Federation and the *Länder* in the Federal state.²⁵⁹

Therefore, the principle of Federal loyalty could be invoked in the case that the WHC is transposed in the German legislation in order to require that the *Länder* also transpose the WHC. Brüggem et al. (2006) consider that a constitutional obligation of the Free State of Saxony to the Federal loyalty does not exist because it lacks the required legislative powers of the Federation.²⁶⁰ Geulen & Klinger (2006) recognise that referendums should not be unlawfully carried out in the view of the principle of loyalty and international friendliness.²⁶¹ However, Killian (2008) refers to the unwritten constitutional duty of the *Länder*, to act federally friendly according to the Federal loyalty and comply with the recommendations of the Federation. A formal declaration of recognition of the *Länder* to comply with the obligations of the WHC was manifestly not issued. Furthermore, the postulate of the “open statehood” of the FRG is also valid, which renders it unlawful to entrench itself under the sovereignty walls of the sovereignty of the Federation and the *Länder*. Nevertheless, the *Länder* remain autonomous states without a formal normative basis for the compliance of international norms, even though the Federation has to allow itself to separately apply them.²⁶² According to Fastenrath (2006), the Dresden RC is bound based on the rule of law and regarding the principle of Federal loyalty.²⁶³

However, it can be considered that for the principle of Federal loyalty to be applied in the case of the WHC, the WHC would have first needed to be transposed into German law.

²⁵⁹ Albrecht & Küchenhoff, p.81 (note 258)

²⁶⁰ Brüggem, Schmid & Jurochnik, p.8 (note 254)

²⁶¹ Geulen, R. & Klinger R., 12 October 2006. *In der Verwaltungsrechtssache Landeshauptstadt Dresden gegen Freistaat Sachsen 4 BS 216/06 beantragen wir namens und in Vollmacht der Antragstellerin und Beschwerdegegnerin die Beschwerde zurückzuweisen* [In the administration legal case Capital City of Dresden against Free State of Saxony 4 BS 216/06 we propose to reject the complaint on behalf of and in legal power of the claimant and appellant], Bautzen: Geulen & Klinger Rechtsanwälte, p.52

²⁶² Killian, M., 2008. *Die Brücke über die Elbe: völkerrechtliche Wirkungen des Welterbe-Übereinkommens der UNESCO. Landes und Kommunalverwaltung, Heft 6*, p.253

²⁶³ Fastenrath, U., 9 August 2006. *Rechtsgutachtliche Stellungnahme zur Zulässigkeit des Baus der Waldschlößchenbrücke und zum Beschluss des Stadtrats der Landeshauptstadt Dresden vom 20. Juli 2006 zum Erhalt des Weltkulturerbestatus für das Dresdner Elbtal* [Legal expert opinion about the admissibility of the construction of the Waldschlößchenbrücke and about the decision of the CC of the Capital City of Dresden from 20 July 2006 for the preservation of the World Heritage status for the Dresden Elbe Valley], Dresden: TU Dresden, p.1

3.2.1.5. Federal Clause of the World Heritage Convention

The WHC foresaw a Federal clause in its art. 34²⁶⁴ for the States Parties having a Federal system, therein stating that Federal states in which the states, provinces or cantons have legislative powers should be informed by the Federation about the WHC. This Federal clause is separated into two sections that respectively refer to non-central states whose central government is competent for the provisions of the WHC (art. 34 para. a WHC²⁶⁵) and non-central states whose federated entities are competent for the provisions of the WHC (art. 34 para. b WHC²⁶⁶). Therefore, both parts of the Federal clause are relevant in the case of the FRG, since nature protection is a concurrent competence of the Federation and the *Länder*, while monuments protection is an exclusive competence of the *Länder*.

As Boer (2008) expresses, art. 34 WHC²⁶⁷ concerns approximately 24 States Parties to the WHC.²⁶⁸ Besides, while art. 34 para. b WHC²⁶⁹ considers the implementation of the WHC as well as management of WHS by lower-levels of decisions, it nonetheless attributes the ultimate responsibility for implementing the WHC and persuading the lower levels of decision to carry out the provisions of the WHC to the federal decisional level.²⁷⁰ Nevertheless, Killian argues that the central government is internationally directly responsible for the implementation of the WHC on the outside, yet on the inside can only (and must) urge that *Länder* and municipalities comply

²⁶⁴ World Heritage Convention [WHC], art. 34 (note 135)

²⁶⁵ World Heritage Convention [WHC], art. 34 para. a “with regard to the provisions of this Convention, the implementation of which comes under the legal jurisdiction of the federal or central legislative power, the obligations of the federal or central government shall be the same as for those States parties which are not federal States”

²⁶⁶ World Heritage Convention [WHC], art. 34 para. b “with regard to the provisions of this Convention, the implementation of which comes under the legal jurisdiction of individual constituent States, countries, provinces or cantons that are not obliged by the constitutional system of the federation to take legislative measures, the federal government shall inform the competent authorities of such States, countries, provinces or cantons of the said provisions, with its recommendation for their adoption.”

²⁶⁷ World Heritage Convention [WHC], art. 34 (note 135)

²⁶⁸ Argentina, Australia, Austria, Belgium, Bosnia and Herzegovina, Brazil, Canada, Comoros, Ethiopia, Germany, India, Malaysia, Mexico, Federated States of Micronesia, Nigeria, Pakistan, Russia, Switzerland, United Arab Emirates, United States of America, Venezuela, see Boer, B., 2008. Article 34, The Federal Clause. In: F. Francioni & F. Lenzerini, eds. *The 1972 World Heritage Convention: a commentary*. Oxford: Oxford University Press, pp.355-356

²⁶⁹ World Heritage Convention [WHC], art. 34 para. b (note 266)

²⁷⁰ Boer, p.356 (note 268) and Zacharias, D., 2010. The UNESCO Regime for the Protection of World Heritage as Prototype of an Autonomy-Gaining International Institution. In: A. Von Bogdandy et al. eds. *The Exercise of Public Authority by International Institutions, Advancing International Institutional Law*. Heidelberg: Springer, p.323

with the WHC. The conclusion of the WHC in form of an administrative arrangement, thus not in the rank of an act, renders the WHC legally weak (“soft wax-butter”) in its nature and the degree of its bindingness.²⁷¹

According to Fastenrath (2006), the City of Dresden is required, insofar as legally possible and in its field of competence, to fulfil the obligations of the FRG coming from the WHC. The *Waldschlößchenbrücke* should only be built if it is compatible with the Dresden Elbe Valley WHS and the Federal Government can require the Free State of Saxony the compliance of the international obligations of the FRG and to the maximum to assert in court a dispute between the Federation and the *Länder*.²⁷² However, for Brüggem et al. (2006), the City Council and the citizens are free to take the decisions that would have the effect of a cultural monument or a cultural site recognised worldwide losing its status. In addition, the status of World Heritage does not have priority before other public and private matters in which necessary weighting has to be adjusted, and thus the Free State of Saxony and its structures are not required to do their utmost to preserve World Heritage.²⁷³

According to the conclusion of the expert opinion of the Ministry of Justice of Lower-Saxony, the inner-state legal practitioners (organs and authorities of the Federation, the *Länder* and the municipalities) and legal subjects are not obliged to respect the provisions of the WHC. Given that a legal transposition of the WHC in inner-state law in accordance with art. 59 para. 2 clause 2 Basic Law²⁷⁴ has not taken place, the provisions of the WHC do not directly apply in the FRG. Furthermore, the points of contacts that would conduct to an indirect inner-state validity of the provisions of the WHC lack and irrespective of the missing direct or indirect validity of the WHC a direct application of the provisions of the WHC fails to their missing enforceability. With an indirect consideration of the protection of the WHS in the frame of planned impact assessments, the provisions of the WHC do not convey any protective positions.²⁷⁵

²⁷¹ Killian, p.251 (note 262)

²⁷² Fastenrath, pp.1-2 (note 263)

²⁷³ Brüggem, Schmid & Jurochnik, p.8 (note 254)

²⁷⁴ Grundgesetz [GG] [Basic Law], art. 59 para. 2 clause 2 (note 210)

²⁷⁵ Justizministerium, p.30 (note 244)

For Bogdandy (2006), the question of the possibilities for the enforcement of the WHC's consideration should be answered that the state legal supervisory authority can require a municipality to duly take the interests of the WHC into consideration in its decisions. Private, and particularly non-governmental, organisations can claim the violation of the interests of the WHC in the frame of their legislation regulatory possibilities of collective action in nature protection, as far as these have a content of nature protection legislation.²⁷⁶ Based on this consideration, the associations for nature protection that initiated the legal procedure could have also invoked the non-respect of the WHC by the City of Dresden and the Free State of Saxony regarding the planning approval decision concerning the *Waldschlößchenbrücke*.

Starting from the point that there is a legal gap regarding the non-transposition of the WHC in German law following the provisions of the Basic Law, the Lindau Agreement, the Unification Treaty, the principle of Federal loyalty and the Federal clause of the WHC fail to prove the bindingness of the WHC for the FRG, the Free State of Saxony or the City of Dresden.

3.2.2. The separation of culture and nature protection

In the German legal system, the protection of nature is a concurrent legislative competence of the Federation and the *Länder*, whereas the protection of monuments is an exclusive legislative competence of the *Länder*. Therefore, the protection of the cultural and natural heritage as identified in the WHC is separated in terms of competences for the German authorities.

The Federal Nature Conservation Act was in preparation at the time of the ratification of the WHC by the FRG: it was adopted on 20 December 1976, whereas the WHC entered into force approximately one month earlier, on 23 November 1976. In addition, some state acts for the protection of monuments (*Landesdenkmalschutzgesetz*) were still in preparation at this time.²⁷⁷

²⁷⁶ Von Bogdandy, p.53 (note 246)

²⁷⁷ Hönes, E.-R., 2007. Der Bund kann die Umsetzung nachholen. *Frankfurter Allgemeine Zeitung*, 18 June, p.19

With regards to natural heritage, the Federal Nature Conservation Act refers to the WHC in art. 2 para. 5 clause 2 Federal Nature Conservation Act.²⁷⁸ This reference to the WHC was included in the Federal Nature Conservation Act in its version from 29 July 2009, although there is no such mention of the WHC in its previous version dating from 21 September 1998.²⁷⁹ In addition, art. 26 and 28 Federal Nature Conservation Act²⁸⁰ provide respectively for landscape conservation areas, which has been the case of the Dresden Elbe Valley since August 1996,²⁸¹ as well as natural monuments. These two articles correspond to art. 15 and 17 of the first Federal Nature Conservation Act, dating from 1976,²⁸² as well as the revised version of the Federal Nature Conservation Act from 1998.²⁸³

While the *Länder* also have their Nature Conservation Act, the Saxon Nature Conservation Act²⁸⁴ only mentions UNESCO in its art. 18 para. 1 clause 3²⁸⁵ concerning biosphere reserves in the

²⁷⁸ Bundesnaturschutzgesetz [BNatSchG] [Federal Nature Conservation Act], art. 2 para. 5 clause 2 “International efforts in the area of nature conservation and landscape management shall be supported especially via protection of cultural and natural heritage within the meaning of the Convention of 16 November 1972 concerning the Protection of the World Cultural and Natural Heritage (Fed. Law Gazette 1977 II pp. 213, 215).” (unofficial translation, Federal Ministry for the Environment, Nature Conservation and Nuclear Safety)

²⁷⁹ Bundesnaturschutzgesetz [BNatSchG] [Federal Nature Conservation Act] 21 September 1998 (Fed. Law Gazette I, p.2994)

²⁸⁰ Bundesnaturschutzgesetz [BNatSchG] [Federal Nature Conservation Act], art. 26 “(1) Landscape protection areas are areas that have been designated in a legally binding manner and in which special protection of nature and landscape is required for the following reasons: 1. in order to conserve, develop or restore the efficiency and proper functioning of the natural balance, or the capability of natural resources to regenerate themselves and to be available for sustainable use, and to protect living sites and habitats of certain wild fauna and flora species, 2. because of the diversity, special characteristics, beauty or special cultural historical significance of their landscapes, or 3. because of their special importance for recreation. (2) In a landscape protection area, all actions which alter the character of the area or which are not compatible with the purpose of its protection shall be prohibited, with particular consideration for Article 5 (1) and in keeping with more specific provisions to be adopted.” and art. 28 “(1) Natural monuments are unique creations of nature, or corresponding areas of up to 5 ha, that have been designated in a legally binding manner and that require special protection for the following reasons: 1. for reasons of science, natural history or national heritage, or 2. because of their rarity, special characteristics or beauty. (2) The removal of natural monuments, as well as any action which may lead to their destruction, damage or alteration, shall be prohibited, in keeping with more specific provisions to be adopted.” (unofficial translation, Federal Ministry for the Environment, Nature Conservation and Nuclear Safety)

²⁸¹ For more information, see section 3.2.3 of this thesis

²⁸² Bundesnaturschutzgesetz [BNatSchG] [Federal Nature Conservation Act] 20 December 1976 (Fed. Law Gazette I, p.3574)

²⁸³ Bundesnaturschutzgesetz [BNatSchG] [Federal Nature Conservation Act] (note 279)

²⁸⁴ Sächsisches Naturschutzgesetz [SächsNatSchG] [Saxon Nature Conservation Act] 23 April 2007 (Saxon Law and Ordinance Gazette, p.110)

²⁸⁵ Sächsisches Naturschutzgesetz [SächsNatSchG], art. 18 para. 1 clause 3 “As biosphere reserves can be established by ordinances areas which are entitled to be recognised as characteristic ecosystems on Earth according to the Programme “Man and the Biosphere” of the Resolution 2.313 of UNESCO from 23 October 1970 (UNESCO 1982 p.3)”

frame of the UNESCO programme “Man and the Biosphere”. However, the Saxon Nature Conservation Act provides regulations for landscape conservation areas and natural monuments in its art. 19 and 21,²⁸⁶ as does the Federal Nature Conservation Act.

With regards to cultural heritage, the Saxon Monument Protection Act²⁸⁷ does not refer to the WHC for the protection of cultural heritage. This non-existence of a reference was further reinforced by the decision of the Saxon Higher Administrative Court on 9 March 2007, which stated that the WHC would not be transformed in the Saxon State arguing that an incorporation of the WHC in the internal legal system through a Contract or Agreement Act according to art. 59 para. 2 clause 1 Basic Law has not been made.²⁸⁸ Nevertheless, while cultural heritage is identified as (1) monuments; (2) groups of buildings; and (3) sites in art. 1 WHC²⁸⁹, the Saxon

²⁸⁶ Sächsisches Naturschutzgesetz [SächsNatSchG] [Saxon Nature Conservation Act], art. 19 “(1) Areas can be established by statutory order as landscape conservation areas, in which a particular protection of nature and landscape is required 1. For the preservation, development or restoration of the productivity and functionality of the habitats or regenerability and sustainable usability of natural resources, 2. Due to diversity, unique character or beauty or to the particular cultural historical significance of the landscape or 3. Due to their particular significance for the recreation. Landscape conservation areas can also serve for the protection of areas of the network “Natura 2000”, if the protection of the biotope and types of community interest in particular depends on a careful management or preservation of a designated landscape structure. In these cases necessary prohibitions for the protection of areas of the biotope and types of community interest can be included in the regulation for the aims of preservation. (2) In landscape conservation areas are any actions forbidden according to the statutory order, which change the character of the area, damage the habitat, affect the landscape scenery and the enjoyment of nature or otherwise are contrary to the particular protective purpose. The parts of areas according to para. 1 clause 2 are to account for zones in accordance with art. 15 para. 2 clause 2 in the statutory order. According to the statutory order any actions which can significantly affect the preservation aims in accordance with art. 10 para. 1 clause 9 Federal Nature Conservation Act are there forbidden.” and art. 21 “(1) Through statutory order or single directive can areas with a surface up to 5 hectares (nature monument areas) and individual effects of the nature (natural formations) be determined as natural monuments, if their protection and preservation is required 1. For scientific, natural historical, geographical or cultural reasons or 2. For the maintaining of biological communities or habitats of particular fauna and flora or 3. Due to their rarity, unique character or beauty. (3) Areas of natural monuments can be in particular biotope types mentioned in art. 26 para. 1 clause 4 to 6 as well as geologically significant formations. (3) Natural formations can be in particular biotope types mentioned in art. 26 para. 1 clause 5 and water falls, individual valuable trees, groups of trees and alleys as well as geologically significant formations, rocky outcrops. (4) (repealed) (5) The removal of natural monuments as well as any actions which can conduct to a destruction, damage, modification or sustainable disturbance of natural monuments or their environment in accordance with art. 15 para. 2 clause 2 are forbidden according to detailed provisions in the statutory order or single directive.” (personal translation)

²⁸⁷ Sächsische Denkmalschutzgesetz [SächsDSchG] [Saxon Monument Protection Act] 3 March 1993, last amended on 29 January 2008 (Saxon Law and Ordinance Gazette, p.138, 146)

²⁸⁸ Hönes, p.54 (note 212)

²⁸⁹ World Heritage Convention [WHC], art. 1 “For the purpose of this Convention, the following shall be considered as “cultural heritage”: monuments: architectural works, works of monumental sculpture and painting, elements or structures of an archaeological nature, inscriptions, cave dwellings and combinations of features, which are of outstanding universal value from the point of view of history, art or science; groups of buildings: groups of separate or connected buildings which, because of their architecture, their homogeneity or their place in the landscape, are of outstanding universal value from the point of view of history, art or science; sites: works of man or the combined

Monument Protection Act also refers to monuments in art. 2 para. 1 Saxon Monument Protection Act²⁹⁰. The concept of monument is abstractly formulated in this provision, with ensembles and monument sectors seen as pluralities of physical structures.²⁹¹ Not only are individual physical structures included in the definition, but also places, streets and groups of buildings, as well as whole districts or neighbourhoods.²⁹² Furthermore, art. 21 para. 1 Saxon Monument Protection Act²⁹³ also mentions groups of buildings. This provision describes three different areas or ensembles: (1) such aggregates of things that consist in a plurality of physical structures and whose different configuration or function justifies the worthiness of protection; (2) the ensembles whose physical structures are namely specific buildings, whose characteristic they convey is however worthy of protection in the appearance resulting from the context; and (3) ground-plans of towns that are characterised within the municipality through the flat form of appearance, reflecting the original order of built areas or open areas.²⁹⁴ Therefore, even though the Saxon Monument Protection Act does not refer to sites literally, it mentions man-made items in art. 21 para. 1 Saxon Monument Protection Act,²⁹⁵ which is similar to the “works of man” mentioned in art. 1 para. 3 WHC Saxon Monument Protection Act²⁹⁶.

works of nature and man, and areas including archaeological sites which are of outstanding universal value from the historical, aesthetic, ethnological or anthropological point of view.”

²⁹⁰ Sächsisches Denkmalschutzgesetz [SächsDSchG] [Saxon Monument Protection Act], art. 2 para. 1 “Cultural heritage in the sense of this law is man-made objects, groups of assets, parts and traces of objects including their natural resources, whose conservation due to their historical, artistic, scientific, town-planning or landscape shaping significance are in the public interest.” (personal translation)

²⁹¹ Martin, D., Schneider, A., Wecker, L. & Bregger, H.-M., 1999. *Sächsisches Denkmalschutzgesetz (Sächs.DSchG) Kommentar*. Wiesbaden: Kommunal- und Schul-Verlag, p.40

²⁹² Martin, et al., p.43 (note 291)

²⁹³ Sächsisches Denkmalschutzgesetz [SächsDSchG] [Saxon Monument Protection Act], art. 21 para. 1 “The municipalities can in consultation with the competent authorities or on their proposal place under protection (protected areas) through rules, areas, particularly street, square or scene views, ground-plans of towns, settlements, districts, groups of buildings, manufacturing plants, to whose conservation comprise a particular public interest for historical, artistic, scientific, town-planning or landscape shaping reasons, as well as their environment, insofar as they are significant for their appearance. The rules require the approval of the competent legal supervisory authority in accordance with § 112 para.1 Municipal Code of Saxony (SächsGemO) in the version of the publication of 18 March 2003 (SächsGVBl p.55, 159), in the respective applicable version. For the delegated activity the Free State of Saxony grants the administrative district 0,01 EUR annually per inhabitant.” (personal translation)

²⁹⁴ Martin, et al., p.148 (note 291)

²⁹⁵ Sächsisches Denkmalschutzgesetz [SächsDSchG] [Saxon Monument Protection Act], art. 21 para. 1 (note 293)

²⁹⁶ World Heritage Convention [WHC], art. 1 para. 3 “Sites: works of man or the combined works of nature and man, and areas including archaeological sites which are of outstanding universal value from the historical, aesthetic, ethnological or anthropological point of view.”

Consequently, despite the Saxon Monument Protection Act not mentioning the WHC, the cultural heritage identified in art. 1 WHC,²⁹⁷ defined as monuments, groups of buildings and sites, is still included in the Saxon Monument Protection Act.

Since the protection of the environment appears in the Basic Law but the protection of monuments does not, during its 37th session in Bremen, the German National Committee for Monument Preservation proposed adding a law on the protection of monuments in the federal law from 1 June 1980. In addition, during its 38th session in Weimar, the German National Committee for Monument Preservation called in a resolution to the German Federal Parliament (*Bundestag*), the Federal Government (*Bundesregierung*) and the Federal Council (*Bundesrat*) in order to bring the project in the reform of the federal system from 28 August 2006.²⁹⁸

Nonetheless, with the reform of the Federal system, the Basic Law for the FRG²⁹⁹ still neither refers to the WHC nor the World Heritage concepts related to cultural heritage. However, natural heritage is referred to in art. 72 para. 3 clause 2 Basic Law,³⁰⁰ which regulates the concurrent legislative powers, as well as in art. 74 para. 1 clause 29 Basic Law³⁰¹ concerning the matters under concurrent legislative powers.

Due to the successful modifications in the federal structure in the frame of the Federal Reform from 28 August 2006, nature protection and landscape management are regulated in a new clause 29 of art. 74 para. 1 Basic Law³⁰² as mentioned above. The objectives are to ensure that the landscape is protected in its diversity, unique character and beauty, also due to its significance as an experience and recreation space for humans, according to art. 1 para. 4 Federal Nature Conservation Act³⁰³. According to art. 26 para. 1 clause 2 Federal Nature Conservation Act,³⁰⁴

²⁹⁷ World Heritage Convention [WHC], art. 1 (note 289)

²⁹⁸ Hönes, E.-R., 2008. Denkmal-, Kulturgüter- und Welterbeschutz im Völkerrecht – 100 Jahre Haager Abkommen vom 18.10.1907 –, *Deutsches Wehrrecht*, Heft 2, p.55

²⁹⁹ Grundgesetz [GG] [Basic Law] (note 10)

³⁰⁰ Grundgesetz [GG] [Basic law], art. 72 para. 3 clause 2 (note 230)

³⁰¹ Grundgesetz [GG] [Basic Law], art. 74 para. 1 clause 29 “Concurrent legislative power shall extend to: 29. protection of nature and landscape management.”

³⁰² Grundgesetz [GG] [Basic Law], art. 74 para. 1 clause 29 (note 301)

³⁰³ Bundesnaturschutzgesetz [BNatSchG] [Federal Nature Conservation Act], art. 1 para. 4 “In order to permanently safeguard the diversity, characteristic features, beauty and recreational value of nature and landscape, the following actions are to be taken, in particular: 1. natural landscapes, and cultural landscapes that have developed over time, and including their cultural, structural and soil monuments, are to be protected against defacement and disfigurement, urban sprawl and other adverse effects, 2. for purposes of outdoor recreation, suitable areas for

historic cultural landscapes and parts of cultural landscapes with special characteristics, including such of particular characteristic or beauty protected or worthy to be protected, are cultural, historic and archaeological monuments to preserve. Although the concept “historical cultural landscape” is not defined, the signification originates at the same time; however, for the unique character or beauty of cultural, historic or archaeological monuments, under which the garden monuments are also included, the reference to the falling under monument law is the competence of the *Länder*. Since a particular legal instrument is still lacking for the effective protection of historic cultural landscapes, it must partially be referred to provisions of monuments law for the protection of monuments landscapes and other nature protection law possibilities as the declaration of landscape protection area.³⁰⁵

In this context, even though the Dresden Elbe Valley inscribed as an evolving cultural landscape on the World Heritage List was not protected by the WHC as such, due to its non-transposition in the German legislation, its various cultural and natural features were partly protected by the Saxon Monument Protection Act for its cultural elements, as well as by the Federal Nature Conservation Act and the Saxon Nature Conservation Act for its natural elements. In this context, both the Federation and the Free State of Saxony were responsible for the protection of the Dresden Elbe Valley. Given that the protection of cultural landscapes such as the Dresden Elbe Valley implies cultural and natural heritage, the next part of this sub-chapter examines the protection of cultural landscapes in the FRG.

recreational purposes, in terms of their properties and location, are to be protected and kept or rendered accessible, particularly in settled areas and areas close to human settlements.” (unofficial translation, Federal Ministry for the Environment, Nature Conservation and Nuclear Safety)

³⁰⁴ Bundesnaturschutzgesetz [BNatSchG] [Federal Nature Conservation Act], art. 26 para. 1 clause 2 “(1) Landscape protection areas are areas that have been designated in a legally binding manner and in which special protection of nature and landscape is required for the following reasons: 2. because of the diversity, special characteristics, beauty or special cultural historical significance of their landscapes” (unofficial translation, Federal Ministry for the Environment, Nature Conservation and Nuclear Safety)

³⁰⁵ Hönes, E.-R., 2007. Zum Schutz historischer Alleen. *Landes und Kommunalverwaltung*, Heft 8, pp.340-341

3.2.3. The need for a better legal protection of cultural landscapes

The Dresden Elbe Valley former WHS was inscribed as a cultural landscape on the World Heritage List; therefore, both the Federation and the Free State of Saxony were competent for its protection. While both the Federation and the Free State of Saxony were competent for the protection of the natural features of the Dresden Elbe Valley, the Free State of Saxony was competent for the protection of its cultural features. However, beyond the separation of natural and cultural features, both the Federal Nature Conservation Act and the Saxon Nature Conservation Act provide landscape conservation. In addition, on 29 August 1996, the then Mayor of Dresden passed an Ordinance³⁰⁶ (*Verordnung*) for the determination of the landscape conservation area (*Landschaftsschutzgebiet*) “Dresden Elbe River meadows and oxbow lakes”, and thus the Dresden Elbe Valley was also protected following art. 19 and 21 para. 1 clause 3 Saxon Nature Conservation Act³⁰⁷ and by the corresponding art. 26 and 28 Federal Nature Conservation Act³⁰⁸.

Landscape protection is a competence of the Federation as landscape conservation, next to nature protection in the exact name of the Federal Nature Conservation Act.³⁰⁹ Nevertheless, art. 2 para. 2 Federal Nature Conservation Act³¹⁰ binds the authorities of the Federation and the *Länder* to support the conservation of landscapes in the frame of their competence. Art. 3 para. 1 Federal Nature Conservation Act³¹¹ details which authorities are referred to in art. 2 para. 2 Federal

³⁰⁶ City of Dresden, 27 March 1997. *Satzung der Landeshauptstadt Dresden für das Denkmalschutzgebiet Elbhänge*. Dresden: Dresden Official Journal Nr. 13/97

³⁰⁷ Sächsisches Naturschutzgesetz [SächsNatSchG] [Saxon Nature Conservation Act], art. 19 (note 286) and art. 21 para. 1 clause 3 “By ordinance or single directive areas covering up to 5 ha (nature monument areas) and individual formations of the nature (natural formations) can be determined as natural monuments, if their protection and preservation are required 3. because of their rarity, special characteristics or beauty” (personal translation)

³⁰⁸ Bundesnaturschutzgesetz [BNatSchG] [Federal Nature Conservation Act], art. 26 and 28 (note 280)

³⁰⁹ Act for Nature Protection and Landscape Conservation (Federal Nature Conservation Act), Bundesnaturschutzgesetz (note 179)

³¹⁰ Bundesnaturschutzgesetz [BNatSchG] [Federal Nature Conservation Act], art. 2 para. 2 “Within the scope of their responsibility, Federal and Länder authorities shall support the realisation of the purposes of nature conservation and landscape management.” (unofficial translation, Federal Ministry for the Environment, Nature Conservation and Nuclear Safety)

³¹¹ Bundesnaturschutzgesetz [BNatSchG] [Federal Nature Conservation Act], art. 3 para. 1 “The competent authorities in charge of nature conservation and landscape management, within the meaning of this Act, are 1. the competent authorities for nature conservation and landscape management pursuant to the legislation of the *Länder*, or 2. the Federal Agency for Nature Conservation (Bundesamt für Naturschutz, BfN), to the extent it is assigned

Nature Conservation Act³¹² mentioned above. In addition, art. 5 para. 1 Federal Nature Conservation Act³¹³ details the particular importance of considering landscape compatible agriculture, forestry and fishery. Finally, art. 26 Federal Nature Conservation Act³¹⁴ regulates landscape conservation areas in which, beyond the protection of natural features, the diversity, characteristic and beauty or the particular cultural and historical significance of a landscape are also mentioned. In this context, reference is also made to cultural landscapes in art. 1 para. 4 clause 1 Federal Nature Conservation Act.³¹⁵

Since protection of nature and landscape management is a concurrent legislation competence according to art. 72 para. 3 clause 2 and 74 para. 1 clause 29 Basic Law,³¹⁶ both the Federation and the *Länder* are competent on this matter. However, once the Federation has enacted a law in one of these fields, the corresponding *Länder* are legally meaningless and the *Länder* legislator is prevented from enacting a law in this field in the future (“barrier effect” of the Federation).³¹⁷ Some mentioned matters in art. 74 para. 1 Basic Law³¹⁸, art. 72 para. 2 Basic Law³¹⁹ impose a further limitation to the Federation legislator with the “awarding authority clause”: in such cases, the Federation only has the legislative right, “if and insofar” a provision at Federal level is

responsibilities under this Act.” (unofficial translation, Federal Ministry for the Environment, Nature Conservation and Nuclear Safety)

³¹² Bundesnaturschutzgesetz [BNatSchG] [Federal Nature Conservation Act], art. 2 para. 2 (note 310)

³¹³ Bundesnaturschutzgesetz [BNatSchG] [Federal Nature Conservation Act], art. 5 para. 1 “In connection with nature conservation and landscape management measures, the special importance, in conserving cultural and recreational landscapes, of agriculture, forestry and fishing designed to be compatible with nature and landscape conservation shall be taken into account.” (unofficial translation, Federal Ministry for the Environment, Nature Conservation and Nuclear Safety)

³¹⁴ Bundesnaturschutzgesetz [BNatSchG] [Federal Nature Conservation Act], art. 26 (note 280)

³¹⁵ Bundesnaturschutzgesetz [BNatSchG] [Federal Nature Conservation Act], art. 1 para. 4 clause 1 “In order to permanently safeguard the diversity, characteristic features, beauty and recreational value of nature and landscape, the following actions are to be taken, in particular: 1. natural landscapes, and cultural landscapes that have developed over time, and including their cultural, structural and soil monuments, are to be protected against defacement and disfigurement, urban sprawl and other adverse effects” (unofficial translation, Federal Ministry for the Environment, Nature Conservation and Nuclear Safety)

³¹⁶ Grundgesetz [GG] [Basic Law], art. 72 para. 3 clause 2 (note 230) and art. 74 para. 1 clause 29 (note 301)

³¹⁷ Albrecht & Küchenhoff, pp.131-132 (note 258)

³¹⁸ Grundgesetz [GG] [Basic Law], art. 74 para. 1 “Concurrent legislative power shall extend to the following matters: 1. civil law, criminal law, court organisation and procedure (except for the correctional law of pretrial detention), the legal profession, notaries, and the provision of legal advice”

³¹⁹ Grundgesetz [GG] [Basic Law], art. 72 para. 2 “The Federation shall have the right to legislate on matters falling within clauses 4, 7, 11, 13, 15, 19a, 20, 22, 25 and 26 of paragraph (1) of Article 74, if and to the extent that the establishment of equivalent living conditions throughout the federal territory or the maintenance of legal or economic unity renders federal regulation necessary in the national interest.”

required for the production of equal living conditions on the Federal territory or to safeguard the legal or business entity in the national interest.³²⁰

As Albrecht & Küchenhoff (2011) express, before the Federal Reform from 1 September 2006, all the legal areas of the concurrent legislation competence were subjected to these limitations, with art. 72 para. 2 Basic Law³²¹ stating: “The Federation has in this area [namely the concurrent legislative competence] the legislative right, if and insofar as the production of equal living conditions on the Federal territory or the safeguard of the legal or business entity in the national interest necessitates a provision at Federal level”. The Federal Reform limited the awarding authority clause to few legal areas and herewith extended the influences of the Federation. With the Federal Reform from 2006, the alternative legislation was included. The *Länder* can also enact laws under named legal areas of the concurrent legislative competence in art. 72 para. 3 Basic Law,³²² as well as for the regulation of the Federal supervision authority according to art. 84 para. 1 clause 2 Basic Law³²³, despite the Federation having already made use of its legislative capacity. The Federation again has the possibility to overcome this law through a new Federal law, albeit with a retention period of six months (art. 72 para. 3 clause 2 Basic Law³²⁴). Each later law precedes the earlier law (art. 72 para. 3 clause 3 Basic Law³²⁵). This mechanism has been frequently criticised, given that the Federation and *Länder* can always overtrump each other with new laws (“pingpong legislation”); furthermore, this principle is a transgression of the hierarchy

³²⁰ Albrecht & Küchenhoff, p.132 (note 258)

³²¹ Grundgesetz [GG] [Basic Law], art. 72 para. 2 (note 319)

³²² Grundgesetz [GG] [Basic Law], art. 72 para. 3 “If the Federation has made use of its power to legislate, the *Länder* may enact laws at variance with this legislation with respect to: 1. hunting (except for the law on hunting licenses); 2. protection of nature and landscape management (except for the general principles governing the protection of nature, the law on protection of plant and animal species or the law on protection of marine life); 3. land distribution; 4. regional planning; 5. management of water resources (except for regulations related to materials or facilities); 6. admission to institutions of higher education and requirements for graduation in such institutions. Federal laws on these matters shall enter into force no earlier than six months following their promulgation unless otherwise provided with the consent of the Bundesrat. As for the relationship between federal law and law of the *Länder*, the latest law enacted shall take precedence with respect to matters within the scope of the first sentence.”

³²³ Grundgesetz [GG] [Basic Law], art. 84 para. 1 clause 2, “If federal laws provide otherwise, the *Länder* may enact deviating regulations.”

³²⁴ Grundgesetz [GG] [Basic Law], art. 72 para. 3 clause 2 (note 230)

³²⁵ Grundgesetz [GG] [Basic Law], art. 72 para. 3 clause 3 “If the Federation has made use of its power to legislate, the *Länder* may enact laws at variance with this legislation with respect to land distribution”

of norms, according to which Federal legislation precedes *Länder* legislation (art. 31 Basic Law³²⁶).³²⁷

Since the *Länder* are also competent for the protection of nature and the conservation of landscape, the Free State of Saxony has its Saxon Nature Conservation Act.³²⁸ Art. 1 Saxon Nature Conservation Act³²⁹ describes the goals of nature protection and landscape conservation, including, in line with art. 26 para. 1 clause 2 and 3 Federal Nature Conservation Act³³⁰, the diversity, characteristic and beauty of landscape, and adding to that the recreational value of nature. Furthermore, art. 1a para. 1 clause 13 Saxon Nature Conservation Act³³¹ details the various aspects of landscapes to be protected. In addition, art. 1c para. 1 Saxon Nature Conservation Act³³² literally repeats art. 5 para. 1 Federal Nature Conservation Act³³³. Finally art.

³²⁶ Grundgesetz [GG] [Basic Law], art. 31 “Federal law shall take precedence over Land law.”

³²⁷ Albrecht & Küchenhoff, pp.132-133 (note 258)

³²⁸ Sächsisches Naturschutzgesetz [SächsNatSchG] [Saxon Nature Conservation Act] 3 July 2007, last amended on 15 December 2010 (Saxon Law and Ordinance Gazette, p.398)

³²⁹ Sächsisches Naturschutzgesetz [SächsNatSchG] [Saxon Nature Conservation Act], art. 1 “Nature and culture are as the foundations of human life as well as on the basis of their own value also in responsibility to the future generations in populated and non-populated areas to be conserved, preserved, developed and, as well as necessary, to be restored, so that 1. the capacity and functionality of the ecosystem, 2. the regeneration and sustainable usability of natural assets, 3. the fauna and flora including their habitats and biotopes as well as the biologic diversity, 4. the diversity, characteristic and beauty as well as the recreational value of nature and landscape be permanently safeguarded.” (personal translation)

³³⁰ Bundesnaturschutzgesetz [BNatSchG] [Federal Nature Conservation Act], art. 26 para. 1 clauses 2 and 3 “Landscape protection areas are areas that have been designated in a legally binding manner and in which special protection of nature and landscape is required for the following reasons: 2. because of the diversity, special characteristics, beauty or special cultural historical significance of their landscapes, or 3. because of their special importance for recreation.” (unofficial translation, Federal Ministry for the Environment, Nature Conservation and Nuclear Safety)

³³¹ Sächsisches Naturschutzgesetz [SächsNatSchG] [Saxon Nature Conservation Act], art. 1a para. 1 clause 13 “The landscape is in its diversity, characteristic and beauty also given its significance as experience and recreational space for humans to be safeguarded. Its characteristic structures and elements are to be preserved or developed. Impairments of the experience and recreational value of the landscape are to be prevented. For the purpose of recreation suitable areas for the recreation in their particularity and location are to be provided. For the recreation in the sense of sentence 4 belong also nature and landscape compatible sporting activities in the wild nature.” (personal translation)

³³² Sächsisches Naturschutzgesetz [SächsNatSchG] [Saxon Nature Conservation Act], art. 1c para. 1 “For measures of the nature protection and the landscape conservation is the particular significance of a nature and landscape compatible agriculture, forestry and fishing for the preservation of the cultural and recreational landscape to be taken into consideration.” (personal translation)

³³³ Bundesnaturschutzgesetz [BNatSchG] [Federal Nature Conservation Act], art. 5 para. 1 (note 313)

19 para. 1 Saxon Nature Conservation Act,³³⁴ which concerns the landscape conservation areas, resembles art. 26 para. 1 Federal Nature Conservation Act³³⁵.

The Saxon Nature Conservation Act explicitly mentions cultural landscapes in two of its articles. First, art. 1a para. 1 clause 14 Saxon Nature Conservation Act³³⁶ specifies that historical cultural landscapes or parts of historical cultural landscapes are to be preserved. Secondly, art. 18 para. 1 clause 2 Saxon Nature Conservation Act³³⁷ refers to cultural landscapes in the frame of biosphere reserves. As Dornbusch (2010) states, the Free State of Saxony has enumerated under art. 2 para. 5 Saxon Monument Protection Act³³⁸ c) as subject of monument conservation referred to: works of garden and landscape planning, historic landscape forms as villages, “heap landscape”, as well as parts of the cultural landscape under f) “standing-stones” and under g) “immovable... archaeological witnesses like rests of settlements and fortifications, grave sites, caves, deserted villages, cult and meeting places and other rests of objects and buildings”. The formulation “historic landscape forms” considerably facilitates the description of the object of protection within the meaning of the concept of “historic cultural landscape”. The formulations of art. 21 para. 1 Saxon Monument Protection Act³³⁹, “monument conservation areas”, orientate themselves

³³⁴ Sächsisches Naturschutzgesetz [SächsNatSchG] [Saxon Nature Conservation Act], art. 19 para. 1 “Areas can be determined as landscape protection areas by ordinance, in which a particular protection of nature and landscape is required 1. for the preservation, development or restoration of the capacity and functionality of the ecosystem or the regeneration and sustainable usability of natural assets, 2. given the diversity, characteristic, or beauty or the particular historico-cultural significance or 3. given their particular significance for the recreation.” (personal translation)

³³⁵ Bundesnaturschutzgesetz [BNatSchG] [Federal Nature Conservation Act], art. 26 (note 280)

³³⁶ Sächsisches Naturschutzgesetz [SächsNatSchG] [Saxon Nature Conservation Act], art. 1a para. 1 clause 14 “The historic cultural landscapes and – landscape parts of particular characteristic, including such of particular significance for the characteristic or beauty of protected or worthy of protection cultural monuments, architectural monuments and archaeological monuments, are to be preserved.” (personal translation)

³³⁷ Sächsisches Naturschutzgesetz [SächsNatSchG] [Saxon Nature Conservation Act], art. 18 para. 1 clause 2 “As biosphere reserves can be determined by ordinance, which as cultural landscape with rich natural feature in essential parts of their areas fulfill the prerequisites of a nature protection area, incidentally mainly a landscape protection area.” (personal translation)

³³⁸ Sächsisches Denkmalschutzgesetz [SächsDSchG] [Saxon Monument Protection Act], art. 2 para. 5 “Cultural monuments for the purpose of this act can be particularly a) buildings, b) settlements or districts, streets or square pictures or views of locations of particular town planning and ethnological significance, c) works of garden and landscape planning, historical landscape forms as village meadows, slopes landscapes, d) works of the production and transport history, e) places and objects of scientific facilities or systems, f) stone monuments, g) immovable and movable archaeological traces such as remains of settlements and fortifications, graves, caves, deserted villages, cult and assembly areas and other remains of objects and buildings, works of the visual arts and handicrafts, i) collections.”

³³⁹ Sächsisches Denkmalschutzgesetz [SächsDSchG] [Saxon Monument Protection Act], art. 21 para. 1 (note 293)

to art. 5 North Rhine-Westphalian Monument Protection Act³⁴⁰, whereas in Saxony a greater reference to cultural landscape is established.³⁴¹

Furthermore, the Regional Planning Act³⁴² provides the protection of cultural landscape and the concept of economic, environmental, social and cultural sustainability. The Regional Planning Act does not only provide the protection of natural or cultural single monuments, but also includes the cultural dimension of a designated area,³⁴³ as art. 2 para. 5 Regional Planning Act³⁴⁴ shows. Moreover, the Regional Planning Act refers to the principle of sustainable development declined under the aspects of economic, environmental, social and cultural sustainability in art. 1 para. 2 Regional Planning Act³⁴⁵ and art. 2 para. 1 clause 1 Regional Planning Act.³⁴⁶

³⁴⁰ Denkmalschutzgesetz Nordrhein-Westfalen [DSchGNW] [North Rhine-Westphalian Monument Protection Act] 11 March 1980, last amended on 5 April 2005 (Law and Ordinance Gazette for the *Land* of North Rhine-Westphalia, p.274), art. 5 “(1) Building sectors which require the permission of the upper office for monuments are placed under protection through the statute of the municipality. With the classification the monument area is subject to regulations of this act. (2) In the statute the area is to designate in which measures are permitted according to § 9. The reasons for which the area is determined as monument area should be specified. In this process plans or presentations based on drawings, photographic or photogrammetric presentations which shall be included for the protective silhouette, the structural coherence of the city scape or site, integrated constructions or individual buildings with the necessary environment (open spaces, open areas, visual references). The plan or the presentation is to be explained to the essential part of the statute. The assessment of the regional environment authority according to § 22 para. 3 is to be included to the statute for information only. (3) The permission may fail only, if a) the statute did not materialise according to the rules, b) the statute contradicts any or other legal provisions of this act or c) the determinations for the fulfilment of the goals of this act are insufficient. (4) If the municipality does not enact any corresponding statute within a reasonable time, the upper monument authority requests to present the statute within three months. After expiry of the period the upper monument authority can place under protection monument areas through administrative regulation. The regulation is to be annulled as soon as a legally binding statute exists.” (personal translation)

³⁴¹ Dornbusch, R. S., 2010. Teil D. Denkmalpflege. In: D. Martin & M. Krautzberger, eds. *Denkmalschutz und Denkmalpflege. 3. Auflage*. München: C.H. Beck., Rn 562-567

³⁴² Raumordnungsgesetz [ROG] [Regional Planning Act] 22 December 2008, last amended on 31 July 2009 (Fed. Law Gazette I, p.2585)

³⁴³ BMVBS & BBR, p.4 (note 220)

³⁴⁴ Raumordnungsgesetz [ROG] [Regional Planning Act], art. 2 para. 5 “Cultural landscapes are to be preserved and developed. Historically characterised and developed cultural landscapes are to be preserved in their typical characteristics and with their cultural and natural monuments. The various landscape types and uses of the sub-areas are to be preserved and developed further with the aims of a harmoniously coexistence, the overcoming of structural problems and for the creation of new economic and cultural concepts. The spatial conditions are to be created so that agriculture and forestry can contribute to protect the natural life resources in rural areas as well as to maintain and shape nature and landscape.” (personal translation)

³⁴⁵ Raumordnungsgesetz [ROG] [Regional Planning Act], art. 1 para. 2 “Vision for the implementation of the task according to para. 1 is a sustainable spatial development which brings in line the social and economic requirements on space with its ecological functions and induces a long-term, balanced regional structure with the equivalent living conditions in the sub-areas.” (personal translation)

³⁴⁶ Raumordnungsgesetz [ROG] [Regional Planning Act], art. 2 para. 1 clause 1 “(2) Principles of spatial development are in particular: 1. In the entire territory of the Federal Republic of Germany and in its sub-areas balanced social, infrastructural, economic, ecological and cultural relations are to be taken into consideration.

Furthermore, the Regional Planning Act also provides the concept of sustainable development in relation to traffic in its art. 2 para. 2 clause 3.³⁴⁷

Despite the reference to landscapes and cultural landscapes in both the Federal Nature Conservation Act and Saxon Nature Conservation Act, neither of them foresees the concept of cultural landscape as the “combined work of nature and man” as the WHC does. However, given that the Dresden Elbe Valley has been protected as a landscape conservation area since August 1996 according to art. 19 and 21 Saxon Nature Conservation Act³⁴⁸ and art. 26 and 28 Federal Nature Conservation Act³⁴⁹, both the Federation and Free State of Saxony had the duty to prevent this cultural landscape from the damage caused to the landscape scenery and recreational use by the construction of the bridge. In addition, in view of the Regional Planning Act, which refers to sustainable development in terms of environmental, economic, social and cultural aspects and also provides the protection of cultural landscape, the four lane bridge project hardly seems in line with this legislation. This context further prompts the question of the legality of the planning approval decision for the *Waldschlößchenbrücke*, since the courts’ decisions did not refer to the protection of the Dresden Elbe Valley by the German legislation since August 1996 as a landscape conservation area, nor did they refer to the concept of sustainability included in the Regional Planning Act. However, according to the hierarchy of norms, it can be argued that both

Thereby the sustainable public service task is to be ensured, sustainable economic growth and innovation are to be supported, development potentials are to be ensured and resources are to be sustainably protected. These tasks are to be implemented equally in agglomerations as in rural areas, in structurally weak areas as in structurally strong areas. Demographic, economic, social as well as other structural changes challenges are to be taken into account, also in the view of the decrease and the increase of population and workplaces as well as in the view of the still continuing consequences of the division of Germany; regional development concepts and prognosis needs of the Land and regional planning are to be integrated. A compensation of spatial and structural imbalance between the regions is to be undertaken. The design possibilities of the use of space are to be kept open on the long-run.” (personal translation)

³⁴⁷ Raumordnungsgesetz [ROG] [Regional Planning Act], art. 2 para. 2 clause 3 “The provision of services and infrastructures of the public service, in particular the accessibility of facilities and offerings of the basic needs of all groups of the population, is to be guaranteed for the ensuring of equality of chances in the sub-areas adequately; this is also valid in sparsely populated regions. The social infrastructure is to be developed in priority in central locations; the accessibility and sustainability criteria of the central location concept are to be organised flexibly to specific regional needs. Spatial prerequisites for the preservation of town centres and local centres as central supply areas are to be created. The protection of critical infrastructure is to be taken into account. The spatial prerequisites for sustainable mobility and an integrated traffic system are to be created. It is to work towards a good and safe accessibility of the sub-areas. Foremost in areas and corridors subject to high traffic pressure the prerequisites for the shifting of traffic to more environmentally compatible modes of transport as rail and shipping are to be improved. Spatial structures are to be designed so that the transport load is reduced and additional traffic avoided.” (personal translation)

³⁴⁸ Sächsisches Naturschutzgesetz [SächsNatSchG] [Saxon Nature Conservation Act], art. 19 and 21 (note 286)

³⁴⁹ Bundesnaturschutzgesetz [BNatSchG] [Federal Nature Conservation Act], art. 26 and 28 (note 280)

the Federal Nature Conservation Act and Regional Planning Act have an equal status since they are federal acts. Therefore, it can be considered that planning is equally as important as landscape conservation.

3.2.4. Perspectives for the transposition of the World Heritage Convention in German law

Hönes (2007) proposes a solution whereby the notion of the protection of monuments could be refined following the law concerning the consideration of the protection of monuments as a generic term in order that it contains the protection of cultural property, including the protection of world heritage.³⁵⁰ In his report, Hönes also includes propositions for the revision of some articles in various legislations in order to include the protection of world heritage: the Civil Code, Penal Code, Regional Planning Act, Building Code, Federal Nature Conservation Act, Federal Forest Act, Federal Waterway Act, Federal Water Act, Federal Highway Act, Federal Soil Protection Act, Environmental Impact Assessment Act, Federal Mining Act, Telecommunications Act and Energy Industry Act.³⁵¹

Furthermore, Hönes (2008) offers two possibilities to solve the problem of the non-transposition of the WHC in German law. Either the Federation could pass an approval law (*Zustimmungsgesetz*)³⁵² in the frame of its competence following art. 59 para. 2 clause 1 Basic Law,³⁵³ or the Federation could pass a law for the consideration of the WHC in German law according to the suggestions of the German National Committee for the protection of historical monuments from 2005.³⁵⁴

³⁵⁰ Hönes, E.-R., 2007. *Vorlage „Entwurf eines zweiten Gesetzes zur Berücksichtigung des Denkmalschutzes im Bundesrecht“* [Presentation “Draft of a second Act for the consideration of the monument protection in Federal law”], Initiative des Deutschen Nationalkomitees für Denkmalschutz für ein Zweites Gesetz zur Berücksichtigung des Denkmalschutzes im Bundesrecht, p.2

³⁵¹ Hönes, pp.4-12 (note 350)

³⁵² Hönes, p.54 (note 212)

³⁵³ Grundgesetz [GG] [Basic Law], art. 59 para. 2 clause 1 (note 211)

³⁵⁴ Hönes, p.54 (note 212)

Concerning the 16 Monument Protection Acts of the *Länder*, eleven do not mention the WHC or cultural heritage.³⁵⁵ However, the Hamburg Monument Protection Act³⁵⁶ mentions cultural heritage in its art. 1 para. 2 Hamburg Monument Protection³⁵⁷, while the Lower Saxon Monument Protection Act³⁵⁸ refers to the WHC in two of its articles. First, art. 2 para. 3 Lower Saxon Monument Protection Act³⁵⁹ cites the WHC in reference to monument protection and monument preservation. Secondly, art. 21 para. 2 Lower Saxon Monument Protection Act³⁶⁰ regulates the authorities for monument protection and specifically the state office for monument protection. In addition, the Rhineland-Palatinate Monument Protection Act³⁶¹ quotes the WHC in its art. 2 para. 3 Rhineland-Palatinate Monument Protection Act³⁶² concerning the obligation for the conservation and management. Furthermore, the Saxony-Anhalt Monument Protection Act³⁶³

³⁵⁵ Baden-Württemberg, Bavaria, Berlin, Brandenburg, Bremen, Hessen, Mecklenburg Western-Pomerania, North-Rhine Westphalia, Thuringia, Saarland, Saxony

³⁵⁶ Denkmalschutzgesetz [DSchG] [Hamburg Monument Protection Act] 3 December 1973, last amended on 27 November 2007 (Hamburg Gazette of Law and Ordinance, p.410)

³⁵⁷ Denkmalschutzgesetz [DSchG] [Hamburg Monument Protection Act], art. 1 para. 2 “The Free and Hanseatic City of Hamburg shall also as owner or otherwise authorised to dispose and as compulsorily authorised support through best practice maintenance measures toward monuments for the value of the cultural heritage in the public and to encourage private initiative.” (personal translation)

³⁵⁸ Niedersächsisches Denkmalschutzgesetz [NDSchG] [Lower Saxon Monument Protection Act] 30 Mai 1978, last amended on 26 May 2011 (Lower Saxon Gazette of Law and Ordinance, p.135)

³⁵⁹ Niedersächsisches Denkmalschutzgesetz [NDSchG] [Lower Saxon Monument Protection Act], art. 2 para. 3 “In public planning procedures and for public construction projects the interests of monument protection and of monument conservation as well as the requirements of the UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage of 16 November 1972 (Fed. Law Gazette 1977 II p.213) are to be taken into account in time for the cultural monuments and the cultural heritage in the sense of the Convention to be preserved and their surroundings shall be appropriately designed, insofar as no other public interests predominate.” (personal translation)

³⁶⁰ Niedersächsisches Denkmalschutzgesetz [NDSchG] [Lower Saxon Monument Protection Act], art. 21 para. 2 “The lower monument protection authorities establish in all measures, which are for the cultural heritage in the sense of the UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage of not only considerable relevance, the consultation with the state office for the preservation of monuments.” (personal translation)

³⁶¹ Denkmalschutzgesetz [DSchG] [Rhineland-Palatinate Monument Protection Act] 23 March 1978, last amended on 26 November 2008 (Gazette of Law and Ordinance for the *Land* Rhineland-Palatinate, p.301)

³⁶² Denkmalschutzgesetz [DSchG] [Rhineland-Palatinate Monument Protection Act], art. 2 para. 3 “The state, the federation, the municipalities and municipality associations and all corporations, institutions and foundations of the public law have in their measures and planning procedures, in particular for the urban land-use planning, to take into consideration the interests of the monument protection and the monument preservation as well as the obligation to preserve the cultural heritage in conformity with the UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage of 16 November 1972. For measures and planning procedures, which touch the interests of the monument protection or of the monument preservation, the heritage management office is to be involved from the beginning.” (personal translation)

³⁶³ Denkmalschutzgesetz des Landes Sachsen-Anhalt [DSchG] [Saxony-Anhalt Monument Protection Act] 21 October 1991, last amended on 20 December 2005 (Gazette of Law and Ordinance for the *Land* Saxony-Anhalt, p.769, 801)

refers to the WHC and the World Heritage List in its art. 2 para. 2 clause 2 Saxony-Anhalt Monument Protection Act³⁶⁴. Finally, the Schleswig-Holstein Monument Protection Act³⁶⁵ consecrates three articles to the WHC as well as WHS. First, art. 1 para. 4 Schleswig-Holstein Monument Protection Act³⁶⁶ refers to the World Heritage List. Secondly, art. 19 para. 2 Schleswig-Holstein Monument Protection Act³⁶⁷ mentions the buffer zones of WHS. Thirdly, art. 21 Schleswig-Holstein Monument Protection Act³⁶⁸ is entirely dedicated to WHS.

Therefore, the question of the transposition of the WHC in German law remains open, despite some of the *Länder* mentioning it in their Monument Protection Acts.

³⁶⁴ Denkmalschutzgesetz des Landes Sachsen-Anhalt [DSchG] [Saxony-Anhalt Monument Protection Act], art. 2 para. 2 clause 2 “Monument sectors as majorities of structural works. Monument sectors can be historic cultural landscapes which are listed in the UNESCO World Heritage List in accordance with art. 11 para.1 clause 1 of the Convention Concerning the Protection of the World Cultural and Natural Heritage of 23 November 1972 (publication of 2 February 1977, Fed. Law Gazette II p.213), city ground plans, cityscapes and scenes views as well as – silhouettes, city districts and – quarters, settlements, farmstead groups, streets, structural complete constructions and individual buildings, including their surroundings if the building stands in a historical, functional or aesthetical relationship. To this belong also artisanal and industrial production areas.” (personal translation)

³⁶⁵ Denkmalschutzgesetz [DSchG] [Schleswig-Holstein Monument Protection Act] 21 November 1996, last amended on 8 September 2010 (Gazette of Law and Ordinance for Schleswig-Holstein, p.575)

³⁶⁶ Denkmalschutzgesetz [DSchG] [Schleswig-Holstein Monument Protection Act], art. 1 para. 4 “World Heritage Sites in the sense of this act are the listed sites in the “World Heritage List” in accordance with Article 11 of the Convention Concerning the Protection of the World Cultural and Natural Heritage of 23 November 1972, Fed. Law Gazette II 1977, p.213, insofar as they are not listed there as natural heritage. Buffer zones are defined areas for a World Heritage Site’s protection of its immediate environment, important views and further determinant characteristics.” (personal translation)

³⁶⁷ Denkmalschutzgesetz [DSchG] [Schleswig-Holstein Monument Protection Act], art. 19 para. 2 “World Heritage Sites are shown as monument sectors according to para.1. In the regulation beside the protected object are to be included buffer zones for the protection of its immediate environment, important views and further determinant characteristics.” (personal translation)

³⁶⁸ Denkmalschutzgesetz [DSchG] [Schleswig-Holstein Monument Protection Act], art. 21 “(1) The bearers of the World Heritage Sites have to establish and to update integrated planning concepts and plans of action in form of management plans. (2) The management plans contain the goals and measures, by which the protection, the preservation and utilisation of the World Heritage Sites shall be achieved. They designate 1. the protection measures through acts, other regulations and contracts, 2. the determination of limits for effective protection of World Heritage Sites, 3. the limits and assessments of buffer zones, 4. the organisation of World Heritage Sites and their integration in the administrative system as well as 5. the concept for the sustainable utilisation. (3) Management plans are transferred from the highest monument protection authorities to the World Heritage Centre. (4) Shall the bearer of a World Heritage Site not comply with its obligations to prepare or to update the management plan also following one of the superior monument protection authorities imposed reasonable period of time, the management plan is prepared or updated alternatively by the superior monument protection authorities. (5) In public planning procedures and by public building measures are the interests of the monument protection and the monument preservation as well as the requirements of the Convention Concerning the Protection of the World Cultural and Natural Heritage of 23 November 1972, Fed. Law Gazette II 1977, p.213, in time for their possible application as the cultural monuments and the cultural heritage in the sense of the Convention are preserved and their buffer zone are appropriately designed, insofar as no other public interests predominate.” (personal translation)

3.3. Summary

To conclude, the case of the *Waldschlößchenbrücke* and the Dresden Elbe Valley have prompted a constitutional question within the FRG: the bindingness of the WHC in the FRG.

Consequently, a legal battle took place opposing the Capital City of Dresden and the Dresden RC concerning the construction of the *Waldschlößchenbrücke* and the preservation of the World Heritage status for the Dresden Elbe Valley. The Dresden Administrative Court argued that both the Capital City of Dresden and the Dresden RC were bound by the WHC. However, the Saxon Higher Administrative Court, the Constitutional Court of the Free State of Saxony and the Federal Constitutional Court adopted the opposite stance while ordering the construction of the *Waldschlößchenbrücke*. In addition, another legal battle also took place with the same starting point: the planning approval decision, albeit in relation to environmental concerns. However, the legal procedure also concluded with the decision to build the bridge.

In this context, it was deemed necessary to analyse the question of the non-transposition of the WHC or its concepts. Looking back at the ratification process of the WHC by the FRG and going through the Basic Law, Lindau Agreement, Unification Treaty, principle of Federal loyalty, Federal Clause of the WHC contributed to present that the FRG is not bound by the WHC due to its non-transposition in German law. Subsequently, with the separation of the legislative competences between the Federation and its *Länder* regarding culture and nature, it was argued that not only was the Free State of Saxony responsible for the protection of the Dresden Elbe Valley, but mostly the Federation. Reviewing the legal protection of cultural landscapes in German law proved that these areas are effectively protected, and that in this context, the Dresden Elbe Valley had been protected as a landscape conservation area since August 1996. Finally, some perspectives for the transposition of the WHC in German law were presented, including a comparison of the various situations in the 16 *Länder* of the FRG.

CHAPTER 4

LEGAL BACKGROUND OF THE CONFLICT BETWEEN UNESCO AND THE STATE PARTY GERMANY

This chapter addresses the legal background of the conflict between the two opposed parties – UNESCO and the State Party Germany to the WHC – concerning the construction of the *Waldschlößchenbrücke* in the core of the Dresden Elbe Valley WHS.

The objective of this chapter is to analyse the conflict between UNESCO and the State Party Germany to the WHC from a legal perspective. Towards this aim, the chapter is divided into three parts. The first two sections focus on the concept of cultural landscapes in the context of the WHC and the legally binding effects for States Parties to the WHC, respectively. The final section of this chapter analyses the step-by-step decisions that led to the delisting of the Dresden Elbe Valley from the World Heritage List.

The first section of this chapter sheds light upon the concept of cultural landscapes in the context of the WHC and its definition in the OG³⁶⁹ since the Dresden Elbe Valley was inscribed as a continuing cultural landscape on the World Heritage List. In this section, the significance for cultural landscapes of the notions of integrity and OUV as well as the allowance for change comprised in cultural landscapes are put into perspective. The case of the Dresden Elbe Valley is confronted by these notions, since the Dresden Elbe Valley was delisted from the World Heritage List due to the loss of its integrity and OUV according to the World Heritage Committee. Accordingly, this section focuses on the legality of the concept of cultural landscapes in the context of the WHC.

³⁶⁹ Since the cultural landscapes are not defined as such in the WHC but only in the OG, the legal nature of the OG is discussed in the section 4.2.3 of this thesis

The second section of this chapter analyses the legally binding effects for States Parties to the WHC since the States Parties are legally bound to the WHC after having ratified it. The two first parts of this section analyse the legal effects for a State Party when a site located on its territory is inscribed on the World Heritage List, as well as its subsequent responsibilities. Then, the two following parts of this section address the question of the legal nature of the OG and the decisions of the World Heritage Committee as well as the need, especially for Federal States, to harmonise the different levels of decisions concerning world heritage *intra* States Parties to the WHC. As in the first section of this chapter, the case of the Dresden Elbe Valley is discussed in each of these parts. Thus, this section focuses on the legality of the WHC for its States Parties.

The third section of this chapter presents a chronological analysis of the decision-making process from the inscription of the Dresden Elbe Valley on the World Heritage List in 2004 to its delisting in 2009. The discussion and decisions taken by the World Heritage Committee at its 28th (Suzhou, 2004), 30th (Vilnius, 2006), 31st (Christchurch, 2007), 32nd (Quebec City, 2008) and 33rd (Seville, 2009) sessions are analysed. Thus, this section focuses on the legality of the delisting procedure and the dispute settlement mobilised.

4.1. The concept of cultural landscapes in the context of the World Heritage Convention

When used in the context of world heritage, the term “cultural landscape” refers to a category of site adopted in 1992. While the WHC separately identifies cultural from natural heritage without mentioning cultural landscapes as such³⁷⁰, the OG define world heritage as cultural and natural heritage, mixed cultural and natural heritage, and cultural landscapes.³⁷¹ The term “cultural landscapes” first entered the OG in 1994.³⁷²

³⁷⁰ World Heritage Convention [WHC], art. 1 (note 289) concerning sites mentions “the combined work of nature and of man” which is used to refer to cultural landscapes

³⁷¹ OG (2013), paras. 45-47 (note 15)

³⁷² UNESCO, 1994. *Operational Guidelines for the Implementation of the World Heritage Convention*. Paris: UNESCO World Heritage Centre, paras. 35-42

However, before entering into discussion concerning the meaning of cultural landscapes in the context of the WHC, it is deemed necessary to question the term “cultural landscape” and its historical development, as well as the attached dimensions of culture and nature, tangible and intangible.

The background of cultural landscapes can be found in geography and ecomuseums.³⁷³ Within the discipline of geography, it is necessary to differentiate the French and German schools, even though their respective representatives wrote about landscapes at the end of the 19th century. While Vidal de la Blache referred to landscapes as *pays*,³⁷⁴ von Richthofen wrote about landscapes as *Landschaften*. Vidal de la Blache (1899) developed a holistic definition of landscapes in which the social phenomena and social life, i.e. *genre de vie*³⁷⁵ are interconnected with the natural environment in which people evolve. Von Richthofen (1883) promoted the study of chorology³⁷⁶ or regional studies, starting from the physical landscape and extended to human interaction “which, when the human as well as the natural aspects were included, were by definition cultural landscapes”.³⁷⁷ Therefore, the term “landscapes” integrates itself in culture as soon as humans and their interaction with the environment are taken into account. Other geographers studied landscapes with various approaches, such as Ratzel, who was interested in explaining the difference of human reactions to landscapes due to cultural differences. Hettner developed the concept of chorology further linking the natural and cultural aspects of an area to understand “the character of regions and places through comprehension of the existence together and interrelations among the different realms of reality and their varied manifestations”.³⁷⁸ Sauer believed that cultural landscape “is fashioned from a natural landscape by a cultural group. Culture is the agent, the natural area is the medium, and cultural landscape is the result”.³⁷⁹

While the aforementioned geographers developed their views on landscapes during the late-18th and early-19th centuries, the ecomuseums are a more recent idea, having appeared in 1971 from

³⁷³ Aplin, G., 2007. World Heritage Cultural Landscapes. *International Journal of Heritage Studies*, 13(6), p.427

³⁷⁴ Vidal de la Blache, P., 1899. Leçon d’ouverture du cours de géographie. *Annales de Géographie*, 8(38), p.99

³⁷⁵ Vidal de la Blache, P., 1902. Les conditions géographiques des faits sociaux. *Annales de Géographie*, 11(55), p.14

³⁷⁶ Von Richthofen, F., 1883. *Aufgaben und Methoden der heutigen Geographie*. Veit & comp., p.39

³⁷⁷ Aplin, p.428 (note 373)

³⁷⁸ Aplin, p.428 (note 373)

³⁷⁹ Sauer, C. O., 1963. The Morphology of Landscape. In: J. Leighly, ed. *Land and Life: A Selection from the Writings of Carl Otwin Sauer*. Berkeley: University of California Press, p.343

the French *écomusée*. According to Aplin, this concept became popular in certain museology circles in the late-20th century.³⁸⁰ Rivière defines ecomuseum as follows:

“... it seeks an explanation of the territory ... and of the populations ... It is an expression of man [sic] and nature. It situates man in his natural environment. It portrays nature in its wilderness, but also as adapted by traditional and industrial society in their own image. It is an expression of time, when the explanations it offers reach back before the appearance of man, ascend the course of the prehistoric and historical times in which he lived and arrive finally at man's present ... It is a laboratory, insofar as it contributes to the study of the past and present of the population concerned and of its total environment ... ”.³⁸¹

As Aplin stresses, the World Heritage Cultural Landscapes could be interpreted as ecomuseums, given that they also demonstrate the existence of human-environment interactions.³⁸²

Both conceptions of landscapes in relation to geography and ecomuseums show that culture can also be found where nature is, making both aspects inseparable and thus cultural landscapes. Nevertheless, natural scientists and social scientists differ in perspective, since the former “consider culture as a heritage of nature” while the latter “believe that nature is defined socio-culturally”.³⁸³ In this context, do landscapes have intrinsic value (cultural and/or natural)? Alternatively, do only humans attach values to these places through an aesthetic appreciation? Again, are these values subjective, attributed by human thought and value systems, or objective, which means that the value is endemic?³⁸⁴

A considerable aspect of cultural landscapes is that they have a “spirit of place”. O'Donnell³⁸⁵ refers to spirit of place through the combination of tangible and intangible heritage, in which values are embodied by the interactions between people and place. The spirit of place is embedded in the tangible elements of the cultural landscape, whereas the intangible aspects are expressed through the use of the place by people.

³⁸⁰ Aplin, p.429 (note 373)

³⁸¹ Davis P., 2005. Places, “Cultural Touchstones” and the Ecomuseum. In: G. Corsane, ed. *Heritage, Museums and Galleries: An Introductory Reader*. Abingdon: Routledge, p.406

³⁸² Aplin, p.429 (note 373)

³⁸³ Olwig K. R., 2005. Introduction: The Nature of Cultural Heritage and the Culture of Natural Heritage-Northern Perspectives on a Contested Patrimony. *International Journal of Heritage Studies*, 11(1), p.3

³⁸⁴ Taylor, K. & Lennon, J. L., 2011. Cultural landscapes: a bridge between culture and nature? *International Journal of Heritage Studies*, 17(6), p.544

³⁸⁵ O'Donnell, P., 2008. *Urban Cultural Landscapes & the Spirit of Place*. Québec: ICOMOS, p.1

After presenting the origins of the concept of cultural landscapes and its attached dimensions, the concept of cultural landscapes as developed in the context of the WHC is discussed in this section in relation to the meaning of OUV and integrity, when these are applied to this category of sites and in the case of the Dresden Elbe Valley. The allowance for change comprised in the concept of cultural landscapes is subsequently confronted to the case of the Dresden Elbe Valley.

4.1.1. Adoption of the concept of cultural landscapes by the World Heritage Committee and its inclusion in the Operational Guidelines

Despite cultural landscapes not being mentioned as such in art. 1 or 2 WHC³⁸⁶, they are developed from the notion of “combined work of nature and of man” contained in art. 1 WHC³⁸⁷. However, a detailed description of the categories of cultural landscapes can be found in the OG. Therefore, an historical overview of the adoption of the concept of cultural landscapes by the World Heritage Committee is elaborated upon in this section.

As early as 1962 – ten years before the adoption of the WHC – a Recommendation was adopted concerning the Safeguarding of Beauty and Character of Landscapes and Sites.³⁸⁸ In this recommendation, landscapes were seen as natural or man-made landscapes, although there was no mention of cultural landscapes. Man-made landscapes referred to rural and urban landscapes.³⁸⁹

³⁸⁶ World Heritage Convention [WHC], art. 1 (note 289) and art. 2 “For the purposes of this Convention, the following shall be considered as “natural heritage”: natural features consisting of physical and biological formations or groups of such formations, which are of outstanding universal value from the aesthetic or scientific point of view; geological and physiographical formations and precisely delineated areas which constitute the habitat of threatened species of animals and plants of outstanding universal value from the point of view of science or conservation; natural sites or precisely delineated natural areas of outstanding universal value from the point of view of science, conservation or natural beauty.”

³⁸⁷ World Heritage Convention [WHC], art. 1 (note 289)

³⁸⁸ UNESCO, 1963. *Records of the General Conference, Resolutions, Twelfth Session, Paris, 9 November - 12 December 1962*. Paris: UNESCO, pp.139-142

³⁸⁹ UNESCO Recommendation concerning the Safeguarding of Beauty and Character of Landscapes and Sites, “For the purpose of this recommendation, the safeguarding of the beauty and character of landscapes and sites is taken to mean the preservation and, where possible, the restoration of the aspect of natural, rural and urban landscapes and sites, whether natural or man-made, which have a cultural or aesthetic interest or form typical natural surroundings.”, p.139 (note 388)

In 1984, during the 8th session of the World Heritage Committee (Buenos Aires, Argentina), mixed cultural/natural properties and rural landscapes were discussed with reference to the then criterion (iii) concerning natural sites as “exceptional combinations of natural and cultural elements”³⁹⁰. Some specific problems related to these sites were recognised, referring more specifically to the identification, evolution and integrity of landscapes.³⁹¹ The need to equally consider cultural and natural heritage was also stressed in order to avoid a strict separation³⁹² between cultural and natural sites. Following this discussion, the World Heritage Committee asked the International Union for Conservation of Nature (henceforth IUCN), the ICOMOS and the International Federation of Landscape Architects (henceforth IFLA) to prepare guidelines to identify and nominate “mixed cultural/natural rural properties or landscapes”³⁹³ that the World Heritage Committee would discuss at its next session the following year.

The results of this task force showed that while looking at art. 1 WHC³⁹⁴ defining cultural heritage, two references were made to natural attributes.³⁹⁵ On the contrary, it was declared that art. 2 WHC³⁹⁶ defining natural heritage does not leave space for cultural elements. The task force proposed that when a site is nominated for cultural and natural aspects, the respective Advisory Body³⁹⁷ should consult the other rather than conducting the evaluation strictly separately.³⁹⁸

³⁹⁰ UNESCO, 1984. *Convention Concerning the Protection of the World Cultural and Natural Heritage, World Heritage Committee Eighth Session, Buenos Aires, Argentina, 29 October - 2 November 1984: SC/84/CONF.004/9*. Paris: UNESCO World Heritage Centre, p.7

³⁹¹ SC/84/CONF.004/9, (1) “the identification of exceptionally harmonious, beautiful, man-made landscapes”; (2) “the evolution of such living landscapes”; and (3) “the integrity of such landscapes which are seldom protected by national legislation”, p.7 (note 390)

³⁹² SC/84/CONF.004/9, “polarization towards either “culture” or “nature” although there had perhaps been such a tendency in the past as States Parties had initially nominated the properties which clearly met either the cultural or natural criteria”, p.8 (note 390)

³⁹³ SC/84/CONF.004/9, p.7 (note 390)

³⁹⁴ World Heritage Convention [WHC], art. 1 (note 289)

³⁹⁵ UNESCO, 1985. *Convention Concerning the Protection of the World Cultural and Natural Heritage, World Heritage Committee Ninth Session, Paris, France, 2 - 6 December 1985: SC/85/CONF.008/3*. Paris: UNESCO World Heritage Centre, (1) “groups of separate or connected buildings which, because of [...] their place in the landscape, are of outstanding universal value” and (2) “[...] the combined works of nature and of man [...] which are of outstanding universal value [...]”, p.3

³⁹⁶ World Heritage Convention [WHC], art. 2 (note 386)

³⁹⁷ The Advisory Bodies are defined in the World Heritage Convention [WHC], art. 8 para. 3 “A representative of the International Centre for the Study of the Preservation and Restoration of Cultural Property (Rome Centre), a representative of the International Council of Monuments and Sites (ICOMOS) and a representative of the International Union for Conservation of Nature and Natural Resources (IUCN), to whom may be added, at the request of States Parties to the Convention meeting in general assembly during the ordinary sessions of the General Conference of the United Nations Educational, Scientific and Cultural Organization, representatives of other

Furthermore, the task force highlighted the unbalance between art. 1 and 2 WHC³⁹⁹ and the criteria for the assessment of cultural and natural heritage in the OG. Indeed, while art. 1 WHC⁴⁰⁰ made two references to natural aspects, the criteria for assessing cultural heritage were strictly cultural. On the other hand, it was demonstrated that even though art. 2 WHC⁴⁰¹ did not refer to cultural aspects, criterion (iii) for the assessment of natural heritage explicitly referred to cultural elements.⁴⁰² Thus, the task force recommended modifying the OG, not by adding rural landscapes as a new category of site but rather by modifying some criteria in order to consider the cultural and natural aspects together rather than separating them. It also recommended that rural landscapes should not be referred to as mixed properties, since the WHC does not mention mixed properties. It was subsequently proposed that rural landscapes are evaluated jointly by ICOMOS and IUCN with the consultation of IFLA.⁴⁰³

The results of the task force were presented at the 9th session of the World Heritage Committee in 1985 (Paris, France). As a result of the discussion, the World Heritage Committee decided that it was necessary to examine the implications of these proposals in greater depth. To do so, a Recommendation of the Bureau should be made to the World Heritage Committee, with the proposals tested on new nominations fitting into the presented categories.⁴⁰⁴

Such an opportunity arose in 1987 at the 11th session of the World Heritage Committee (Paris, France) with regard to the nomination of the Lake District National Park in the United Kingdom. However, the site was not inscribed but deferred since the World Heritage Committee decided to first clarify its position regarding cultural landscapes before taking a decision concerning this

intergovernmental or non-governmental organizations, with similar objectives, may attend the meetings of the Committee in an advisory capacity.”

³⁹⁸ SC/85/CONF.008/3, p.3 (note 395)

³⁹⁹ World Heritage Convention [WHC], art. 1 (note 289) and art. 2 (note 386)

⁴⁰⁰ World Heritage Convention [WHC], art. 1 (note 289)

⁴⁰¹ World Heritage Convention [WHC], art. 2 (note 386)

⁴⁰² UNESCO, 1984. *Operational Guidelines for the Implementation of the World Heritage Convention*. Paris: World Heritage Centre, para. 24 “... areas of exceptional natural beauty or exceptional combinations of natural and cultural elements”

⁴⁰³ SC-85/CONF.008/3, p.6 (note 395)

⁴⁰⁴ UNESCO, 1985. *Convention Concerning the Protection of the World Cultural and Natural Heritage, World Heritage Committee Ninth Session, Paris, France, 2 - 6 December 1985: SC/85/CONF.008/9*. Paris: UNESCO World Heritage Centre, p.6

nomination.⁴⁰⁵ This nominated site was categorised as natural heritage since it appears with the other deferred nominations in this category. Nevertheless, cultural criteria were identified by ICOMOS for the assessment of the OUV of this site. Therefore, the issue of cultural landscapes was considered with the nomination of this site, which was seen as a potential first candidate for inscription on the World Heritage List as a cultural landscape.⁴⁰⁶

During the 14th session of the World Heritage Committee (Banff, Alberta, Canada) in 1990, the nomination of the Lake District was discussed again by the World Heritage Committee following the request of the State Party United Kingdom to the WHC.⁴⁰⁷ However, this nomination, this time considered as a cultural property, was again deferred.⁴⁰⁸ The World Heritage Committee argued that it could not take a decision concerning this type of property owing to the lack of clear criteria.⁴⁰⁹ Therefore, in order for the World Heritage Committee to examine the nomination of this property, the Secretariat was asked to prepare such criteria in a proposal to be submitted to the Bureau at its fifteenth session.⁴¹⁰

During the 15th session of the World Heritage Committee (Carthage, Tunisia) in 1991, the Secretariat's proposition was presented and provoked debate. A new draft criterion for cultural heritage related to cultural landscapes was presented for inclusion in the OG.⁴¹¹ However, when the World Heritage Committee asked the opinion of the Advisory Bodies about this draft, the representative of ICOMOS emitted some reservations.⁴¹² The representative of IUCN warned that

⁴⁰⁵ UNESCO, 1987. *Convention Concerning the Protection of the World Cultural and Natural Heritage, World Heritage Committee Eleventh Session, Paris, France, 7 - 11 December 1987: SC-87/CONF.005/9*. Paris: UNESCO World Heritage Centre, p.10

⁴⁰⁶ Aplin, p.431 (note 373)

⁴⁰⁷ UNESCO, 1990. *Convention Concerning the Protection of the World Cultural and Natural Heritage, World Heritage Committee Fourteenth Session, Banff, Alberta, Canada, 7 - 12 December 1990: CLT-90/CONF.004/13*. Paris: UNESCO World Heritage Centre, p.4

⁴⁰⁸ Interestingly, this site is not yet inscribed on the World Heritage List but figures on the Tentative List of the United Kingdom named "England's Lake District" proposed as a cultural landscape

⁴⁰⁹ CLT-90/CONF.004/13, p.8 (note 407)

⁴¹⁰ CLT-90/CONF.004/13, p.8 (note 407)

⁴¹¹ UNESCO, 1991. *Convention Concerning the Protection of the World Cultural and Natural Heritage, World Heritage Committee Fifteenth Session, Carthage, Tunisia, 9 - 13 December 1991: SC-91/CONF.002/11*. Paris: UNESCO World Heritage Centre, Annex, p.6

⁴¹² UNESCO, 1991. *Convention Concerning the Protection of the World Cultural and Natural Heritage, World Heritage Committee Fifteenth Session, Carthage, Tunisia, 9 - 13 December 1991: SC-91/CONF.002/15*. Paris: UNESCO World Heritage Centre, "ICOMOS was not completely satisfied with the new version proposed by the UNESCO Secretariat. They considered that first of all a definition of this concept, as well as a philosophy of conservation specific to such a type of site, should be elaborated.", p.25

natural sites would be affected by the inclusion of such a criterion and the imbalance between cultural and natural sites on the World Heritage List would increase.⁴¹³ Moreover, the members of the World Heritage Committee were also divided regarding this criterion and decided that the finalisation of the definition of the criteria specific to cultural landscapes should be continued by the Secretariat, more specifically the Division of Ecological Sciences and Physical Heritage Division, in cooperation with ICOMOS, IUCN and IFLA.⁴¹⁴

Therefore, an expert meeting on cultural landscapes was organised at La Petite Pierre (France) in October 1992, with the objective of studying the criteria related to cultural landscapes for their inscription on the World Heritage List in order that they could be submitted in a recommendation to the World Heritage Committee at its 16th session.⁴¹⁵ The report of this expert meeting suggested that “only slight changes”⁴¹⁶ were required to the six cultural criteria for the cultural landscapes to be integrated in the World Heritage List. In addition, recommendations were included for the inclusion of paragraphs relating to cultural landscapes in the OG.⁴¹⁷

At its 16th session (Santa Fe, United States of America), the World Heritage Committee adopted the revision of the six cultural criteria accompanied with recommendations.⁴¹⁸

Cultural landscapes⁴¹⁹ have thus been included in the OG since 1994 as three categories of sites:

⁴¹³ SC-91/CONF.002/15, p.25-26 (note 412)

⁴¹⁴ SC-91/CONF.002/15, p.26 (note 412)

⁴¹⁵ UNESCO, 1992. *Report of the Expert Group on Cultural Landscapes, La Petite Pierre (France) 24-26 October 1992*. [Online] Available at: <http://whc.unesco.org/archive/pierre92.htm> [Accessed 16 April 2012]

⁴¹⁶ UNESCO (note 415)

⁴¹⁷ UNESCO (note 415)

⁴¹⁸ UNESCO, 1992. *Convention Concerning the Protection of the World Cultural and Natural Heritage, World Heritage Committee Sixteenth Session, 7 - 14 December 1992, Santa Fe, United States of America: WHC-92/CONF.002/12*. Paris: UNESCO World Heritage Centre, “(a) the modified criteria will be applied in identifying and evaluating cultural landscapes for the World Heritage List; (b) the German proposal for amendments to paragraph 24 (b) (ii) and the new paragraph 37 will be incorporated in the OG; (c) in view of the relationship of many cultural landscapes to the maintenance of ecosystem processes and biological diversity, the importance of interdisciplinary review of proposals for inscribing such sites needs to be kept in mind. In this regard, IUCN has offered to assist ICOMOS in landscape evaluations; (d) it is essential to ensure that cultural landscapes nominated for the World Heritage List meet the highest standards of universal significance and integrity that characterise sites inscribed previously under natural and cultural criteria; (e) the States Parties should be informed of the new criteria and be asked to submit Tentative Lists of cultural landscapes in accordance with paragraph 7 of the OG; (f) the Centre is requested to convene a group of experts on the tentative lists and related issues (illustrations, examples and specific revisions requested by these criteria), and report back to the seventeenth session of the Bureau”, p.55

⁴¹⁹ As of May 2013 there are 81 cultural landscapes inscribed on the World Heritage List, see UNESCO, 2013. *Cultural Landscape*. [Online] Available at: <http://whc.unesco.org/en/culturallandscape/#2> [Accessed 16 May 2013]

“i) The most easily identifiable is the clearly defined **landscape designed and created intentionally by man**⁴²⁰. This embraces garden and parkland landscapes constructed for aesthetic reasons which are often (but not always) associated with religious or other monumental buildings and ensembles.

ii) The second category is the **organically evolved landscape**. This results from an initial social, economic, administrative, and/or religious imperative and has developed its present form by association with and in response to its natural environment. Such landscapes reflect that process of evolution in their form and component features. They fall into two sub-categories:

- a **relict (or fossil) landscape**⁴²¹ is one in which an evolutionary process came to an end at some time in the past, either abruptly or over a period. Its significant distinguishing features are, however, still visible in material form.

- a **continuing landscape**⁴²² is one which retains an active social role in contemporary society closely associated with the traditional way of life, and in which the evolutionary process is still in progress. At the same time it exhibits significant material evidence of its evolution over time.

iii) The final category is the **associative cultural landscape**⁴²³. The inclusion of such landscapes on the World Heritage List is justifiable by virtue of the powerful religious, artistic or cultural associations of the natural element rather than material cultural evidence, which may be insignificant or even absent.”⁴²⁴

The Dresden Elbe Valley was inscribed on the World Heritage List as a continuing landscape, and thus under the second sub-category of the organically evolved landscapes, which represent the second of the three categories of cultural landscapes.

4.1.2. The notion of integrity related to cultural landscapes

During its 20th session (Mérida, Mexico) in 1996, the World Heritage Committee decided that the conditions of integrity should be applied to all sites.⁴²⁵ Nevertheless, the notion of integrity,

⁴²⁰ For example Dessau-Wörlitz (FRG) and Aranjuez (Spain)

⁴²¹ For example the Blaenavon Industrial Landscape (United Kingdom) and the Cilento and Vallo di Diano National Park with the Archeological Sites of Paestum and Velia, and the Certosa di Padula (Italy)

⁴²² For example the Middle Upper Rhine Valley (FRG) and the Viñales Valley (Cuba)

⁴²³ For example the Uluru Kata Tjuta (Australia) and Tongariro National Park (New Zealand)

⁴²⁴ OG (1994) (personal emphasis) (note 372)

⁴²⁵ UNESCO, 1996. *Convention Concerning the Protection of the World Cultural and Natural Heritage, World Heritage Committee Twentieth Session, Merida, Mexico, 2 - 7 December 1996: WHC-96/CONF.201/21*. Paris: UNESCO World Heritage Centre, Decision 20.COM/IX.13, p.76. The conditions of integrity apply to natural heritage since the first version of the OG in 1977

which is not mentioned in the WHC, first appeared next to authenticity in the OG in 2005, as a condition⁴²⁶ to be met for both cultural and natural sites to be inscribed on the World Heritage List, apart from the OUV. Integrity⁴²⁷ is subsequently defined in the OG (2005) as “a measure of the wholeness and intactness of the natural and/or cultural heritage and its attributes”.⁴²⁸ The definition goes further as certain requirements need to be met.⁴²⁹ In this context, what does integrity mean for the category of sites represented by cultural landscapes and what is the relation between integrity and authenticity?

Fowler indicates that integrity usually refers to integrity as physical and/or contextual and/or environmental, and according to him, issues of authenticity and integrity are regularly confused.⁴³⁰ As illustrated by Fowler, “[u]nsympathetic development around a site, or within a landscape, injurious to a site’s intrinsic qualities would, for example, be considered, in World Heritage terms, to have diminished its authenticity”.⁴³¹ Fowler also notes that concerning the conditions of integrity and authenticity for cultural landscape, a shift could occur “from consideration of the integrity of nature itself and of the authenticity of human influence on a landscape to the integrity of the relationship between nature and human present in the same landscape”.⁴³²

Fowler relates integrity to “wholeness, completeness, unimpaired or uncorrupted condition, continuation of traditional uses and social fabric”.⁴³³ In addition, according to him, “[i]ntegrity is the extent to which the layered historic evidence, meaning and relationships between elements

⁴²⁶ UNESCO, 2005. *Operational Guidelines for the Implementation of the World Heritage Convention*. Paris: UNESCO World Heritage Centre, para. 78 “To be deemed of outstanding universal value, a property must also meet the conditions of integrity and/or authenticity and must have an adequate protection and management system to ensure its safeguarding”

⁴²⁷ Integrity is the object of paras. 87-95 of the OG (2005) (note 426) There is no modification in the last version of the OG dating from 2013 which is thus identical to their 2005 version concerning integrity

⁴²⁸ OG (2005), para. 88 “Examining the conditions of integrity, therefore requires assessing the extent to which the property: a) includes all elements necessary to express its outstanding universal value; b) is of adequate size to ensure the complete representation of the features and processes which convey the property’s significance; c) suffers from adverse effects of development and/or neglect” (note 426)

⁴²⁹ OG (2005), para. 88 (note 426)

⁴³⁰ Fowler, P. J., 2003. *World Heritage Cultural Landscapes 1992-2002*. Paris: UNESCO World Heritage Centre, p.16

⁴³¹ Fowler, p.16 (note 430)

⁴³² Fowler, p.20 (note 430)

⁴³³ Fowler, p.20 (note 430)

remain intact and can be interpreted in the landscape”.⁴³⁴ With regards to continuing landscapes, as was the case of the Dresden Elbe Valley, Fowler states that they “reflect a process of evolution in form and features which can be ‘read’ like documents, but their condition of historical integrity can also be defined by the continuity of traditional functions, and the relationship of parts with the whole landscape”.⁴³⁵ In this context, it can be argued that the traditional function of recreational area of the Elbe River meadows might be disturbed by the construction of the *Waldschlößchenbrücke*, thus threatening the integrity of the cultural landscape.

Additionally, in measuring urban landscape integrity, O’Donnell refers to “the degree to which the historical interactions of humanity and nature that formed the cultural landscape remain present and observable today”.⁴³⁶ While mentioning para. 89 OG⁴³⁷ (2005) concerning the integrity of sites, Aplin develops four elements that should be taken into account and maintained.⁴³⁸

In the case of the Dresden Elbe Valley, there was no statement of integrity in the nomination file, given that the condition of integrity was extended to all types of sites in the revision of the OG dating from 2005 and the nomination file was sent to the World Heritage Centre in January 2003. However, the Dresden Elbe Valley was transferred to the List of World Heritage in Danger in 2006 because the World Heritage Committee argued that the construction of the *Waldschlößchenbrücke* would destroy the integrity of the cultural landscape. This decision was taken based on the results of an independent Visual Impact Study (henceforth VIS) conducted by the Institute of Urban Design and Regional Planning of the RWTH Aachen University.

The three main conclusions of this VIS are reported below as the basis for further discussion on the meaning of integrity for the Dresden Elbe Valley. First, the VIS concluded that the

⁴³⁴ Fowler, p.20 (note 430)

⁴³⁵ Fowler, p.20 (note 430)

⁴³⁶ O’Donnell, pp.3-4 (note 385)

⁴³⁷ OG (2005), para. 89 “For properties nominated under criteria (i) to (vi), the physical fabric of the property and/or its significant features should be in good condition, and the impact of deterioration processes controlled. A significant proportion of the elements necessary to convey the totality of the value conveyed by the property should be included. Relationships and dynamic functions present in cultural landscapes, historic towns or other living properties essential to their distinctive character should also be maintained.” (note 426)

⁴³⁸ Aplin, (1) “the physical fabric of the property and/or its significant features should be in good condition; (2) “the impact of deterioration processes should be controlled”; (3) “a significant proportion of the elements necessary to show the totality of the value conveyed by the property should be included”; and (4) “relationships and dynamic functions present in Cultural Landscapes should also be maintained”, p.433 (note 373)

Waldschlößchenbrücke “does not fit in with the existing series of Dresden bridges”⁴³⁹. Secondly, the VIS demonstrated that the *Waldschlößchenbrücke* “obscures a number of views of the Dresden skyline and the Elbe Valley which are of historical importance as well as continuing relevance to daily life in the city”⁴⁴⁰. Thirdly, the VIS argued that the *Waldschlößchenbrücke* “cuts into the cohesive landscape of the Elbe river bend at its most sensitive point, splitting it irreversibly into two halves”⁴⁴¹.

Based on these results and the above presentation of the concept of integrity, not only is the visual integrity of the Dresden Elbe Valley cultural landscape damaged, but also the architectural integrity and integrity of the spirit of place or the use of the site. While the visual integrity and integrity of the spirit of place are mainly destroyed on a specific location of the Dresden Elbe Valley between the *Albertbrücke* and the *Loschwitzer Brücke* (“Blue Wonder”), the architectural integrity is disturbed across the whole protected area.

Approximately 4 km separate the *Albertbrücke* from the *Loschwitzer Brücke* in the City of Dresden and former WHS Dresden Elbe Valley. At this location, the meadows on both sides of the Elbe River are of an exceptional width, reaching up to 750-800 metres.⁴⁴² This creates a considerable unified green area within the city and provides a wide panoramic view towards the historical cityscape, the Elbe River and the landscape, including castles and villas dating from the 19th century⁴⁴³. Thus, the wholeness or intactness of the cultural landscape is destroyed by the construction of the *Waldschlößchenbrücke*. As stated in the conclusions of the VIS cited above, the bridge cuts this specific part of the landscape, which constitutes a whole, into two halves. Moreover, it also obstructs the view of the historical cityscape in one direction, and the scenic landscape, scattered with castles and villas, in the other⁴⁴⁴.

⁴³⁹ RWTH, 2006. *Visual Impact Study (VIS) of the “Verkehrszug Waldschlösschenbrücke” on the UNESCO World Heritage Site “Dresden Elbe Valley”, 3rd revised version*. Aachen: Institute of Urban Design and Regional Planning, Aachen University, p.109

⁴⁴⁰ RWTH, p.109 (note 439)

⁴⁴¹ RWTH, p.111 (note 439)

⁴⁴² RWTH, p.21 (note 439)

⁴⁴³ For a description of these cultural features, see section 2.1.4 of this thesis

⁴⁴⁴ Figures 22 and 23 (section 2.1.4 of this thesis) show how the *Waldschlößchenbrücke* cuts the cultural landscape into two halves and thus obstructs the view

Furthermore, when integrity is related to human interactions with the landscape, the integrity of the spirit of place is also disturbed by the construction of the bridge. As emphasised in the aforementioned conclusions of the VIS, the special relationships between humans and nature in this part of the cultural landscape are dramatically altered. The notion of spirit of place – meaning the living, social and spiritual nature of place – aims at preserving the tangible and intangible elements of heritage in order to contribute to sustainable and social development in an innovative way.⁴⁴⁵ The ICOMOS defines the spirit of place as “the tangible (buildings, sites, landscapes, routes, objects) and the intangible elements (memories, narratives, written documents, rituals, festivals, traditional knowledge, values, textures, colors, odors, etc.), that is to say the physical and the spiritual elements that give meaning, value, emotion and mystery to place.”⁴⁴⁶ In addition, Pearce (2010) argues that the spirit of place “is created by the stored memories of a community, passed in turn to each member, but when individuals stand there they feel the weight of past experience lighting up the scene with meaning, and in their own experiences of the place they add to, and perhaps modify, the significance the place carries.”⁴⁴⁷ In this context, it is arguable that the construction of the *Waldschlößchenbrücke* destroys the spirit of place, which is used as a recreational area by the inhabitants of the City of Dresden and has even been recognised as a recreational area since August 1996, when the Elbe River meadows were designated to be protected as a landscape conservation area.⁴⁴⁸

The architectural integrity of the whole area of the cultural landscape also suffers from the design of the bridge. As demonstrated in the VIS and its conclusions cited above, as well as section 2.1.3 of this thesis, the *Waldschlößchenbrücke* does not fit with the other bridges. Furthermore, a length of 636 metres makes the *Waldschlößchenbrücke* the longest bridge in Dresden, exceeding by 140 metres the second longest bridge, the *Autobahnbrücke* (396 metres), which is located outside the former WHS. Compared with the elder bridges located in the former WHS, the *Waldschlößchenbrücke* is 214 metres longer than the *Marienbrücke* (422 metres).

⁴⁴⁵ ICOMOS, 2008. *Québec Declaration on the Preservation of the Spirit of Place*. Québec, Canada: Sixteenth General Assembly of ICOMOS, p.1

⁴⁴⁶ ICOMOS, p.2 (note 445)

⁴⁴⁷ Pearce, S., 2010. Material matters. In: S. Lira & R. Amoêda, eds. *Constructing Intangible Heritage*. Barcelos: Green Lines Institute for Sustainable Development, p.18

⁴⁴⁸ For more information, see section 3.2.3 of this thesis

Since the condition of integrity has recently been extended to all categories of sites, guidance is still needed concerning the application of this condition to cultural heritage. Consequently, an expert meeting was organised in Al Ain (United Arab Emirates) in March 2012, where it was recommended to add guidance to the condition of integrity for the sites inscribed under criteria (i) to (vi), thus cultural sites, to para. 89 OG⁴⁴⁹ (2013). Concerning cultural landscapes, it was suggested to add the following: “a) Properties nominated as cultural landscapes, should contain key interrelated, interdependent and visually integral elements”.⁴⁵⁰

In terms of the cultural landscape, not only was the integrity of the Dresden Elbe Valley threatened by the construction of the *Waldschlößchenbrücke*, but also the OUV of the site. The concept of OUV related to cultural landscape in the context of the WHC is thus the object of the next section.

4.1.3. The significance of the Outstanding Universal Value for cultural landscapes

Until the revision of the OG in 2005, two lists of criteria were designated: one list included cultural criteria (i-vi) and the other listed the natural criteria (vii-x), thus separating cultural from natural heritage. With the adoption of the cultural landscapes, the criteria for the assessment of OUV were revised, with one list of ten criteria included in the OG (2005). Accordingly, culture and nature are no longer strictly separated. Nevertheless, despite one list rather than two, the unique list still first identifies the cultural criteria (i-vi) and subsequently the natural criteria (vii-x). Furthermore, cultural landscapes are inscribed on the World Heritage List as cultural sites and must then satisfy the OUV according to the cultural criteria.

⁴⁴⁹ OG (2013), para. 89 (note 15)

⁴⁵⁰ UNESCO, 2012. *Report of the International Expert Meeting on Integrity for Cultural Heritage, Al Ain, United Arab Emirates, 12 - 14 March 2012*. Paris: World Heritage Centre, p.4

Despite being mentioned in the Preamble of the WHC (paras. 6, 7, 8⁴⁵¹), the concept of “outstanding universal value” is not defined in art. 1 and 2 WHC⁴⁵², which respectively define cultural heritage and natural heritage, nor elsewhere in the WHC. To find a definition of the concept of “outstanding universal value”, it is necessary to look at para. 49 OG⁴⁵³ (2013), while the ten criteria are defined in para. 77 OG⁴⁵⁴ (2013). Since the OG are regularly revised by the World Heritage Committee, contrary to the WHC, the concept of “outstanding universal value” and its ten criteria are regularly revised and thus evolve.

In addition, the Preamble of the WHC does not only refer to “outstanding universal value” (paras. 7 and 8 WHC⁴⁵⁵) but also to “outstanding interest” (para. 6 WHC⁴⁵⁶). As Francioni (2008) puts it,

⁴⁵¹ World Heritage Convention [WHC], Preamble, para. 6 “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”, para. 7 “Considering that, in view of the magnitude and gravity of the new dangers threatening them, it is incumbent on the international community as a whole to participate in the protection of the cultural and natural heritage of outstanding universal value, by the granting of collective assistance which, although not taking the place of action by the State concerned, will serve as an efficient complement thereto”, para. 8 “Considering that it is essential for this purpose to adopt new provisions in the form of a convention establishing an effective system of collective protection of the cultural and natural heritage of outstanding universal value, organized on a permanent basis and in accordance with modern scientific methods”

⁴⁵² World Heritage Convention [WHC], art. 1 (note 289) and art. 2 (note 386)

⁴⁵³ OG (2013), para. 49 “Outstanding Universal Value means cultural and/or natural significance which is so exceptional as to transcend national boundaries and to be of common importance for present and future generations of all humanity. As such, the permanent protection of this heritage is of the highest importance to the international community as a whole. The Committee defines the criteria for the inscription of properties on the World Heritage List.” (note 15)

⁴⁵⁴ OG (2013), para. 77 “The Committee considers a property as having Outstanding Universal Value (see paragraphs 49-53) if the property meets one or more of the following criteria. Nominated properties shall therefore: (i) represent a masterpiece of human creative genius; (ii) exhibit an important interchange of human values, over a span of time or within a cultural area of the world, on developments in architecture or technology, monumental arts, town-planning or landscape design; (iii) bear a unique or at least exceptional testimony to a cultural tradition or to a civilization which is living or which has disappeared; (iv) be an outstanding example of a type of building, architectural or technological ensemble or landscape which illustrates (a) significant stage(s) in human history; (v) be an outstanding example of a traditional human settlement, land-use, or sea-use which is representative of a culture (or cultures), or human interaction with the environment especially when it has become vulnerable under the impact of irreversible change; (vi) be directly or tangibly associated with events or living traditions, with ideas, or with beliefs, with artistic and literary works of outstanding universal significance. (The Committee considers that this criterion should preferably be used in conjunction with other criteria); (vii) contain superlative natural phenomena or areas of exceptional natural beauty and aesthetic importance; (viii) be outstanding examples representing major stages of earth's history, including the record of life, significant on-going geological processes in the development of landforms, or significant geomorphic or physiographic features; (ix) be outstanding examples representing significant on-going ecological and biological processes in the evolution and development of terrestrial, fresh water, coastal and marine ecosystems and communities of plants and animals; (x) contain the most important and significant natural habitats for in-situ conservation of biological diversity, including those containing threatened species of Outstanding Universal Value from the point of view of science or conservation.”

⁴⁵⁵ World Heritage Convention [WHC], Preamble, paras. 7 and 8 (note 451)

⁴⁵⁶ World Heritage Convention [WHC], Preamble, para. 6 (note 451)

do these two concepts mean different things? How should they be interpreted? Francioni suggests looking at the 1969 Vienna Convention on the Law of Treaties and especially its art. 31⁴⁵⁷ concerning the general rule of interpretation in order to find an answer to this question. In this context, both terms can be interpreted as synonyms to qualify world heritage, with the variation that “outstanding interest” refers to the importance for the international community to protect this heritage and “outstanding universal value” designates this heritage in itself. Furthermore, while “outstanding interest” is a term mentioned in the Preamble of the WHC, the “outstanding universal value” is constantly referred to in practice for the assessment of heritage.

To conclude his commentary on the Preamble of the WHC, Francioni states that despite the lack of definition of the “outstanding universal value” in the WHC, the notion of “outstanding universal value” has developed through the years of application of the WHC following two elements. First, Francioni refers to the appeal created by the universality and exceptionality of the property, and second the time and space dimensions that must be comprised in the universality of the property to represent the worldwide diversity of cultures and traditions.

Since the concept of “world heritage” is also not defined in the WHC and can be interpreted through the concept of “outstanding universal value”, whose ten criteria characterise what “world heritage” is, a literary analysis of the three words “outstanding universal value” seems necessary. The WHC is authenticated⁴⁵⁸ in five languages in which the World Heritage Committee debates during its yearly sessions. However, the documents are prepared in either English or French, and thus a comparison of the term “outstanding universal value” in both languages shows a slight difference in meaning. The French equivalent of “outstanding universal value” being “*valeur*

⁴⁵⁷ Convention on the Law of Treaties [VCLT] 23 May 1969 (United Nations Treaty Series, p.332), art. 31 “1. A treaty 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. 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty; (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty. 3. There shall be taken into account, together with the context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) any relevant rules of international law applicable in the relations between the parties. 4. A special meaning shall be given to a term if it is established that the parties so intended.”

⁴⁵⁸ World Heritage Convention [WHC], art. 30 “This Convention is drawn up in Arabic, English, French, Russian and Spanish, the five texts being equally authoritative.”

universelle exceptionnelle” deserves a comparison of the terms “outstanding” and “*exceptionnel*”, which are not absolutely similar. While “outstanding” refers to something praiseworthy or striking, the term “*exceptionnel*” implicates the uniqueness, specialness or exceptionality of something. In this context, the slight difference between these two terms can lead to different interpretations in the documents elaborated by the Advisory Bodies who evaluate the sites, as well as the members of the World Heritage Committee who adopt the decisions during their yearly sessions. Moreover, States Parties might develop varying interpretations depending on the language (English or French) in which the nomination file of a site for potential inscription on the World Heritage List is prepared.

In addition, the reference to outstanding and universal prompts the question of whether these terms need to be understood as opposed to regional, national and local, thus a geographical understanding. Referring to cultural landscapes, Fowler shows that the concept of OUV is not opposed to a local interest for a place only, since all landscapes have a local interest and it is the designation of “National Park” or “World Heritage Site” that differentiate them.⁴⁵⁹ For potential WHS, these landscapes must also be of “universal value”. In this context, it is the value of the place that gives it the potential access to the WHS. The value attached to a place is attributed through a special designation as “National Park” for example and thus specific regulations for its protection. Therefore, the differentiation is already executed within States Parties.

As Rössler observed, in practice the criteria applied to cultural landscapes differ according to the categories of cultural landscapes. Criterion (i) is usually applied for the “clearly defined landscape”, but the criteria (ii), (iii), (iv) and (v) are referred to for the second category of cultural landscapes, namely the “organically evolved landscapes, and criterion (vi) for the “associative cultural landscapes”. As the Dresden Elbe Valley was inscribed on the World Heritage List under the criteria (ii), (iii), (iv) and (v), solely these four criteria will be reviewed and discussed here in relation to their significance for cultural landscapes.

⁴⁵⁹ Fowler, p.19 (note 430)

The Dresden Elbe Valley was inscribed by the World Heritage Committee on the World Heritage List on 2 July 2004 as a cultural landscape on the basis of cultural criteria (ii), (iii), (iv), and (v)⁴⁶⁰:

“Criterion (ii): The Dresden Elbe Valley has been the crossroads in Europe, in culture, science and technology. Its art collections, architecture, gardens, and landscape features have been an important reference for Central European developments in the eighteenth and nineteenth centuries.

Criterion (iii): The Dresden Elbe Valley contains exceptional testimonies of court architecture and festivities, as well as renowned examples of middle-class architecture and industrial heritage representing European urban development into the modern industrial era.

Criterion (iv): The Dresden Elbe Valley is an outstanding cultural landscape, an ensemble that integrates the celebrated baroque setting and suburban garden city into an artistic whole within the river valley.

Criterion (v): The Dresden Elbe Valley is an outstanding example of land use, representing an exceptional development of a major Central-European city. The value of this cultural landscape has long been recognized, but it is now under new pressures for change.”⁴⁶¹

The Dresden Elbe Valley starts from Pillnitz Palace in the East and goes until Übigau Palace in the West of the City of Dresden at a length of approximately 18 km. This cultural landscape is the result of “centuries-long tradition of respect and care for this unique natural landscape, and of the cultural valorisation of this setting by means of park and garden design, urban planning and architecture”.⁴⁶² In the case of the Dresden Elbe Valley, the emphasis is placed on how culture and nature are interrelated in this landscape, with reference to gardens, parks and architectural settings. Despite the mention of the urban development of the City of Dresden during the industrialisation period, the most celebrated feature of the Dresden Elbe Valley is the respect for this landscape in terms of architecture.

In this sense, the construction of the *Waldschlößchenbrücke* was considered by the Advisory Body ICOMOS and the World Heritage Committee as irreversibly damaging the OUV for which this cultural landscape had been inscribed on the World Heritage List. However, since continuing

⁴⁶⁰ Decision 28 COM 14B.40 (note 4)

⁴⁶¹ Nomination file, p.1 (note 98)

⁴⁶² RWTH, p.11 (note 439)

cultural landscapes such as the Dresden Elbe Valley are inhabited places, a limited acceptance for change is acknowledged. This issue is raised in the following section.

4.1.4. The allowance for change comprised in the concept of cultural landscapes

The process of change is comprised within the definition of continuing cultural landscapes as developed in the context of the WHC:

*“a continuing landscape is one which retains an active social role in contemporary society closely associated with the traditional way of life, and in which the evolutionary process is still in progress. At the same time it exhibits significant material evidence of its evolution over time”.*⁴⁶³

Furthermore, cultural landscapes are sites, namely “works of man or the combined works of nature and man”.⁴⁶⁴ Cultural landscapes are also seen as “embrac[ing] a diversity of manifestations of the interaction between humankind and its environment”.⁴⁶⁵ The interaction of man and the environment or the action of man in his environment leads to the question of whether and to what extent is it accepted that man changes the environment according to his needs in the context of a continuing cultural landscape inscribed on the World Heritage List.

In this context, how can integrity and the OUV of a continuing cultural landscape be maintained despite its evolution? An expert workshop on integrity and cultural landscapes took place in Aranjuez (Spain, 2007), discussing the concept of limits of acceptable change for World Heritage cultural landscapes in relation to authenticity and integrity.⁴⁶⁶

According to this declaration, it can be argued that the acceptance for change in the location of cultural landscapes depends on the statement of OUV described in the nomination file of the site. Moreover, the conditions of integrity and authenticity are also taken into account. As seen in the

⁴⁶³ OG (2013), Annex 3, p.88 (note 15)

⁴⁶⁴ World Heritage Convention [WHC], art. 1 (note 289)

⁴⁶⁵ OG (2013), Annex 3, p.88 (note 15)

⁴⁶⁶ UNESCO, “Limits of acceptable change should be established through clarification of the outstanding universal value, the integrity of a property as well as its authenticity, qualifiers and attributes. Management of change in cultural landscapes is an issue to be further addressed.”, p.3 (note 450)

third part of this section on the notion of OUV for cultural landscapes, the statement of OUV for the Dresden Elbe Valley places emphasis on the landscape itself, with its careful development over centuries also being stressed. The reference to the landscape and the architecture appears in the description for all the four criteria under which the Dresden Elbe Valley had been inscribed on the World Heritage List. On the contrary, the infrastructure and especially transportation infrastructure developed on the landscape itself is not mentioned as being part of the value for which the site had been inscribed. Indeed, change is even seen as a threat to the cultural landscape: “the value of this cultural landscape has long been recognized, but it is now under new pressures for change”.⁴⁶⁷

Concerning the integrity of the Dresden Elbe Valley, the ICOMOS evaluation mentioned that:

*“The Dresden Elbe Valley has been defined as a continuing cultural landscape. Its historical stratigraphy has layers from different periods, mainly from the 18th and 19th centuries. Through these interventions the meadows and river side were kept free of constructions and the essential qualities of the landscapes were established, including the focal points: the monumental centre of Dresden and its palaces”.*⁴⁶⁸

Thus, the careful development and modernisation of the city at the location of the meadows along the Elbe River reflect a major aspect of the statement of integrity for this site. In addition, a large amount of the historical centre was destroyed due to the bombings of Dresden at the end of World War II, although the palaces and villas near the Elbe River survived, thus contributing to the integrity of the site.

In this context, the allowance for change, which would have meant the acceptance of the construction of the *Waldschlößchenbrücke* at this sensible location of the cultural landscape in order to answer the needs of the community, was not possible.

To summarise, the concept of cultural landscapes, dating from the 19th century, was developed long before the inclusion of the cultural landscapes as a new category of sites to be inscribed on the World Heritage List in 1992.

⁴⁶⁷ WHC-04/28.COM/26, p.39 (note 103)

⁴⁶⁸ ICOMOS, p.88 (note 100)

The specificity of cultural landscapes found in their definition in art. 1 WHC⁴⁶⁹ as representing “the combined works of nature and man” implies that the integrity and OUV related to cultural landscapes are also specific compared to other types of cultural sites. In addition, the consideration of communities living in cultural landscapes prompts the question of change comprised in the concept of cultural landscapes, given that the communities shape their environment according to their needs. This remark is even more valid for the continuing cultural landscapes that have “an active social role in contemporary society”,⁴⁷⁰ whose “evolutionary process is still in progress”.⁴⁷¹

As the Dresden Elbe Valley was inscribed on the World Heritage List as a continuing cultural landscape, it is somewhat surprising that the project of the *Waldschlößchenbrücke* was not accepted. Nevertheless, while analysing the notions of integrity and OUV related to the Dresden Elbe Valley, it becomes clear that the construction of the *Waldschlößchenbrücke* represented a threat to the Dresden Elbe Valley. In terms of integrity, the visual integrity and integrity of the spirit of place are threatened at the specific location of the bridge, while the architectural integrity is threatened across the whole territory of the former WHS. Concerning the OUV, given that the emphasis was placed on the landscape itself and the architecture of the villas and palaces located near the bridge in the statement of OUV, the construction of the bridge would thus irreversibly damage this OUV.

Therefore, the first part of the legal background of the conflict between UNESCO and the State Party Germany to the WHC is found in the fact that in the case of the Dresden Elbe Valley, the construction of the *Waldschlößchenbrücke* is incompatible with the concept of cultural landscapes as developed in the context of the WHC. The second part of the legal background of the conflict between UNESCO and the State Party Germany to the WHC concerns the legally binding effects for States Parties to the WHC.

⁴⁶⁹ World Heritage Convention [WHC], art. 1 (note 289)

⁴⁷⁰ OG (2013), p.88 (note 15)

⁴⁷¹ OG (2013), p.88 (note 15)

4.2. The legally binding effects for States Parties to the World Heritage Convention

When a State ratifies an international treaty such as the WHC, it obtains some rights yet is also constrained to fulfil certain duties and responsibilities. On the one hand, following the ratification of the WHC, the State has access to the World Heritage List, international assistance and the World Heritage Fund, but on the other hand this signatory State must comply⁴⁷² with the WHC.

In the case of the Dresden Elbe Valley, the State Party Germany to the WHC benefited from its rights when this cultural landscape was inscribed on the World Heritage List in 2004. Already before the inscription of the site, the duties and responsibilities of the State Party Germany to the WHC were to include exhaustive information in the nomination file, as well as correctly informing the Advisory Body (ICOMOS) during the evaluation of the property and notifying any “factual error”⁴⁷³ in the evaluation of the Advisory Body to the World Heritage Centre. Once the site was inscribed, the State Party had to do its utmost to protect its OUV and integrity.⁴⁷⁴

However, with the construction of the *Waldschlößchenbrücke* in the core of the Dresden Elbe Valley, the World Heritage Committee argued that the OUV and integrity of this WHS would be irreversibly damaged. Thus, after the decision of the World Heritage Committee to inscribe the Dresden Elbe Valley on the World Heritage List in 2004, the site was transferred to the List of World Heritage in Danger in 2006 and delisted from the World Heritage List in 2009. These three decisions of the World Heritage Committee prompt the question of their legal nature with regards to the WHC.

⁴⁷² Dai, X., 2007. *International Institutions and National Policies*. New York: Cambridge University Press, p.10

⁴⁷³ OG (2013), para. 150 “Letters from the concerned State(s) Party(ies) detailing the factual errors they might have identified in the evaluation of their nomination made by the Advisory Bodies must be received by the Chairperson at least 14 days before the opening of the session of the Committee with copies to the relevant Advisory Body(ies). Provided that the Chairperson, in consultation with the World Heritage Centre and the Advisory Body, is satisfied that the letter deals only with factual errors and contains no advocacy, the letter shall be distributed in the working languages to the members of the Committee and may be read out by the Chairperson following the presentation of the evaluation. If a letter contains both notification of factual errors and advocacy, only those parts of it dealing with factual errors shall be distributed.” (note 15) and Decision 7 EXT.COM 4B.1. A letter notifying factual errors can be sent by the State Party to the Chairperson with copies to the relevant Advisory Bodies until 14 days before the opening of the World Heritage Committee sessions

⁴⁷⁴ World Heritage Convention [WHC], art. 4 (note 138) For an analysis of the concepts of outstanding universal value and integrity related to cultural landscapes, see section 4.1.2 and 4.1.3 of this thesis

The legally binding effects for States Parties to the WHC, which also refer to their obligation of compliance with the WHC, are discussed in order to show the implications of compliance for States Parties to the WHC, as well as the limits of an international treaty such as the WHC. While the two first sections present the legally binding effects for States Parties to the WHC through the legal classification of the listing and the responsibilities of States Parties, the two following sections discuss the legal value of the OG and the decisions of the World Heritage Committee, as well as the lack of *intra* states harmonisation between the different levels of decisions.

4.2.1. The legal classification of the listing of a site on the World Heritage List

Applying for the inscription of a site on the World Heritage List and having this site inscribed by the World Heritage Committee following art. 11 WHC⁴⁷⁵ leads to legal constraints for the State Party to the WHC. The protection of this site is subsequently no longer solely regulated under

⁴⁷⁵ World Heritage Convention [WHC], art. 11 “1. Every State Party to this Convention shall, in so far as possible, submit to the World Heritage Committee an inventory of property forming part of the cultural and natural heritage, situated in its territory and suitable for inclusion in the list provided for in paragraph 2 of this Article. This inventory, which shall not be considered exhaustive, shall include documentation about the location of the property in question and its significance. 2. On the basis of the inventories submitted by States in accordance with paragraph 1, the Committee shall establish, keep up to date and publish, under the title of "World Heritage List," a list of properties forming part of the cultural heritage and natural heritage, as defined in Articles 1 and 2 of this Convention, which it considers as having outstanding universal value in terms of such criteria as it shall have established. An updated list shall be distributed at least every two years. 3. The inclusion of a property in the World Heritage List requires the consent of the State concerned. The inclusion of a property situated in a territory, sovereignty or jurisdiction over which is claimed by more than one State shall in no way prejudice the rights of the parties to the dispute. 4. The Committee shall establish, keep up to date and publish, whenever circumstances shall so require, under the title of "list of World Heritage in Danger", a list of the property appearing in the World Heritage List for the conservation of which major operations are necessary and for which assistance has been requested under this Convention. This list shall contain an estimate of the cost of such operations. The list may include only such property forming part of the cultural and natural heritage as is threatened by serious and specific dangers, such as the threat of disappearance caused by accelerated deterioration, large-scale public or private projects or rapid urban or tourist development projects; destruction caused by changes in the use or ownership of the land; major alterations due to unknown causes; abandonment for any reason whatsoever; the outbreak or the threat of an armed conflict; calamities and cataclysms; serious fires, earthquakes, landslides; volcanic eruptions; changes in water level, floods and tidal waves. The Committee may at any time, in case of urgent need, make a new entry in the List of World Heritage in Danger and publicize such entry immediately. 5. The Committee shall define the criteria on the basis of which a property belonging to the cultural or natural heritage may be included in either of the lists mentioned in paragraphs 2 and 4 of this article. 6. Before refusing a request for inclusion in one of the two lists mentioned in paragraphs 2 and 4 of this article, the Committee shall consult the State Party in whose territory the cultural or natural property in question is situated. 7. The Committee shall, with the agreement of the States concerned, co-ordinate and encourage the studies and research needed for the drawing up of the lists referred to in paragraphs 2 and 4 of this article.”

internal law of the State Party; rather, it is the responsibility of “the international community as a whole” according to art. 6 para. 1 WHC⁴⁷⁶ to cooperate in order to protect the site. Accordingly, the site benefits from a higher level of protection.

The moment when the legally binding effects enter into force and the question of the existence of any legally binding effects at all represent issues with contradictory answers. Fastenrath (2006) argues that the inscription of a site on the World Heritage List does not imply any obligations for the States Parties.⁴⁷⁷ The listing would only represent a clarification following art. 3 WHC⁴⁷⁸, which requires the States Parties to identify the cultural and natural properties located on their territories as defined in art. 1 and 2 WHC.⁴⁷⁹ In this case, the inscription of a site on the World Heritage List by the World Heritage Committee can be considered as an inner-administrative act. Besides, Carducci⁴⁸⁰ demonstrates that the legally binding effects exist independently of the inscription of a site on the World Heritage List, given that States Parties are expected to protect their heritage at the national level in compliance with the WHC. Carducci argues that it is not the WHC that protects heritage but rather the States Parties, and thus the WHC applies to its member states before and regardless of the inscription of a site on the World Heritage List. However, in both cases, the role of the World Heritage Committee and the function of the World Heritage List are reduced. Thus, if the inscription of a site represents only a clarification in the first case, while States Parties protect their heritage independently of the inscription of a site in the second case, why would States Parties need to enlist their sites of OUV?

In fact, to reply to the first case, it is necessary to mention the roles of Tentative Lists and the inscription procedure. The sites identified by States Parties in their Tentative Lists are not automatically inscribed on the World Heritage List, despite benefitting from protection at the

⁴⁷⁶ World Heritage Convention [WHC], art. 6 para. 1 “Whilst fully respecting the sovereignty of the States on whose territory the cultural and natural heritage mentioned in Articles 1 and 2 is situated, and without prejudice to property right provided by national legislation, the States Parties to this Convention recognize that such heritage constitutes a world heritage for whose protection it is the duty of the international community as a whole to co-operate.”

⁴⁷⁷ Fastenrath, U., 2006. Der Schutz des Weltkulturerbes in Deutschland – Zur innerstaatlichen Wirkung von völkerrechtlichen Verträgen ohne Vertragsgesetz. *Die Öffentliche Verwaltung*, Heft 24, p.1017

⁴⁷⁸ World Heritage Convention [WHC], art. 3 “It is for each State Party to this Convention to identify and delineate the different properties situated on its territory mentioned in Articles 1 and 2 above.”

⁴⁷⁹ World Heritage Convention [WHC], art. 1 (note 289) and 2 (note 386)

⁴⁸⁰ Carducci, G., 2008. Articles 4-7, National and International Protection of the Cultural and Natural Heritage. In: F. Francioni & F. Lenzerini, eds. *The 1972 World Heritage Convention: a commentary*. Oxford: Oxford University Press, p.109

national level. For a site listed in the Tentative List to be inscribed on the World Heritage List, a much longer and complex procedure takes place. First, the State Party prepares a nomination file⁴⁸¹ comprising the identification, description and justification for the site's inscription. Moreover, the nomination file must also integrate the state of conservation and the potential threats for the sites. The management and protection of the site must include legislative measures for the protection as well as the boundaries and buffer zones, the management system and a sustainable use of the site, while the monitoring of the site must also be indicated. Subsequently, the Advisory Bodies⁴⁸² conduct an evaluation of the proposed site for inscription on the World Heritage List. The next step is the discussion of the candidacy – based on the nomination file and evaluation – of the site by the World Heritage Committee during its yearly sessions. The decision of the World Heritage Committee can result in the inscription of the site on the World Heritage List, the deferral or referral of the nomination file, or the refusal of inscription.⁴⁸³

To answer to the second case, which considers that States Parties must protect their heritage independently from the inscription of a site on the World Heritage List, it is necessary to question the role of the listing system. Indeed, the existence of the World Heritage List and List of World Heritage in Danger in the WHC shows that the sites inscribed on one of these lists are not only protected by the State Party on the territory of which they are located, but also by the international community. By contrast, the other sites are only protected by the legislation of the State Party to which they belong.

Therefore, it can be argued that legally binding effects for States Parties to the WHC enter into force when a site located on their territories receives the World Heritage status through its inscription on the World Heritage List. In addition, even though the inscription of a site on the World Heritage List represents the final step in a long, complex and costly procedure, this classification cannot be understood as the end of this procedure. On the contrary, the

⁴⁸¹ OG (2013), III.B. Format and content of nominations (paras.129-133) (note 15)

⁴⁸² OG (2013), para. 31 e) “in the case of ICOMOS and IUCN evaluate properties nominated for inscription on the World Heritage List and present evaluation reports to the Committee” (note 15)

⁴⁸³ OG (2013), III.G. Decision of the World Heritage Committee, paras. 153-160 (note 15)

classification of the site on the World Heritage List must be considered as a part of a long-term process of heritage protection⁴⁸⁴ for the inscribed site.

In the case of the Dresden Elbe Valley, this cultural landscape was inscribed under the criteria (ii), (iii), (iv) and (v).⁴⁸⁵ Thus, the obligation of the State Party Germany to the WHC was to protect the OUV declined under these four criteria of this cultural property, as well as the integrity⁴⁸⁶ of the site when these were threatened by the construction of the *Waldschlößchenbrücke*. The incompatibility of the bridge with the cultural landscape was described in the VIS conducted by the Institute of Urban Design and Regional Planning of the RWTH Aachen University, which was asked to prepare this study by the German UNESCO Commission.⁴⁸⁷

In addition to the obligations of States Parties linked to the inscription of a site located on their territories on the World Heritage List, each State Party to the WHC has responsibilities as soon as this State Party ratifies⁴⁸⁸ the WHC.

4.2.2. The responsibilities of States Parties to the World Heritage Convention

The duties of States Parties to the WHC related to heritage properties in general⁴⁸⁹ are described in art. 3 to 6 and 11 para. 1 WHC⁴⁹⁰. They are discussed in this section and confront the case of

⁴⁸⁴ The state of conservation of properties inscribed on the World Heritage List is regularly examined by the World Heritage Committee, OG (2013), IV. Process for monitoring the state of conservation of world heritage properties, paras.169-198 (note 15)

⁴⁸⁵ For an analysis of the significance of the OUV declined under these four criteria, see section 4.1.3. of this thesis

⁴⁸⁶ For an analysis of the notion of integrity in relation to cultural landscapes, see section 4.1.2. of this thesis

⁴⁸⁷ RWTH (note 439)

⁴⁸⁸ World Heritage Committee [WHC], art. 31 para. 2 “The instruments of ratification or acceptance shall be deposited with the Director-General of the United Nations Educational, Scientific and Cultural Organization.”

⁴⁸⁹ While the previous section looked at the effects for a State Party of the inscription of a site located on its territory on the World Heritage List, this section looks at the responsibilities of States Parties to the WHC towards their heritage

⁴⁹⁰ World Heritage Convention [WHC], art. 3 (note 478), art. 4 and 5 (note 138), art. 6 “Whilst fully respecting the sovereignty of the States on whose territory the cultural and natural heritage mentioned in Articles 1 and 2 is situated, and without prejudice to property right provided by national legislation, the States Parties to this Convention recognize that such heritage constitutes a world heritage for whose protection it is the duty of the international community as a whole to co-operate. 2. The States Parties undertake, in accordance with the provisions

the Dresden Elbe Valley. The specific responsibilities linked to the process of nomination and inscription of a site on the World Heritage List are subsequently discussed in relation to the case of the Dresden Elbe Valley.

States Parties to the WHC have the duties first to “identify and delineate” the cultural and natural heritage located on their territories as mentioned in art. 3 WHC,⁴⁹¹ which represents a “central obligation under the Convention for all States Parties”.⁴⁹² Nevertheless, it is the World Heritage Committee who decides to inscribe a property on the World Heritage List, rather than the State Party.⁴⁹³

Second, the States Parties to the WHC must ensure the “identification, protection, conservation, presentation and transmission to future generations” of this identified heritage according to art. 4 WHC.⁴⁹⁴ While most States Parties to the WHC also have internal legislations related to the protection of heritage, it is necessary to differentiate this heritage from the one that can be identified following art. 1 and 2 WHC⁴⁹⁵, given that the definitions in the WHC might not necessarily encompass the definitions found in internal legislations, and *vice versa*.⁴⁹⁶ In the case of the Dresden Elbe Valley, the State Party Germany to the WHC partly failed to protect, conserve, present and transmit to future generations at least the part of this cultural landscape at the location of the *Waldschlößchenbrücke*.

of this Convention, to give their help in the identification, protection, conservation and presentation of the cultural and natural heritage referred to in paragraphs 2 and 4 of Article 11 if the States on whose territory it is situated so request. 3. 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.” and art. 11 para. 1 “Every State Party to this Convention shall, in so far as possible, submit to the World Heritage Committee an inventory of property forming part of the cultural and natural heritage, situated in its territory and suitable for inclusion in the list provided for in paragraph 2 of this Article. This inventory, which shall not be considered exhaustive, shall include documentation about the location of the property in question and its significance.”

⁴⁹¹ World Heritage Convention [WHC], art. 3 (note 478)

⁴⁹² Boer, B., 2008. Article 3, Identification and Delineation of World Heritage Properties. In: F. Francioni, F. & F. Lenzerini, eds. *The 1972 World Heritage Convention: a commentary*, Oxford: Oxford University Press, p.86

⁴⁹³ Boer, p.91 (note 492)

⁴⁹⁴ World Heritage Convention [WHC], art. 4 (note 138)

⁴⁹⁵ World Heritage Convention [WHC], art. 1 (note 289) and art. 2 (note 386)

⁴⁹⁶ Carducci, pp.112-113 (note 480)

Third, States Parties are expected to develop policies, services, scientific and technical studies, measures for heritage protection following art. 5 WHC.⁴⁹⁷ These actions are also directly related to the protection, conservation, and presentation of properties and potentially to the implementation stage.⁴⁹⁸ The duties of the State Party Germany to the WHC under this article were fulfilled following the conduction of the VIS by the Institute of Urban Design and Regional Planning of the RWTH Aachen University,⁴⁹⁹ however; they were fulfilled too late and did not permit halting the construction of the bridge and thus keeping the site on the World Heritage List.

Fourth, States Parties agree with the role of the international community to cooperate for the protection of this international heritage according to art. 6 para. 1 WHC,⁵⁰⁰ as well as with the non-undertaking of measures that could possibly threaten this heritage (art. 6 para. 3 WHC⁵⁰¹). Therefore, while usually international treaties bind their member states with each other, the WHC states that its States Parties recognise the role of the international community as a whole⁵⁰² to protect this world heritage defined in art. 1 and 2 WHC⁵⁰³. The State Party Germany to the WHC did not follow the opinion of the international community, represented by the World Heritage Committee, to build a tunnel rather than the bridge in order to keep the Dresden Elbe Valley on the World Heritage List.⁵⁰⁴ Furthermore, the State Party Germany to the WHC took measures that threatened the integrity of the cultural landscape while deciding to build the bridge in the core zone of the Dresden Elbe Valley.

Fifth, States Parties need to transmit an inventory of the cultural and natural heritage located on their territories to the World Heritage Committee, as mentioned by art. 11 para. 1 WHC.⁵⁰⁵ This represents the first step of the procedure for the inclusion of a property on the World Heritage

⁴⁹⁷ World Heritage Convention [WHC], art. 5 (note 138)

⁴⁹⁸ Carducci, p.117 (note 480)

⁴⁹⁹ RWTH (note 439)

⁵⁰⁰ World Heritage Convention [WHC], art. 6 para. 1 (note 476)

⁵⁰¹ World Heritage Convention [WHC], art. 6 para. 3 “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.”

⁵⁰² Boer, p.101 (note 492)

⁵⁰³ World Heritage Convention [WHC], art. 1 (note 289) and art. 2 (note 386)

⁵⁰⁴ UNESCO, 2008. *Convention Concerning the Protection of the World Cultural and Natural Heritage, World Heritage Committee Thirty-second Session, Quebec City, Canada, 2 - 10 July 2008: WHC-08/32.COM/24Rev*. Paris: UNESCO World Heritage Centre, p.35

⁵⁰⁵ World Heritage Convention [WHC], art. 11 para. 1 (note 490)

List, despite not being “expressed in mandatory terms”.⁵⁰⁶ Accordingly, States Parties submit their Tentative Lists “in so far as possible”⁵⁰⁷ depending on their scientific, technical or financial capacities. The Dresden Elbe Valley cultural landscape entered the German Tentative List on 1 February 2003.⁵⁰⁸

In this context, it can be argued that the State Party Germany to the WHC did not fulfil its responsibilities regarding the Dresden Elbe Valley due to a lack of information concerning the bridge in the nomination file, while the error of location of this bridge stated in the ICOMOS evaluation was never corrected. In the nomination file for the Dresden Elbe Valley, it is recognised within the section on development pressures for natural properties that the *Waldschlößchenbrücke* might cause “interference with the traditional settlement layout and the natural scenery, although continuing constructional development is not intended in these areas”.⁵⁰⁹ Nevertheless, the bridge is first mentioned in the nomination file on page 48, in relation with the use of the meadows at the location of the bridge,⁵¹⁰ and subsequently on page 81, stating that only a decision has been taken for the construction of this bridge without further detail on its location.⁵¹¹ More details could be found in a separate document listed as “short description of the project *Waldschlößchen bridge*”⁵¹² in the section of the nomination file concerning the documentation on the cultural property. Along with the nomination file in the annexes, this

⁵⁰⁶ The two following steps are respectively the submission by States Parties to the World Heritage Committee of a nomination file for inclusion, and the decision taken by the World Heritage Committee to inscribe a site or not, see Scovazzi, T., 2008. Articles 8-11, World Heritage Committee and World Heritage List. In: F. Francioni & F. Lenzerini, eds. *The 1972 World Heritage Convention: a commentary*. Oxford: Oxford University Press, pp.157-158

⁵⁰⁷ World Heritage Convention [WHC], art. 5 (note 138)

⁵⁰⁸ Glaser, G., 2004. *UNESCO-Welterbe: das Elbtal in Dresden*. [Online] Available at: http://deposit.ddb.de/ep/netpub/28/34/66/972663428/_data_dync/_stand_Dezember_2006/0904/dresden.htm [Accessed 10 May 2012]

⁵⁰⁹ Nomination file, p.99 (note 98)

⁵¹⁰ Nomination file, p.48, “The organisation of public festivals for the period until the completion of the festival area in the vicinity of the *Waldschlößchen bridge* is not in conflict with the urban construction plans.” (note 98)

⁵¹¹ Nomination file, p.81, “The representation of the traffic areas shows that no main traffic arteries are planned in the Elbe area, which would affect the townscape and landscape. Options for five new bridges are represented beside the existing bridges. A final decision concerning number and location has not yet been taken, except for the *Waldschlößchenbrücke* (decision of the city council No. V2012-44-2002 from 30 May 2002).” (note 98)

⁵¹² Nomination file, p.112 (note 98)

document was in German, rather than one of the two official languages of UNESCO (English and French). For this reason, this document was not part of the official nomination file.⁵¹³

Furthermore, while the nomination file did not contain enough precise information on the *Waldschlößchenbrücke*, the evaluation prepared by ICOMOS indicated an incorrect location of the bridge:

*“The construction of a new bridge is foreseen 5 km down the river from the centre. Its design results from an international competition. The profile has been kept slender and low in order to reduce impact on landscape.”*⁵¹⁴

First, the bridge is not identified as the *Waldschlößchenbrücke*; however, since the nomination file mentioned that possibilities for five new bridges were envisaged and that only a decision concerning the *Waldschlößchenbrücke* had been taken, it can be deduced that the reference to the bridge in the ICOMOS evaluation concerns the *Waldschlößchenbrücke*. Secondly, the location of the bridge “5 km down the river from the centre” is wrong,⁵¹⁵ given that the Elbe River flows from East to West and the bridge is located on the Eastern side of the City of Dresden. Thirdly, the remark concerning the design of the bridge being “kept slender and low”⁵¹⁶ is questionable, particularly regarding the later refusal of the project of the bridge as such.

From the lack of precise information about the bridge in the nomination file to the incorrect information included in the ICOMOS evaluation, the threat that represented the *Waldschlößchenbrücke* for the integrity and OUV of the Dresden Elbe Valley was not pointed out. However, since the ICOMOS evaluation was published in March 2004 and the World Heritage Committee session where the nomination of the Dresden Elbe Valley was examined started on 28 June 2004, there was sufficient time for the representatives of the State Party to correct the information and transmit it to the World Heritage Centre.

⁵¹³ Ringbeck, B. & Rössler, M., 2011. Between international obligations and local politics: the case of the Dresden Elbe Valley under the 1972 World Heritage Convention. *Informationen zur Raumentwicklung*, Heft 3/4, p.206

⁵¹⁴ ICOMOS, p.87 (note 100)

⁵¹⁵ UNESCO, 2006. *Convention Concerning the Protection of the World Cultural and Natural Heritage, World Heritage Committee Thirtieth Session, Vilnius, Lithuania, 8 - 16 July 2006: WHC-06/30.COM/7B*. Paris: UNESCO World Heritage Centre, p.198

⁵¹⁶ WHC-06/30.COM/7B, p.198, the opinion was possibly given following the consideration of the design of the bridge provided in the nomination file: “Enclosed was a territorial land use plan (FNP) with five different alternatives for Elbe crossings, and further photo montages of the competition result for the project of the “Waldschlösschen bridge”.” (note 515)

To further discuss the potential existence of legally binding effects for States Parties, the legal nature of the OG and the decisions of the World Heritage Committee are assessed in the next section.

4.2.3. The legal nature of the Operational Guidelines and the decisions of the World Heritage Committee

In this section, attention is paid to the legal nature of the decisions of the World Heritage Committee to inscribe a site on the World Heritage List, to transfer a site to the List of World Heritage in Danger or to delist a site from the World Heritage List. In addition, the legal nature of the OG also warrants discussion, since the World Heritage Committee takes its decisions following the OG, and only the OG explicitly refer to the possibility to delist WHS. Furthermore, although art. 11 paras. 2 and 5 WHC⁵¹⁷ mention criteria to be established to define the OUV, these criteria and the notion of integrity are solely described in the OG.

While art. 11 para. 2 WHC⁵¹⁸ refers to the World Heritage List, art. 11 para. 4 WHC⁵¹⁹ refers to the List of World Heritage in Danger to be both “establish[ed], ke[pt] up to date and

⁵¹⁷ World Heritage Convention [WHC], art. 11 para. 2 “On the basis of the inventories submitted by States in accordance with paragraph 1, the Committee shall establish, keep up to date and publish, under the title of “World Heritage List,” a list of properties forming part of the cultural heritage and natural heritage, as defined in Articles 1 and 2 of this Convention, which it considers as having outstanding universal value in terms of such criteria as it shall have established. An updated list shall be distributed at least every two years.” and art. 11 para. 5 “The Committee shall define the criteria on the basis of which a property belonging to the cultural or natural heritage may be included in either of the lists mentioned in paragraphs 2 and 4 of this article.”

⁵¹⁸ World Heritage Convention [WHC], art. 11 para. 2 (note 517)

⁵¹⁹ World Heritage Convention [WHC], art. 11 para. 4 “The Committee shall establish, keep up to date and publish, whenever circumstances shall so require, under the title of “list of World Heritage in Danger”, a list of the property appearing in the World Heritage List for the conservation of which major operations are necessary and for which assistance has been requested under this Convention. This list shall contain an estimate of the cost of such operations. The list may include only such property forming part of the cultural and natural heritage as is threatened by serious and specific dangers, such as the threat of disappearance caused by accelerated deterioration, large-scale public or private projects or rapid urban or tourist development projects; destruction caused by changes in the use or ownership of the land; major alterations due to unknown causes; abandonment for any reason whatsoever; the outbreak or the threat of an armed conflict; calamities and cataclysms; serious fires, earthquakes, landslides; volcanic eruptions; changes in water level, floods and tidal waves. The Committee may at any time, in case of urgent need, make a new entry in the List of World Heritage in Danger and publicize such entry immediately.”

publish[ed]”⁵²⁰ by the World Heritage Committee. In addition, art. 11 para. 1 WHC⁵²¹ refers to the inventory by the States Parties to the WHC of the cultural and natural heritage located on their territory. Art. 11 para. 3 WHC⁵²² refers to the need of the consent of the State Party prior to the inscription of a site located on its territory on the World Heritage List by the World Heritage Committee. Art. 11 para. 6 WHC⁵²³ and art. 11 para. 7 WHC⁵²⁴ refer respectively to the obligation of the World Heritage Committee to consult the States Parties to the WHC and to their agreement regarding art. 11 paras. 2 and 4⁵²⁵. Therefore, it can be considered that the States Parties to the WHC are largely included in the decision-making process of the World Heritage Committee concerning the inscription of a site on the World Heritage List (art. 11 para. 2 WHC⁵²⁶) and the transfer of a site to the List of World Heritage in Danger (art. 11 para. 4 WHC⁵²⁷). Nevertheless, while the consent of the States Parties to the WHC is explicitly required for the World Heritage Committee to inscribe a site located on their territory on the World Heritage List (art. 11 para. 3 WHC⁵²⁸), the consent of the States Parties is not required for the transfer of a site to the List of World Heritage in Danger (art. 11 para. 6 WHC⁵²⁹).

Even though the WHC does not mention the possibility of delisting sites from the World Heritage List, a certain interpretation of art. 11 WHC⁵³⁰ shows that it is possible to do so. Buzzini and Condorelli (2008) provide answers to the three following questions: can a property be delisted from the World Heritage List? Is the consent of the State Party required to this effect? Is it necessary for a property in question to have been previously inscribed on the List of World

⁵²⁰ World Heritage Convention [WHC], art. 11 para. 2 (note 517) and art. 11 para. 4 (note 519)

⁵²¹ World Heritage Convention [WHC], art. 11 para. 1 (note 490)

⁵²² World Heritage Convention [WHC], art. 11 para. 3 “The inclusion of a property in the World Heritage List requires the consent of the State concerned. The inclusion of a property situated in a territory, sovereignty or jurisdiction over which is claimed by more than one State shall in no way prejudice the rights of the parties to the dispute.”

⁵²³ World Heritage Convention [WHC], art. 11 para. 6 “Before refusing a request for inclusion in one of the two lists mentioned in paragraphs 2 and 4 of this article, the Committee shall consult the State Party in whose territory the cultural or natural property in question is situated.”

⁵²⁴ World Heritage Convention [WHC], art. 11 para. 7 “The Committee shall, with the agreement of the States concerned, co-ordinate and encourage the studies and research needed for the drawing up of the lists referred to in paragraphs 2 and 4 of this article.”

⁵²⁵ World Heritage Convention [WHC], art. 11 para. 2 (note 517) and art. 11 para. 4 (note 519)

⁵²⁶ World Heritage Convention [WHC], art. 11 para. 2 (note 517)

⁵²⁷ World Heritage Convention [WHC], art. 11 para. 4 (note 519)

⁵²⁸ World Heritage Convention [WHC], art. 11 para. 3 (note 522)

⁵²⁹ World Heritage Convention [WHC], art. 11 para. 6 (note 523)

⁵³⁰ World Heritage Convention [WHC], art. 11 (note 475)

Heritage in Danger?⁵³¹ In respect of the first question, they argue that since the World Heritage Committee must publish an updated list at least every two years, according to art. 11 para. 2 WHC⁵³², this means that once inscribed, a site does not benefit from a “permanent and immutable status”.⁵³³ Furthermore, referring to the legal principle of parallelism of forms, they demonstrate that the body that is competent for delisting a property is the same as the one competent for inscriptions of sites on the World Heritage List, i.e. the World Heritage Committee. This principle follows the *actus-contrarius* theory, which means that the taking back, i.e. the delisting from the World Heritage List, follows the same rules as the original decision, i.e. the inscription on the World Heritage List. In addition, there is no burden for the States Parties to the WHC if a site is delisted, because no or less protection is required in comparison to a listed site.

Secondly, they answer negatively as to whether the consent of a State Party is needed for the delisting of a site from the World Heritage List. According to them, despite the need for the State Party’s consent to inscribe a site on the World Heritage List, following art. 11 para. 2 WHC⁵³⁴, it is nevertheless the World Heritage Committee that takes the final decision whether or not to inscribe it, according to art. 11 para. 3 WHC⁵³⁵. Thus, they argue that by extension, the World Heritage Committee decides alone whether or not to keep these sites that it has inscribed. However, practice shows that the World Heritage Committee seeks consultation with the States Parties to the WHC before taking final decisions, as was the case with the Dresden Elbe Valley between 2006 and 2009.

Thirdly, their answer to the potential necessity for a site to be delisted to have been previously inscribed on the List of World Heritage in Danger is negative. They show that this intermediary step is not necessary, because in the case of a permanent and irreversible loss of OUV, it is not necessary to inscribe the site on the List of World Heritage in Danger, but rather to directly delist it. However, since the World Heritage Committee has developed a policy of consultation with the States Parties before taking final decisions, in accordance with the WHC, the transfer to the List

⁵³¹ Buzzini, G. P., Condorelli, L., 2008. Article 11, List of World Heritage in Danger and Deletion of a Property from the World Heritage List. In: F. Francioni & F. Lenzerini, eds. *The 1972 World Heritage Convention: a commentary*, Oxford: Oxford University Press, p.175

⁵³² World Heritage Convention [WHC], art. 11 para. 2 (note 517)

⁵³³ Buzzini & Condorelli, p.197 (note 531)

⁵³⁴ World Heritage Convention [WHC], art. 11 para. 2 (note 517)

⁵³⁵ World Heritage Convention [WHC], art. 11 para. 3 (note 522)

of World Heritage in Danger represents an intermediary step that leaves room for discussion on alternative solutions and compromise. In the case of the Dresden Elbe Valley, the site was transferred to the List of World Heritage in Danger in 2006, as soon as the threat for the OUV and integrity had been acknowledged through the VIS. Subsequently, the Dresden Elbe Valley remained on the List of World Heritage in Danger for three years, until its delisting from the World Heritage List in 2009. However, in the case of the Arabian Oryx Sanctuary in Oman, the first ever delisted WHS, the site was directly delisted from the World Heritage List in 2007 without previous transfer to the List of World Heritage in Danger, despite regular state of conservation reports between 2004 and 2007.

In addition, the OG mention the possible delisting⁵³⁶ of a property in the enumeration of the functions of the World Heritage Committee “in co-operation with States Parties”.⁵³⁷ Subsequently, another reference to the delisting⁵³⁸ of a property appears in the section of the OG consecrated to the decisions of the World Heritage Committee, while a whole section in the OG is also dedicated to the potential delisting.⁵³⁹ Thus, what is the legal value of the OG and are they binding for States Parties?

⁵³⁶ OG (2013), para. 24. d) “decide whether a property should be deleted from the World Heritage List” (note 15)

⁵³⁷ OG (2013), para. 24 “The main functions of the Committee are, in co-operation with States Parties, to: a) identify, on the basis of Tentative Lists and nominations submitted by States Parties, cultural and natural properties of Outstanding Universal Value which are to be protected under the Convention and to inscribe those properties on the World Heritage List; b) examine the state of conservation of properties inscribed on the World Heritage List through processes of Reactive Monitoring (see Chapter IV) and Periodic Reporting (see Chapter V); c) decide which properties inscribed on the World Heritage List are to be inscribed on, or removed from the List of World Heritage in Danger; d) decide whether a property should be deleted from the World Heritage List (see Chapter IV); e) define the procedure by which requests for International Assistance are to be considered and carry out studies and consultations as necessary before coming to a decision (see Chapter VII); f) determine how the resources of the World Heritage Fund can be used most advantageously to assist States Parties in the protection of their properties of Outstanding Universal Value; g) seek ways to increase the World Heritage Fund; h) submit a report on its activities every two years to the General Assembly of States Parties and to the UNESCO General Conference; i) review and evaluate periodically the implementation of the Convention; j) revise and adopt the Operational Guidelines.” (note 15)

⁵³⁸ OG (2013), para. 176. d) “when there is evidence that the property has deteriorated to the point where it has irretrievably lost those characteristics which determined its inscription on the List, the Committee may decide to delete the property from the List. Before any such action is taken, the Secretariat will inform the State Party concerned. Any comments which the State Party may make will be brought to the attention of the Committee.” (note 15)

⁵³⁹ OG (2013), IV.C. Procedure for the eventual deletion of properties from the World Heritage List, paras.192-198, notably para. 192 “The Committee adopted the following procedure for the deletion of properties from the World Heritage List in cases: a) where the property has deteriorated to the extent that it has lost those characteristics which determined its inclusion in the World Heritage List; and b) where the intrinsic qualities of a World Heritage site were

The WHC does not mention the OG, and they were first developed in 1977 as a “Main Working Paper”⁵⁴⁰ drafted by the Secretariat of the World Heritage Committee and the Advisory Bodies. Contrary to the WHC, which is in practice un-revisable due to the complexity of the procedure, the OG constitute “flexible working documents”⁵⁴¹ and “are periodically revised to reflect the decisions of the World Heritage Committee”.⁵⁴² Thus, they appear as the interpretation of the WHC by the World Heritage Committee following the jurisprudence of its yearly sessions. Von Schorlemer⁵⁴³ argues that despite the OG representing an internal document, a secondary legislation for UNESCO, which is only binding for the UNESCO bodies (World Heritage Committee for example) and not for the States Parties, these OG nevertheless create external effects. In addition, Boisson de Chazournes⁵⁴⁴ argues that while guiding the World Heritage Committee in its decisions under the light of the WHC, the OG are an administrative act with external effects. To illustrate the external effects of the OG on the States Parties, Boisson de Chazournes mentions the assessment of OUV by the States Parties for the nomination of a site on the World Heritage List. Given that the ten criteria under the concept of OUV are developed by the World Heritage Committee in the OG and States Parties need to identify them in the nomination file for the potential inscription of a site on the World Heritage List, in this sense the OG can be considered to have external effects on States Parties. Furthermore, Zacharias (2010) argues that the OG “function as external governance instruments”⁵⁴⁵ and compare them to “an administrative regulation in the sense of the notion used in German law”,⁵⁴⁶ thus a *Verwaltungsvorschriften*.

In addition, concerning the case of the Dresden Elbe Valley, the decisions to first inscribe it on the World Heritage List, then to transfer it to the List of World Heritage in Danger and finally to delist it from the World Heritage List were taken by the World Heritage Committee during its

already threatened at the time of its nomination by action of man and where the necessary corrective measures as outlined by the State Party at the time, have not been taken within the time proposed (see paragraph 116).” (note 15)

⁵⁴⁰ Von Schorlemer, p.328 (note 9)

⁵⁴¹ Von Schorlemer, p.328 (note 9)

⁵⁴² OG (2013), p.ii (note 15)

⁵⁴³ Von Schorlemer, p.329 (note 9)

⁵⁴⁴ Boisson de Chazournes, L., 2005. Treaty law-making and non-treaty law-making: the evolving structure of the international legal order. In: R. Wolfrum & V. Röben, eds. *Developments of International Law in Treaty Making*, Berlin, Heidelberg, New York: Springer, p.473

⁵⁴⁵ Zacharias, p.321 (note 270)

⁵⁴⁶ Zacharias, p.321 (note 270)

yearly sessions. In this context, it is necessary to question the legal value of these decisions that the World Heritage Committee took regarding the Dresden Elbe Valley. While the WHC has legally binding effects for its States Parties, are the decisions taken by the World Heritage Committee also binding or only *de facto* accepted by States Parties?

While the legal value of the World Heritage Committee's decisions is not clearly mentioned in the WHC, art. 14 WHC⁵⁴⁷ nevertheless notifies that the UNESCO Director-General "shall have the responsibility for the implementation of [the World Heritage Committee's] decisions". In terms of the OG, it is mentioned in para. 23⁵⁴⁸ that decisions of the Committee "are based on objective and scientific considerations" and that "any appraisal made on its behalf must be thoroughly and responsibly carried out". Therefore, it can be concluded that the decisions of the World Heritage Committee are internal bureaucracy of UNESCO.

Finally, even though the States Parties are not bound by the OG, which represent an administrative regulation of the World Heritage Committee, and despite the non-existence of any term referring to the delisting process of WHS in the WHC, the interpretation of art. 11 WHC⁵⁴⁹ demonstrates the legal right of the World Heritage Committee to do so. Furthermore, the decisions of the World Heritage Committee can be seen as internal bureaucracy of UNESCO. Besides, in order to achieve a more efficient implementation of the WHC, not only should national levels of decision be aware of it, but also other levels of decision within States Parties.

⁵⁴⁷ World Heritage Convention [WHC], art. 14 "1. The World Heritage Committee shall be assisted by a Secretariat appointed by the Director-General of the United Nations Educational, Scientific and Cultural Organization. 2. The Director-General of the United Nations Educational, Scientific and Cultural Organization, utilizing to the fullest extent possible the services of the International Centre for the Study of the Preservation and the Restoration of Cultural Property (the Rome Centre), the International Council of Monuments and Sites (ICOMOS) and the International Union for Conservation of Nature and Natural Resources (IUCN) in their respective areas of competence and capability, shall prepare the Committee's documentation and the agenda of its meetings and shall have the responsibility for the implementation of its decisions."

⁵⁴⁸ OG (2013), para. 23 "Committee decisions are based on objective and scientific considerations, and any appraisal made on its behalf must be thoroughly and responsibly carried out. The Committee recognizes that such decisions depend upon: a) carefully prepared documentation; b) thorough and consistent procedures; c) evaluation by qualified experts; and d) if necessary, the use of expert referees." (note 15)

⁵⁴⁹ World Heritage Convention [WHC], art. 11 (note 475)

4.2.4. The need for a harmonisation between the different levels of decisions intra States Parties concerning the World Heritage Convention

National levels of decisions within States Parties, such as Ministries for Foreign Affairs for example, deal with the WHC and are usually the only level of decision to be aware of the WHC and its implications. In a centralised state, this situation does not bring direct legal problems, although the lack of awareness of different levels of decisions is regrettable. Nonetheless, in the case of federal states such as the FRG, legal issues might particularly arise when another level of decision is also competent for heritage protection than the national level. Indeed, this is precisely the issue involved in the case of the Dresden Elbe Valley. Even though the World Heritage Committee is not responsible for the repartition of the competences related to heritage within States Parties to the WHC, the consequences of the lack of awareness of the other levels of decisions on the implications of the WHC reflects a concern of the World Heritage Committee.

For example, since the *Länder* are competent for cultural heritage matters in the FRG, they are not necessarily aware of the implications of the WHC. In addition, despite the non-existence of a Federal Ministry for Cultural Affairs, another institution representing the 16 *Länder* and unifying their cultural policy was created in the FRG in 1948, namely the Standing Conference. The Standing Conference is responsible for education, research and culture in the FRG, and represents the *Länder* at the federal, European and international levels. Moreover, the Standing Conference is in charge of preparing the Tentative List of WHS located in the FRG.

In addition, as “[r]elations with foreign states shall be conducted by the Federal Government” according to art. 32 Basic Law,⁵⁵⁰ the authorities at the federal level are responsible for conducting the foreign cultural policy. The Federal Foreign Office is responsible for world heritage, while intermediary institutions that are funded by the Federal Foreign Office, including the German Commission for UNESCO, also develop programmes in various fields of culture. Besides, it is quite usual for States Parties to the WHC that the Ministries for Foreign Affairs are responsible for communicating with UNESCO. In the case of the FRG, the Federal Foreign Office represents a link between UNESCO and the State Party Germany to the WHC. Therefore,

⁵⁵⁰ Grundgesetz [Basic Law] [GG], art. 32 (note 208)

even though the *Länder* are competent for the protection of heritage, when it comes to world heritage, institutions at the national level are also involved, i.e. the Federal Foreign Office and the Standing Conference.

In this context, despite the repartition of competences and institutions responsible reflecting a constitutional matter of the States Parties to the WHC, which the World Heritage Committee cannot influence, the OG insist on the need to involve local communities.⁵⁵¹ Thus, there is a need to develop awareness of the WHC at the decisional level of the *Länder* who are competent in the field of heritage protection. Furthermore, the municipal decisional level also needs to be conscious of the WHC and its implications in order to involve the local communities, such as the inhabitants of a city and cultural landscape as in the case of the Dresden Elbe Valley, for example. Following the OG properly, the inhabitants should have been consulted and involved during the preparation of the nomination file⁵⁵² for the Dresden Elbe Valley. From a more general perspective, States Parties are encouraged to involve local communities “in the identification, nomination and protection of World Heritage properties”.⁵⁵³ The local communities should be considered as “partners in the protection and conservation of World Heritage”.⁵⁵⁴ States Parties should also include the local communities during the preparation of their Tentative Lists.⁵⁵⁵ However, the WHC does not mention the role of the local communities and the need to involve them; rather they are only mentioned in the OG, and since the OG can be considered as an

⁵⁵¹ OG (2013), paras. 12 (note 553), 40 (note 554), 64 (note 555), 123 (note 552) and Annex 3, para. 12 (note 552) related to the inscription of cultural landscapes (note 15)

⁵⁵² OG (2013), para. 123 “Participation of local people in the nomination process is essential to enable them to have a shared responsibility with the State Party in the maintenance of the property. States Parties are encouraged to prepare nominations with the participation of a wide variety of stakeholders, including site managers, local and regional governments, local communities, NGOs and other interested parties.” and Annex 3, para.12 “General criteria for protection and management are equally applicable to cultural landscapes. It is important that due attention be paid to the full range of values represented in the landscape, both cultural and natural. The nominations should be prepared in collaboration with and the full approval of local communities.” (note 15)

⁵⁵³ OG (2013), para. 12 “States Parties to the Convention are encouraged to ensure the participation of a wide variety of stakeholders, including site managers, local and regional governments, local communities, non-governmental organizations (NGOs) and other interested parties and partners in the identification, nomination and protection of World Heritage properties.” (note 15)

⁵⁵⁴ OG (2013), para. 40 “Partners in the protection and conservation of World Heritage can be those individuals and other stakeholders, especially local communities, governmental, non-governmental and private organizations and owners who have an interest and involvement in the conservation and management of a World Heritage property.” (note 15)

⁵⁵⁵ OG (2013), para. 64 “States Parties are encouraged to prepare their Tentative Lists with the participation of a wide variety of stakeholders, including site managers, local and regional governments, local communities, NGOs and other interested parties and partners.” (note 15)

administrative regulation, States Parties to the WHC are not bound by the OG. Thus, States Parties to the WHC decide whether to follow the OG concerning the involvement of local communities.

In this context, given that the lack of awareness of the WHC by decisional levels other than the national level might lead to conflicts, a harmonisation by the States Parties to the WHC among their different decisional levels concerning the WHC and the involvement of the local communities as suggested in the OG could permit avoiding such conflicts.

To summarise, the legally binding effects for States Parties to the WHC were discussed both when a site located on the territory of a State Party is inscribed on the World Heritage List, i.e. the legal classification, and when a state becomes a member of the WHC, i.e. its responsibilities. It was argued that legally binding effects take place for a State Party once a site located on its territory integrates the World Heritage List and the responsibilities of States Parties have been declined according to the WHC.

The last two sections were then dedicated to the implications of an international treaty such as the WHC in terms of the legal value of the OG and the decisions of the World Heritage Committee for the States Parties to the WHC, as well as in terms of the WHC's lack of awareness at levels of decision other than the national level. The OG were presented as an administrative regulation and the decisions of the World Heritage Committee as internal bureaucracy, thus without binding effects for the States Parties to the WHC. Moreover, it was also argued that while the decision to inscribe a site on the World Heritage List requires the consent of the State Party to the WHC on whose territory the site is located, such consent is not required for the transfer of a site to the List of World Heritage in Danger, nor for the delisting of a site from the World Heritage List. In addition, in terms of the harmonisation of the different levels of decision *intra* States Parties to the WHC, it was argued that municipal levels of decision should be aware of the WHC and involve local communities in order to avoid conflicts.

The case of the Dresden Elbe Valley was declined all along these four sections in order to confront the State Party Germany to the WHC to the legal classification of the Dresden Elbe Valley, its responsibilities as a State Party, the legal value of the OG and the decisions of the

World Heritage Committee, and the need to harmonise the awareness of the different levels of decision within the State Party towards the WHC, as well as involving local communities.

Regarding the legal classification, it was argued that as soon as the Dresden Elbe Valley entered the World Heritage List, the State Party Germany to the WHC encountered obligations. In addition, before the inscription, the responsibilities of the State Party involved including all information concerning the *Waldschlößchenbrücke* and providing correct information during the evaluation of the site by the Advisory Body, as well as noticing any mistakes in the report of the evaluation. While the site was inscribed on the World Heritage List, the State Party had to do its utmost to protect the OUV and integrity of the site. During the conflict, the decisions to transfer the Dresden Elbe Valley to the List of World Heritage in Danger and to subsequently delist it from the World Heritage List did not require the consent of the State Party Germany to the WHC. Finally, it was demonstrated that while the *Länder* are competent for the protection of heritage in Germany, the national level deals with world heritage, and thus there is a need to harmonise the awareness of the WHC at the state and municipal levels in order for heritage identified under the WHC to be effectively protected by the State Party.

4.3. Delisting procedure of the Dresden Elbe Valley from the World Heritage List: step-by-step decisions

The Dresden Elbe Valley was inscribed on the World Heritage List by the World Heritage Committee in 2004⁵⁵⁶ as a continuing cultural landscape. However, two years later, in 2006, this site was transferred to the List of World Heritage in Danger⁵⁵⁷. The construction of the *Waldschlößchenbrücke* in the core of the WHS was considered a threat to the OUV and integrity of the site by the World Heritage Committee. At its yearly sessions in 2007 and 2008, the World Heritage Committee decided to keep the Dresden Elbe Valley on the List of World Heritage in Danger in order to allow time to search for an alternative solution that would be acceptable for both the State Party Germany to the WHC and the World Heritage Committee. Finally, the World

⁵⁵⁶ Decision 28 COM 14.B.40 (note 4)

⁵⁵⁷ Decision 30 COM 7B.77 (note 5)

Heritage Committee put an end to the conflict in 2009 by delisting the Dresden Elbe Valley from the World Heritage List.⁵⁵⁸

When the Dresden Elbe Valley was delisted from the World Heritage List in 2009, it represented the first cultural site ever delisted. Nevertheless, the first delisting ever of a WHS took place in 2007⁵⁵⁹ when the World Heritage Committee decided to delist the Arabian Oryx Sanctuary in Oman. This site was inscribed as a natural site in 1994 under natural criterion (iv)⁵⁶⁰ at the time of the inscription, which represents criterion (x)⁵⁶¹ since the revision of the OG in 2005. The integrity and OUV were threatened by the reduction of 90% of the protected area following a Royal Decree from January 2007.⁵⁶² In addition, according to IUCN “the population of Oryx had significantly declined due to poaching, which would lead to imminent extinction as the breeding herd consisted of only four females and four males, and that exploration for hydrocarbons in the area had been foreseen”.⁵⁶³ Thus, the World Heritage Committee decided for the first time in its history to delist a site from the World Heritage List. The delisting had been requested by the State Party, and was twice⁵⁶⁴ repeated by the Observer Delegation of Oman during the discussion concerning the Arabian Oryx Sanctuary by the World Heritage Committee in 2007. Consequently, the delisting of the Arabian Oryx Sanctuary in 2007 created a precedent in terms of the decisions of the World Heritage Committee regarding the case of the Dresden Elbe Valley.

This section of the chapter about the conflict between UNESCO and the State Party Germany to the WHC focuses on the step-by-step decisions of the World Heritage Committee, from the

⁵⁵⁸ Decision 33 COM 7A.26 (note 6)

⁵⁵⁹ Decision 31 COM 7B.11 (note 3)

⁵⁶⁰ UNESCO, 1994. *Convention Concerning the Protection of the World Cultural and Natural Heritage, World Heritage Committee Eighteenth Session, Phuket, Thailand, 12 - 17 December 1994: WHC-94/CONF.003/16*. Paris: UNESCO World Heritage Centre, p.46

⁵⁶¹ OG (2013), para. 77, criterion (x) “contain the most important and significant natural habitats for in-situ conservation of biological diversity, including those containing threatened species of Outstanding Universal Value from the point of view of science or conservation” (note 15)

⁵⁶² UNESCO, 2007. *Convention Concerning the Protection of the World Cultural and Natural Heritage, World Heritage Committee Thirty-first Session, Christchurch, New Zealand, 23 June - 2 July 2007: WHC-07/31.COM/INF.24*. Paris: UNESCO World Heritage Centre, p.80

⁵⁶³ WHC-07/31.COM/INF.24, p.80 (note 562)

⁵⁶⁴ WHC-07/31.COM/INF.24, “[The Observer Delegation of Oman] requested the Committee to respect the State Party’s request to delete the property from the World Heritage List”, p.82 and “The State Party appealed to the Committee to accept the State Party’s request to delete the property from the List”, p.85 (note 562)

inscription of the Dresden Elbe Valley on the World Heritage List in 2004 to its delisting in 2009. In this context, the discussions of the World Heritage Committee members are analysed.

However, prior to entering discussion on the delisting process of the Dresden Elbe Valley, it is useful to provide some information to contextualise the inscription of the Dresden Elbe Valley on the World Heritage List. The former GDR – where Dresden used to be located – acceded to the WHC on 12 December 1988.⁵⁶⁵ A nomination file was prepared for the Baroque ensemble of Dresden, although the then Bureau (since 1992 the World Heritage Centre) did not recommend this site for inclusion in the World Heritage List.⁵⁶⁶ Furthermore, the World Heritage Committee was informed of the decision of Germany to “withdraw Wörlitz, Quedlinburg, Magdeburg and Dresden from nomination to the World Heritage List” during its 14th session in 1990.⁵⁶⁷ The nomination of Dresden as a historic town was considered as negative in the ICOMOS evaluation, “because of a lack of authenticity due to the fact that the war-torn city was reconstructed after World War II”.⁵⁶⁸

Each of the sections from the inscription to the delisting of the Dresden Elbe Valley from the World Heritage List includes a discussion of the issues raised during the World Heritage Committee sessions in order to examine the type of dispute settlement applied: (1) political or diplomatic dispute settlement,⁵⁶⁹ or (2) judicial dispute settlement⁵⁷⁰. It can be argued that dispute settlement is a broad concept that is concerned with the concept of “applicable law”, i.e. the system of legal norms binding for States Parties to the WHC.⁵⁷¹ In addition, each of the following parts of this section on the delisting procedure are based on the Summary record of the

⁵⁶⁵ UNESCO (note 11)

⁵⁶⁶ UNESCO, 1990. *Convention Concerning the Protection of the World Cultural and Natural Heritage, World Heritage Committee Fourth Session, Banff, Alberta, Canada, 7 - 12 December 1990: CC-90/CONF.004/2*. Paris: UNESCO World Heritage Centre, “Although the Bureau recognized the importance of this property for the cultural heritage of the German Democratic Republic, it considered that this site did not meet the criteria for entry on the World Heritage List, as defined for the purpose of implementing the Convention”, p.3

⁵⁶⁷ CLT-90/CONF.004/13, p.4 (note 407)

⁵⁶⁸ Ringbeck & Rössler, p.205 (note 513)

⁵⁶⁹ The political or diplomatic dispute settlement involves consultations, mediation, conciliation, panel procedures subject to political approval by the member states

⁵⁷⁰ The judicial dispute settlement involves arbitrations through judicial bodies

⁵⁷¹ Marceau, G., 2002. WTO Dispute Settlement and Human Rights. *European Journal of International Law*, 13(4), p.755, while the author applies this idea to WTO, I transferred it to the WHC

corresponding session of the World Heritage Committee as well as the draft decisions and the decisions adopted by the World Heritage Committee at its corresponding session.

4.3.1. Inscription of the Dresden Elbe Valley on the World Heritage List (2004)

The nomination file for the Dresden Elbe Valley was signed by the then Mayor of Dresden on 6 January 2003, and received at the World Heritage Centre by 30 January 2003. In addition, the ICOMOS evaluation of the site took place in September 2003 and the written evaluation was signed in March 2004.

The discussion of the World Heritage Committee concerning the inscription of the Dresden Elbe Valley on the World Heritage List is transcribed in the Summary record of the 28th session of the World Heritage Committee (Suzhou, China, 28 June – 7 July 2004).⁵⁷² The case of the Dresden Elbe Valley was discussed on the morning of 2 July 2004.

While the OUV of the site was acknowledged, attention was brought to the description of criterion (v)⁵⁷³ in the ICOMOS evaluation and specifically on the part “pressures in favour of change”.⁵⁷⁴ A representative of ICOMOS explained that the inclusion of a reference to urban development in the description of criterion (v) was meant “to assist the conservation effort for the property”.⁵⁷⁵ Afterwards, it is regrettable that the discussion was not deepened regarding this issue, which could have possibly led to the project of bridge(s) construction being designated twice in the nomination file⁵⁷⁶ and once in the ICOMOS evaluation.⁵⁷⁷ In addition, the issue of

⁵⁷² UNESCO, 2004. *Convention Concerning the Protection of the World Cultural and Natural Heritage, World Heritage Committee Twenty-eighth Session, Suzhou, China, 28 June - 7 July 2004: WHC-04/28.COM/INF.26*. Paris: UNESCO World Heritage Centre, pp.217-218

⁵⁷³ Nomination file, “The Dresden Elbe Valley is an outstanding example of land use, representing an exceptional development of a major Central-European city. The value of this cultural landscape has long been recognized, but it is now under new pressures for change”, p.1 (note 98)

⁵⁷⁴ WHC-04/28.COM/INF.26, p.217 (note 572)

⁵⁷⁵ WHC-04/28.COM/INF.26, p.217 (note 572)

⁵⁷⁶ Nomination file, “The representation of the traffic areas shows that no main traffic arteries are planned in the Elbe area, which would affect the townscape and landscape. Options for five new bridges are represented beside the existing bridges. A final decision concerning number and location has not yet been taken, except for the Waldschlößchenbrücke (decision of the city council No. V2012-44-2002 from 30th May 2002)”, p.81 and “Other development pressures exist in the area of bridge locations (e.g. Waldschlößchenbrücke) through interference with

management plans was also discussed,⁵⁷⁸ since a management plan seemed to be missing for the Dresden Elbe Valley. The answer of ICOMOS⁵⁷⁹ implies that management plans were prepared after the ICOMOS evaluation of the site rather than in the initial nomination file.

Another issue raised during the discussion on the Dresden Elbe Valley concerns the suggestion to add criterion (vi)⁵⁸⁰ to the four other criteria. This extra inclusion was proposed in view of the bombings of the City of Dresden in February 1945.⁵⁸¹ Despite this proposition receiving support from several members of the World Heritage Committee, it was not retained due to the decision-making of the World Heritage Committee.⁵⁸² Furthermore, while acknowledging the relevance⁵⁸³ of criterion (vi) for the Dresden Elbe Valley, a representative of ICOMOS emitted some reservations concerning the applicability of this criterion to the Dresden Elbe Valley.⁵⁸⁴

Thus, two elements during the discussion of the World Heritage Committee to inscribe the Dresden Elbe Valley on the World Heritage List could have brought the attention of the World Heritage Committee and possibly led to the referral, deferral or non-inscription. First, the issue of urban development identified as “new pressures for change” as described for criterion (v) and secondly, the questioned management plan of the site.

the traditional settlement layout and the natural scenery, although continuing constructional development is not intended in these areas”, p.99 (note 98)

⁵⁷⁷ ICOMOS, “The construction of a new bridge is foreseen 5 km down the river from the centre. Its design results from an international competition. The profile has been kept slender and low in order to reduce impact on landscape”, p.87 and “This cultural landscape has long been recognized, which has contributed to the preservation and survival of its qualities, even though it is now under new pressures for change”, p.89 (note 100)

⁵⁷⁸ WHC-04/28.COM/INF.26, “[o]nly a good management system existed for the Dresden Elbe Valley in Germany”; “ICOMOS seemed to value the effectiveness of management systems above management plans”, p.218 (note 572)

⁵⁷⁹ WHC-04/28.COM/INF.26, “a commission had been established to implement the management plan of properties as a direct result of the ICOMOS assessment mission”, p.218 (note 572)

⁵⁸⁰ OG (2013), para. 77, Criterion (vi) “be directly or tangibly associated with events or living traditions, with ideas, or with beliefs, with artistic and literary works of outstanding universal significance. (The Committee considers that this criterion should preferably be used in conjunction with other criteria)” (note 15)

⁵⁸¹ WHC-04/28.COM/INF.26, “the property was representative of the drama and reconstruction of an entire town and people”, p.217 (note 572)

⁵⁸² WHC-04/28.COM/INF.26, “[...] the Committee had decided not to add new criteria during its session and [...] the Advisory Bodies would need to evaluate any additional criteria”, p.218 (note 572)

⁵⁸³ WHC-04/28.COM/INF.26, “in view of the historic event”, p.217 (note 572)

⁵⁸⁴ WHC-04/28.COM/INF.26, “the property had been nominated primarily as a cultural landscape and not as a town centre”, pp.217-218 (note 572)

At the 29th session of the World Heritage Committee in Durban (South Africa) from 10 to 15 July 2005, the state of conservation of the newly-inscribed Dresden Elbe Valley cultural landscape was not revised.

4.3.2. Transfer of the Dresden Elbe Valley to the List of World Heritage in Danger (2006)

Between the inscription of the Dresden Elbe Valley on the World Heritage List and the 30th session of the World Heritage Committee (Vilnius, 2006), the World Heritage Centre became aware of the construction of the *Waldschlößchenbrücke* through complaints and reports from individuals and local NGOs.⁵⁸⁵

Consequently, a meeting with various stakeholders of the State Party Germany to the WHC such as the Mayor of Dresden, the Permanent Delegation of Germany to UNESCO, the Federal Foreign Office, the German National Commission for UNESCO and members of the World Heritage Centre was organised at the World Heritage Centre in Paris on 20 January 2006. During this meeting, the German authorities were requested not to start the construction of the bridge before the 30th session of the Committee. The implementation of a VIS of the bridge proposal was also suggested to the German authorities.⁵⁸⁶

Following this meeting, a report entitled “Waldschlösschenbrücke Bridge World Heritage status”, a printed brochure and statement by the City of Dresden providing background on the decisions for the *Waldschlößchenbrücke* were received at the World Heritage Centre. It was stated that the construction of the bridge would not start before August 2006. In addition, the suggestion to implement a VIS of the proposed bridge project was followed by the German authorities, since the Institute of Urban Design and Regional Planning of the RWTH Aachen University carried it out.⁵⁸⁷

⁵⁸⁵ WHC-06/30.COM/7B, pp.197-198 (note 515)

⁵⁸⁶ WHC-06/30.COM/7B, p.198 (note 515)

⁵⁸⁷ WHC-06/30.COM/7B, pp.198-199 (note 515)

Therefore, two years after the inscription of the Dresden Elbe Valley on the World Heritage List, the World Heritage Committee discussed the state of conservation of this site, during the 30th session of the World Heritage Committee in Vilnius (Lithuania), from 8 to 16 July 2006.

On the one hand, the discussion of the World Heritage Committee concerning the Dresden Elbe Valley concerned issues related to its decision-making process, i.e. the transfer of the Dresden Elbe Valley to the List of World Heritage in Danger and the modalities of such a decision. On the other hand, the discussion also focused on the core of the problem: the threat of the *Waldschlößchenbrücke* to the OUV and integrity of the Dresden Elbe Valley. Therefore, the form of the decision seemed to matter as much, if not more, than the content to the World Heritage Committee.

The possibility of delisting the Dresden Elbe Valley from the World Heritage List was suggested during its next session, the 31st session in 2007, since the result of the VIS showed that the construction of the bridge would irreversibly damage the OUV and integrity of the site. Nevertheless, opinions were divided⁵⁸⁸ concerning the possible delisting. However, because the allusion to a possible delisting was dividing the members of the World Heritage Committee, the opinion of ICOMOS or the World Heritage Centre was sought. In respect of this doubt, the Chairperson mentioned that the position of ICOMOS was expressed in the draft decision⁵⁸⁹ and the representative of the World Heritage Centre supported this position, referring to the nature of the site and the VIS.⁵⁹⁰ Thus, the World Heritage Committee could base its decision to transfer the Dresden Elbe Valley to the List of World Heritage in Danger on the result of the VIS.⁵⁹¹ At the time when this discussion took place, no delisting had ever taken place, which can partly explain the hesitation of the World Heritage Committee members.

⁵⁸⁸ UNESCO, 2006. *Convention Concerning the Protection of the World Cultural and Natural Heritage, World Heritage Committee Thirtieth Session, Vilnius, Lithuania, 8 - 16 July 2006: WHC-06/30.COM/INF.19. Paris:* UNESCO World Heritage Centre, on the one hand the delisting was seen as “a drastic step” but on the other hand it was acknowledged that “the Committee had a duty to recognize its responsibility”, p.137

⁵⁸⁹ WHC-06/30.COM/INF.19, p.140 (note 588)

⁵⁹⁰ WHC-06/30.COM/INF.19, “confirmed that the property had been inscribed as a continuing cultural landscape”; “the Visual Impact Study undertaken by the State Party made it clear that the bridge would compromise the values for which it had been inscribed”, p.140 (note 588)

⁵⁹¹ For more information, see section 4.1.2 of this thesis

Another issue discussed concerns the ICOMOS evaluation in which the bridge is not seen as being a potential threat to the cultural landscape, and thus does not represent a conflict with the application of the Dresden Elbe Valley to the World Heritage List. Indeed, the response of ICOMOS to this question⁵⁹² was sought during the discussion. In respect of this crucial question in the conflict between UNESCO and the State Party Germany to the WHC, a representative of ICOMOS referred to the several failed projects of the bridge in the course of history,⁵⁹³ as well as the OG.⁵⁹⁴ This answer from ICOMOS shows the lack of information provided on the state-of-the-art of the project both in the nomination file and during the ICOMOS evaluation in Dresden prior to the inscription of the site on the World Heritage List. Indeed, since the international competition in 1997, the design of the bridge and the decision to build it had been clear.⁵⁹⁵ In addition, the evocation of the OG does not bring any clarification since States Parties to the WHC are not bound by the OG. Furthermore, the reference to the renouncement – in the course of history – of the project due to the impact on the valley represents a valuable argument⁵⁹⁶ that might prompt the question of why the bridge was built then. Thus, the World Heritage Committee questioned the Advisory Body ICOMOS about the evaluation that its members conducted, which, according to the WHC, is supposed to assist the World Heritage Committee.⁵⁹⁷ For the evaluation of cultural landscapes, a joint evaluation by ICOMOS and IUCN would represent a more complete evaluation, taking into account both the cultural and natural features of the site.

The case of the Dresden Elbe Valley was compared with that of the Tower of London, because contradictions seemed to exist between the decisions of the World Heritage Committee

⁵⁹² WHC-06/30.COM/INF.19, “why the proposed bridge had not been brought to the Committee’s attention at the time of inscription”, p.136 (note 588)

⁵⁹³ WHC-06/30.COM/INF.19, “the idea of the bridge had been discussed at various times since the nineteenth century but had always been dropped because of the impact on the valley”, p.137 (note 588)

⁵⁹⁴ WHC-06/30.COM/INF.19, “the OG required that major construction should be notified during the nomination process – but in the case under consideration, no crystallized plans had existed at the relevant time”, p.137 (note 588)

⁵⁹⁵ For more information on the chronology of the *Waldschlößchenbrücke* see section 2.1.1 of this thesis

⁵⁹⁶ This argument needs however to be taken carefully since it cannot be supported by references

⁵⁹⁷ World Heritage Convention [WHC], art. 13 para. 7 “The Committee shall co-operate with international and national governmental and non-governmental organizations having objectives similar to those of this Convention. For the implementation of its programmes and projects, the Committee may call on such organizations, particularly the International Centre for the Study of the Preservation and Restoration of Cultural Property (the Rome Centre), the International Council of Monuments and Sites (ICOMOS) and the International Union for Conservation of Nature and Natural Resources (IUCN), as well as on public and private bodies and individuals.”

concerning these two cases.⁵⁹⁸ However, the idea was expressed that the cases of the Tower of London and the Dresden Elbe Valley were different.⁵⁹⁹ Thus, in the course of the discussion it appeared to the World Heritage Committee that a choice had to be made by the State Party Germany to the WHC.⁶⁰⁰ In addition, differences were seen in the two cases since the Dresden Elbe Valley had been inscribed on the World Heritage List as a cultural landscape.⁶⁰¹ Accordingly, the World Heritage Committee also compared the cases of different WHS in order to make decisions.

Another thematic issue raised concerns the modalities of transfer of a site to the List of World Heritage in Danger. Referring to the possible decision to transfer the Dresden Elbe Valley to the List of World Heritage in Danger, it was stated that the agreement of the State Party was needed prior to the transfer of a site located on its territory to the List of World Heritage in Danger.⁶⁰² However, the Chairperson referred to precedent decisions to counter-argue this idea,⁶⁰³ citing four examples of sites that had been transferred without the consent of the State Party to the List of World Heritage in Danger: Manas Wildlife Sanctuary in India (1992), Sangay National Park in Ecuador (1992), Ichkeul National Park in Tunisia (1996) and Simien National Park in Ethiopia (1996).⁶⁰⁴ Here again, the World Heritage Committee tends to take decisions according to its precedent decisions. It can be added that as demonstrated in section 4.2.3 of this thesis, the consent of the States Parties to the WHC is not needed for a site to be transferred to the List of World Heritage in Danger.

⁵⁹⁸ WHC-06/30.COM/INF.19, p.138. The state of conservation of the Tower of London (United Kingdom) was examined by the World Heritage Committee three sites prior to the examination of the Dresden Elbe Valley at the same meeting. The following comment of a Committee members shows the concern related to the case of the Dresden Elbe Valley: "It was a serious case which under many circumstances would lead to immediate inscription on the List of World Heritage in Danger and possible deletion from the World Heritage List. There was no statement of significance or authenticity and it was clear that the proposed construction would affect the views of St Paul's and Tower Bridge, with a risk that they become 'Disneyland-like'. The Committee should not be afraid and should reflect on the line it had adopted with other similar issues, for example Cologne Cathedral.", p.134 (note 588)

⁵⁹⁹ WHC-06/30.COM/INF.19, in the case of the Tower of London "more information was needed" whereas in the case of the Dresden Elbe Valley "it was clear that, if the work was carried out the outstanding universal value would be lost", p.138 (note 588)

⁶⁰⁰ WHC-06/30.COM/INF.19, "the State Party had to choose between the bridge and the World Heritage status", p.138 (note 588)

⁶⁰¹ WHC-06/30.COM/INF.19, p.139 (note 588)

⁶⁰² WHC-06/30.COM/INF.19, p.138 (note 588)

⁶⁰³ WHC-06/30.COM/INF.19, "there were precedents for inscription on the List of World Heritage in Danger without State Party consent", p.138 (note 588)

⁶⁰⁴ WHC-06/30.COM/INF.19, p.138 (note 588)

Attention was also brought to the general issue of the conflict between conservation and development.⁶⁰⁵ From the perspective of the conflict between heritage protection and urban development, the case of the Dresden Elbe Valley is not isolated. Indeed, many WHS have to deal with this concern and thus a general reflection and the development of guidelines⁶⁰⁶ could be helpful for the prevention of such conflicts.

The question of a possible conflict on this issue within the different levels of administration of the State Party was omitted.⁶⁰⁷ However, a representative of the Observer Delegation of Germany reacted to the comment concerning potential conflict within the State Party.⁶⁰⁸ In any case, the situation within States Parties to the WHC is not an issue that the World Heritage Committee is entitled to solve.

The issue of the “bad communication or misinformation”⁶⁰⁹ was mentioned once concerning the lack of information contained in the nomination file and the erroneous information in the ICOMOS evaluation about the location of the bridge. The fact that the World Heritage Centre became aware of the construction of the bridge through individual initiatives and NGOs also supports the idea of poor communication or misinformation. Therefore, should the nomination files and evaluations by the Advisory Bodies be cross checked once received at the World Heritage Centre? However, this would represent a costly procedure. Furthermore, it is the role of the World Heritage Committee to assess the nomination files before inscription on the World Heritage List.

Attention was paid to the community in Dresden when the idea was presented that the bridge could also be seen as a new viewing site, with other perspectives for the appreciation of the site’s value. In this view, the decision that the World Heritage Committee would take was seen as a

⁶⁰⁵ WHC-06/30.COM/INF.19, “important for the Committee to have a debate on the tensions between heritage and development”, p.139 (note 588)

⁶⁰⁶ The adoption of the concept of Historic Urban Landscape (HUL) discussed in chapter 5 of this thesis is a first step in this direction

⁶⁰⁷ WHC-06/30.COM/INF.19, “contrast that seemed to exist within the State Party itself between the federal administration and the local community”, p.139 (note 588)

⁶⁰⁸ WHC-06/30.COM/INF.19, “its previous comments did not imply conflict between the State Party and the City of Dresden [...] there had simply not been sufficient time for proper consultations with all concerned”, p.139 (note 588)

⁶⁰⁹ WHC-06/30.COM/INF.19, p.136 (note 588)

message⁶¹⁰ to the supporters of the bridge construction project. However, the World Heritage Committee is not entitled to solve such an issue, especially following the result of the referendum of 27 February 2005, favouring the construction of the bridge.

Another issue discussed concerns the credibility of the World Heritage Committee and the WHC which, it was considered “were at stake”.⁶¹¹ This shows that the issue of urban development within WHS needs to be further discussed and the position of the World Heritage Committee in relation to the WHC clarified.

Therefore, the analysis of the discussion of the World Heritage Committee shows that the issues⁶¹² discussed are related to the internal decision-making process of the World Heritage Committee (modalities of transfer of a site to the List of World Heritage in Danger, ICOMOS evaluation, development vs. conservation, credibility of the WHC) and its position vis-à-vis the State Party Germany to the WHC in the case of the Dresden Elbe Valley. Since the World Heritage Committee was searching for a consensus with the State Party Germany to the WHC, it can be argued that a political and diplomatic dispute settlement was being conducted.

4.3.3. In search for a compromise (2007-2008)

4.3.3.1. 31st session of the World Heritage Committee (Christchurch, 2007)

The 31st session of the World Heritage Committee took place one year later in Christchurch (New Zealand), from 23 June to 2 July 2007. On the morning of 25 June, the World Heritage Committee again discussed the state of conservation of the Dresden Elbe Valley.

The major issue discussed during the 31st session of the World Heritage Committee concerned alternative solutions such as a tunnel or new design for the bridge. A representative of the NGO

⁶¹⁰ WHC-06/30.COM/INF.19, “the Committee send[s] a strong unequivocal message to the State Party and the local population who supported the bridge construction”, p.138 (note 588)

⁶¹¹ WHC-06/30.COM/INF.19, p.139 (note 588)

⁶¹² A summary of the issues discussed by the World Heritage Committee between 2006 and 2009 concerning either the political and diplomatic dispute-settlement or its internal decision-making process can be found in Annex IV of this thesis

Tunnel Initiative present during the discussion declared that 60% of those polled in Dresden were in favour of a tunnel in the event that it protects the OUV of the site. The State Party Germany to the WHC was seeking a tunnel alternative and new proposed bridge in order to keep the World Heritage status. Nevertheless, a representative of ICOMOS repeated that the Dresden Elbe Valley had been inscribed as a cultural landscape on the World Heritage List, and thus the solution – a tunnel or new design for the bridge – should respect it. Thus, the impact of these alternatives on the OUV should be investigated. In addition, the new design of the bridge was seen as an improvement yet not as the optimal solution, given that it could not avoid an impact on the OUV of the site. Moreover, since alternatives were proposed, it was suggested to add them in the decision. Support was generally found for the tunnel alternative, although it was mentioned that since the site is a cultural landscape, any intervention such as the entries of the tunnel could have consequences, even in the buffer zone. Thus, it was proposed that the tunnel alternative should be added in the decision, since it seemed to be the solution that would permit protecting the OUV and integrity of the site. Interestingly, the option of not building anything was not mentioned at all. Thus, the need for an Elbe crossing at this location was acknowledged and the least intrusive solution was sought. This negotiation towards finding an alternative solution reflects part of the political and diplomatic dispute settlement process.

Another major issue that was discussed – and had already been discussed the previous year during the 30th session of the World Heritage Committee – concerned the possible delisting of the Dresden Elbe Valley from the World Heritage List. The effort made by the State Party Germany to the WHC to find a compromise was indicated, and thus an opinion was given that the delisting should not take place before a decision with irreversible effect would be taken. On the contrary, it was recalled that the decision taken in Vilnius (Lithuania) in 2006 was valid, implicating that the delisting should take place in the case that the bridge was being built. However, another prudent opinion was emitted, rather against the delisting, explaining that even though the WHC provided for delisting, this decision had never been taken before⁶¹³ and that since the State Party Germany to the WHC was dedicated to conservation, contrary to other States Parties, it was not found proper to delist the site. Subsequently, concerns were expressed towards paragraph 7 of the draft

⁶¹³ The final decision to delist the Arabian Oryx Sanctuary (Oman) from the World Heritage List took place in the evening of Thursday 28 June 2007, thus after the discussion and decision concerning the Dresden Elbe Valley

decision, because even though the site remained in danger, it was considered that the decision for delisting was inappropriate and thus a request was made to delete the last paragraph. Another comment was made concerning this paragraph, in terms of its implication towards the delisting decision.⁶¹⁴ Another careful opinion concerning the possible delisting reminded that delisting represented a last resort in the decision-making process. Thus, the issue of the delisting, which represents the internal decision-making process of the World Heritage Committee, was not unanimously accepted by the members of the World Heritage Committee.

The importance of the OUV was recognised, given that it represents another major issue discussed by the Committee members. In relation with the alternative solutions in terms of their impact on the OUV, the tunnel emerged as a preferable solution. Furthermore, recalling that the World Heritage Committee was facing such a choice for the first time, it was declared that the OUV remains the basis for any decision. Criterion (iv)⁶¹⁵, one of the four criteria under which the Dresden Elbe Valley had been inscribed on the World Heritage List, was mentioned in declaring the necessity of the World Heritage Committee being certain that the site had lost its OUV, since the World Heritage Committee was responsible for the protection of the OUV. It was then suggested that the World Heritage Committee and Advisory Bodies evaluate the impact of the alternatives – the tunnel and the new proposed bridge – on the OUV. Thus, the OUV, which are the central question in this conflict, were discussed in relation to the modalities of the decision-making process of the World Heritage Committee.

The legal matters represented another issue mentioned during the discussion. After the intervention of the Observer Delegation of Germany on the judicial process, it was clear that the City of Dresden did not have the legal possibility at its disposal to suggest alternative solutions, given that the judicial process had been exhausted.⁶¹⁶ Consequently, the situation was identified as follows by a Committee member: while technique seemed able to bring a solution, the situation was of a juridical problem order. Therefore, it was offered that the World Heritage

⁶¹⁴ WHC-07/31.COM/INF.24, “made the construction of the bridge the condition for delisting”; “that a Decision to delist should come as a result of deliberation by the Committee and not as the outcome of an automatic process”, p.50 (note 562)

⁶¹⁵ Nomination file, “The Dresden Elbe Valley is an outstanding cultural landscape, an ensemble that integrates the celebrated baroque setting and suburban garden city into an artistic whole within the river valley.”, p.1 (note 98)

⁶¹⁶ WHC-07/31.COM/INF.24, “it was important to note that the court decisions did not concern the substance of the matter but only a question of temporary injunction against the construction of the bridge”, p.48 (note 562)

Committee clearly intervened with the competent German authorities in order to find a solution. As discussed in chapter 3 of this thesis, the legal background of the conflict within the FRG can be found in the non-transposition of the WHC in German law, a matter that the World Heritage Committee cannot influence.

The question of the time required by the State Party Germany to the WHC to find a solution was also raised. While the possibility of one year was suggested, this was found insufficient by the Observer Delegation of Germany.⁶¹⁷ Nevertheless, the opinion to give the State Party one year only was emitted. This discussion shows the decision-making process of the World Heritage Committee, which seeks consultation and negotiation, and thus political and diplomatic dispute settlement, with States Parties to the WHC prior to taking final decisions.

The possibility for the German authorities to organise a second referendum, which would be related to the protection of the OUV of the Dresden Elbe Valley, was asked to the Observer Delegation of Germany. It was met with the response that a two-thirds majority would be needed at the CC in order to decide to hold another referendum. As seen in section 2.2.4 of this thesis, a petition for another referendum concerning the alternative of a tunnel was organised in the City of Dresden, although this referendum did not take place. In addition, a referendum based on the WHC or its concepts such as OUV or integrity could not take place since the WHC was not transposed in German law.

The issue of the debate between development and heritage protection, already discussed during the previous year's 30th session of the World Heritage Committee, was raised again. The conflict for the State Party Germany to the WHC⁶¹⁸ was identified as development to meet the needs of the inhabitants and the protection of the World Heritage status for the Dresden Elbe Valley. This issue is related to the internal decision-making process of the World Heritage Committee, which is expected to adopt a policy or guidelines concerning development vs. conservation.

⁶¹⁷ WHC-07/31.COM/INF.24, "one year would permit it to make the basic political decisions [but] it would not be sufficient to address all the issues related to zoning", p.50 (note 562)

⁶¹⁸ WHC-07/31.COM/INF.24, "the State Party was determined to find a solution to protect the property and at the same time meet the transport needs of the residents", p.48 (note 562)

In view of the conflict taking place within the FRG, it was questioned whether all levels of governments within a State Party should co-sign the WHC.⁶¹⁹ However, this matter is not a responsibility of the World Heritage Committee but rather of the States Parties to the WHC.

Another issue raised during the discussion concerns the proposal to apply the reinforced monitoring mechanism according to art. 11 para. 7 WHC⁶²⁰ and paras. 169-176 OG⁶²¹, which was supported without much comment. Thus, a reinforced reactive monitoring mission took place in Dresden in February 2008, with the result discussed in the next session of this thesis (4.3.3.2). This is also part of the mediation process, which followed a political and diplomatic dispute settlement.

The precedent that would represent the decision to delist the Dresden Elbe Valley from the World Heritage List was also mentioned, since no delisting had taken place yet.⁶²² This concern of the World Heritage Committee is related to its own decision-making.

A request for more information concerning the documents under examination by the World Heritage Centre and ICOMOS was emitted, stating that the documents received were in none of the two official languages of UNESCO and failed to focus significantly on the legal cases that would have been of help to the World Heritage Committee. Thus, the information submitted by the State Party to the WHC to the World Heritage Centre for the World Heritage Committee is not of great help in terms of the advancement of the decision-making process, and failed to contribute to the negotiation.

Attention was paid to the issue of the respect of the sovereignty of the State Party.⁶²³ Nonetheless, sovereignty is not an issue since States Parties to the WHC are expected to comply with the WHC once they have ratified it. This comment is part of the internal decision-making process of the World Heritage Committee.

⁶¹⁹ WHC-07/31.COM/INF.24, “a need for a seminar to examine the implementation of the Convention in Federal Systems”, p.49 (note 562)

⁶²⁰ World Heritage Convention [WHC], art. 11 para. 7 (note 524)

⁶²¹ OG (2005), IV.A Reactive Monitoring, paras. 169-176 (note 426)

⁶²² On this issue, see note 613

⁶²³ WHC-07/31.COM/INF.24, “seeking to direct the design and zoning, was showing signs of trespassing on issues of sovereignty”, p.50 (note 562)

Bringing new thoughts into the discussion, the two goals of the WHC (1) to identify and inscribe sites of OUV on the World Heritage List and (2) to conserve them were reminded and discussed in light of the existing imbalance⁶²⁴ between these two goals. Thus, discussion was raised concerning the initial purpose of the WHC, which the World Heritage Committee questioned, and the point here was rightly stated in the sense that the priority should be placed on conservation rather than inscribing new sites. The larger the World Heritage List, the more complicated the careful evaluation of the state of conservation of the sites already inscribed on the World Heritage List. This point also concerns the internal decision-making of the World Heritage Committee.

The credibility was raised again in the discussion, but while the credibility of the World Heritage Committee and the WHC had been mentioned during the previous year, the credibility of the World Heritage List was pointed out on this occasion. The insistence on the issue of credibility shows that the World Heritage Committee is concerned about its authority as the organ responsible for the implementation of the WHC according to art. 8 para. 1 WHC⁶²⁵, and this issue once again relates to the internal decision-making of the World Heritage Committee.

The issue of finding a solution between protection and progress⁶²⁶ was also raised. This question is connected to the need for the preparation of guidelines and principles related to urban development and heritage protection in order to guide the decision-making of the World Heritage Committee.

Finally, issues related to the political and diplomatic dispute settlement were raised (reinforced monitoring mission, time needed for the State Party Germany to the WHC, sovereignty), while concerns related to the decision-making process of the World Heritage Committee also occupied

⁶²⁴ WHC-07/31.COM/INF.24, “the trend in favour of the first represented a backward step and there was a need to put conservation back into prime position”, p.50 (note 562)

⁶²⁵ World Heritage Convention [WHC], art. 8 para. 1 WHC “An Intergovernmental Committee for the Protection of the Cultural and Natural Heritage of Outstanding Universal Value, called “the World Heritage Committee”, is hereby established within the United Nations Educational, Scientific and Cultural Organization. It shall be composed of 15 States Parties to the Convention, elected by States Parties to the Convention meeting in general assembly during the ordinary session of the General Conference of the United Nations Educational, Scientific and Cultural Organization. The number of States members of the Committee shall be increased to 21 as from the date of the ordinary session of the General Conference following the entry into force of this Convention for at least 40 States.”

⁶²⁶ WHC-07/31.COM/INF.24, “have a general reflection on the issue [and the question of] how it would be possible to protect World Heritage properties without taking into account the evolution of the general public society, and also how to combine protection and progress”, p.50 (note 562)

a large part of the discussion (delisting, purpose of the WHC, credibility, discussion on development vs. conservation).

4.3.3.2. 32nd session of the World Heritage Committee (Quebec City, 2008)

As decided in para. 6 of the final decision 31 COM 7A.27⁶²⁷, a reinforced reactive monitoring mission was organised in Dresden on 4 and 5 February 2008. It was noticed that the construction of the bridge had started according to a slightly modified design of the bridge. However, it was stated that even though the new design was proving to try to be less intrusive, its shape, function and location remained the same, and thus it was not considered a solution that maintained the OUV and integrity of the site. On the contrary, the alternative of a tunnel was discussed during the mission with the authorities in Dresden and appeared to reflect a solution with a much lesser impact on the landscape, although an impact assessment would still be needed. Therefore, it was requested to stop the construction of the bridge in order to allow time to explore the alternative solution of a tunnel. Considering the possibility of developing a new design for a bridge, it was declared that in both cases of a tunnel or new bridge, a timely and costly planning procedure would have to take place and another design for a bridge would still have an impact on the integrity and value of the landscape.⁶²⁸ Thus, the implementation of a reinforced reactive monitoring mission represents part of the political and diplomatic dispute settlement.

The following year, the World Heritage Committee again discussed the state of conservation of the Dresden Elbe Valley on the second day (3 July 2008) of its 32nd session, which took place in Quebec City (Canada) from 2 to 10 July 2008.

The major issue discussed during the 32nd session of the World Heritage Committee concerning the Dresden Elbe Valley was the two options proposed in the draft decision. While the first

⁶²⁷ Decision 31 COM 71.27 adopted at the 31st session of the World Heritage Committee, Christchurch, New Zealand, para. 6 “Decides to apply the reinforced monitoring mechanism in monitoring the state of conservation of the property, subject to the procedures in Document WHC-07/31 COM/5.2 and Decision 31 COM 5.2”

⁶²⁸ Boccardi, G., Kilian, J., 2008. *Mission Report. Reinforced Monitoring Mission to the Dresden Elbe Valley World Heritage Property, Germany, 4-5 February 2008*. Paris: UNESCO World Heritage Centre, p.20

option involved delisting the Dresden Elbe Valley from the World Heritage List, the second option suggested retaining it on the List of World Heritage in Danger and considering the delisting of the site at the next session of the World Heritage Committee in the event that the construction of the bridge was continued. A preference for the second option was emitted and subsequently supported throughout the discussion. Nevertheless, para. 6 of the second option⁶²⁹ was not accepted as such, and the request was made to revise⁶³⁰ it. To argue and complement the support for the second option, the waiting of satisfactory decisions by the local authorities was expressed as well as the alternative of a tunnel rather than the bridge. The need for the authorities to have more time was also mentioned, as well as the fact that more information would be at the disposition of the World Heritage Committee to take a decision in 2009. Moreover, even though support for the second option was expressed, suggestion was also made to strengthen the wording of para. 11⁶³¹ in order to show the will to delist the site in the case that no change could be observed. The choice between these two options refers to the decision-making process of the World Heritage Committee and is also part of the negotiation process in the political and diplomatic dispute settlement.

Support to the community in Dresden was raised in the discussion regarding the individuals and NGOs that became involved in the protection of the World Heritage status for the Dresden Elbe Valley. The community was also mentioned in reference to the *Global Strategy for a Balanced, Representative and Credible World Heritage List*⁶³² developed under the 5Cs⁶³³ (Credibility,

⁶²⁹ Draft Decision 32 COM 7A.26 discussed at the 32nd session of the World Heritage Committee, Quebec City, Canada, para. 6 Option 2 “Considers that the work already implemented and planned will irreversibly damage the outstanding universal value and integrity of the property”, p.78

⁶³⁰ UNESCO, 2008. *Convention Concerning the Protection of the World Cultural and Natural Heritage, World Heritage Committee Thirty-second Session, Quebec City, Canada, 2 - 10 July 2008: WHC-08/32.COM*. Paris: UNESCO World Heritage Centre, “while keeping only “the work planned” and removing “the work already implemented””, p.31

⁶³¹ Draft Decision 32 COM 7A.26 (note 629), para. 11 “Also decides to retain the Dresden Elbe Valley (Germany) on the List of World Heritage in Danger, with the option of deleting this property from the World Heritage List at its 33rd session in 2009, if works on the bridge continue.”, p. 78

⁶³² UNESCO, 1994. *Convention Concerning the Protection of the World Cultural and Natural Heritage, World Heritage Committee Eighteenth Session, Phuket, Thailand, 12 - 17 December 1994: WHC-94/CONF.003/INF.6*. Paris: UNESCO World Heritage Centre

⁶³³ UNESCO, 2002, *Convention Concerning the Protection of the World Cultural and Natural Heritage, World Heritage Committee Twenty-sixth Session, Budapest, Hungary, 24 - 29 June 2002: WHC-02/CONF.202/5*. Paris: UNESCO World Heritage Centre and OG (2013), para. 26 “The current Strategic Objectives (also referred to as “the 5 Cs”) are the following: 1. Strengthen the Credibility of the World Heritage List; 2. Ensure the effective Conservation of World Heritage Properties; 3. Promote the development of effective Capacity-building in States

Conservation, Capacity-building, Communication, Community), since two of the 5Cs were currently in conflict: Community and Credibility. The World Heritage Committee again expressed concerns regarding its credibility in relation to its decision-making process and the involvement of the communities as developed in the Global Strategy and included in the OG.

The potential delisting of the site from the World Heritage List was again mentioned, albeit was less discussed than during the two previous sessions of the World Heritage Committee in 2006 and 2007. The need for a determination to delist the site in case that the expectations of the World Heritage Committee were not met was expressed. This is again related to the options concerning the decision-making process of the World Heritage Committee.

As during the previous session of the World Heritage Committee, the fact that the case would represent a precedent if the Dresden Elbe Valley was delisted from the World Heritage List was mentioned, given that it would be the first time that the World Heritage Committee takes this decision without the consent of the State Party. Moreover, the local community was also mentioned in relation to this unprecedented decision.⁶³⁴ This reference to the decision-making process of the World Heritage Committee highlights its concern in deciding to delist the Dresden Elbe Valley from the World Heritage List without the consent of the State Party Germany to the WHC. Even though the practice of the decision-making of the World Heritage Committee appears to aim at being consensual, it has the right and responsibility to delist a site that has lost its OUV, as demonstrated in section 4.2.3 of this thesis.

The legality of the procedure was sought while requesting the legal adviser concerning the possibility to adopt the decision with the amendment proposed for para. 6 of the draft decision⁶³⁵, to which the legal adviser replied positively.⁶³⁶ Again, the need to refer to the legal adviser before taking the decision is connected to the internal decision-making of the World Heritage Committee.

Parties; 4. Increase public awareness, involvement and support for World Heritage through Communication; 5. Enhance the role of Communities in the implementation of the World Heritage Convention.” (note 15)

⁶³⁴ WHC-08/32.COM, “would frustrate civil society in Dresden”, p.31 (note 630)

⁶³⁵ On this issue, see note 629

⁶³⁶ WHC-08/32.COM, “that the Committee had the prerogative to express a firm attention to delete a property if certain conditions or problems still existed”, p.32 (note 630)

During this session of the World Heritage Committee, the OUV was rarely discussed in comparison to the two previous sessions, where it had been long discussed. It was only stated that while the OUV was already damaged by the construction of the bridge, it was not yet irreversible. However, it was declared that the damage would become irreversible in the event that the site was not brought back to its original condition. However, the OUV comprises the basis for the discussion, since they were considered by the World Heritage Committee to be threatened by the construction of the *Waldschlößchenbrücke*.

Another issue discussed concerned the new design of the bridge, which was considered as still having impact on the landscape due to the changes undertaken – considered as minor and of cosmetic order. Therefore, it was declared that the new design of the bridge was not considered as an alternative. Consequently, this option would not permit preserving the World Heritage status since the OUV and integrity would still be threatened, the Mission Report of the reinforced monitoring mission conducted in February 2008 concluded.⁶³⁷ This issue reflects part of the mediation and negotiation process in the frame of the political and diplomatic dispute settlement.

The support of the State Party Germany to the WHC was acknowledged. In the decision-making process, the cooperation of the States Parties to the WHC, here the FRG, is taken into account, given that the dispute settlement mobilised is political and diplomatic.

The issue of credibility was also raised in view of the conflict between community and credibility, two of the 5Cs developed in the context of the Global Strategy as during the previous session of the World Heritage Committee. This issue is related to the decision-making process of the World Heritage Committee.

The possibility of a monthly monitoring being implemented was also suggested. Due to the seriousness of the case and the advancement of the decisions concerning the planned project of the *Waldschlößchenbrücke*, the World Heritage Committee sought to make use of its instruments to assist the State Party to the WHC in its decision. This issue emphasises the intent to solve the conflict via a political and diplomatic dispute settlement involving mediation and negotiation.

⁶³⁷ Boccardi & Kilian, pp.18 and 20 (note 628)

The conflict between development and heritage protection was raised in the form of a conflict between economic considerations and culture, with the idea that a project based solely on economic considerations could not be sustainable, although the discussion did not develop in this direction. This concern is related to the need to develop guidelines and principles for an integrative urban development respectful of heritage and in line with the concept of sustainability. Thus, the concern expressed is connected with the internal decision-making process of the World Heritage Committee.

The responsibility of all States Parties to the WHC and the multilateralism that the WHC represents was discussed, expressing the opinion that if one State Party failed, they all failed. This comment refers to the WHC and the World Heritage system and thus the role of the international community as a whole to protect the world cultural and natural heritage of OUV. In the case under consideration, this statement relates both to the decision-making process of the World Heritage Committee (“responsibility”, “multilateralism”) and the political and diplomatic dispute settlement (“fail”).

One allusion was made to the Arabian Oryx Sanctuary (Oman), the natural site delisted during the previous session of the World Heritage Committee in 2007.⁶³⁸ It was mentioned that it would be regrettable if the Dresden Elbe Valley was delisted from the World Heritage List, and thus the duty⁶³⁹ of the World Heritage Committee was reminded. This is also a reference to the decision-making process of the World Heritage Committee and can be connected to the idea that the World Heritage Committee should prioritise the evaluation of the state of conservation of the WHS rather than the inscription of new sites on the World Heritage List.

During this session, the World Heritage Committee again discussed both issues related to the political and diplomatic dispute settlement (reinforced reactive monitoring mission, the two options, monthly monitoring, failure) and to its internal decision-making process (legality of the procedure, new design of the bridge, support to the State Party Germany to the WHC, development vs. conservation, credibility, responsibility, delisting).

⁶³⁸ Decision 31 COM 7B.11 (note 3)

⁶³⁹ WHC-08/32.COM, “not just to put sites on the list but to maintain them on it”, p.32 (note 630)

4.3.4. Delisting of the Dresden Elbe Valley from the World Heritage List (2009)

One year later, the World Heritage Committee met during its 33rd session in Seville (Spain) from 22 to 30 June 2009. The state of conservation of the Dresden Elbe Valley was discussed on two occasions on Thursday 25 June 2009, during the morning and afternoon meetings.

Before the delisting took place, the argument not to delist was raised by the Observer Delegation of Germany, the Mayor of Dresden, as well as a few members of the World Heritage Committee. First, referring to the WHC, the representative explained that the decision to delist the Dresden Elbe Valley from the World Heritage List would represent a precedent⁶⁴⁰ since the OG rather than the WHC had a provision for delisting. However, this argument does not stand, given that the delisting is possible in accordance with art. 11 WHC⁶⁴¹, as demonstrated in section 4.2.3 of this thesis. The issue of the delisting refers to the decision-making process of the World Heritage Committee.

An appeal to the search for a consensual decision was delivered.⁶⁴² Therefore, a request was made to postpone the decision in order to allow time for further consideration of the options and further discussion.⁶⁴³ The need for time was raised in order to review the issue of the tunnel, and reference was made to para. 196 OG.⁶⁴⁴ Nevertheless, the World Heritage Committee does not need the consent of the State Party to the WHC to delist a site located on its territory, and consultation had taken place continuously since 2006. This issue relates to the political and diplomatic dispute settlement.

⁶⁴⁰ UNESCO, 2009. *Convention Concerning the Protection of the World Cultural and Natural Heritage, World Heritage Committee Thirty-third Session, Seville, Spain, 22 - 30 June 2009: WHC-09/33.COM*. Paris: UNESCO World Heritage Centre, “the deletion of a site from the List had not been imagined at the time the Convention was passed, and the Convention did not contain the necessary instruments to delete sites, since these were contained in the Operational Guidelines”, p.90

⁶⁴¹ World Heritage Convention [WHC], art. 11 (note 475)

⁶⁴² WHC-09/33.COM, “the Delegation did not believe that all the conditions for deletion had been met”, p.90 (note 640)

⁶⁴³ WHC-09/33.COM, “a full debate had not taken place on the issue in the Committee”; “it felt it had not been adequately consulted on the matter”, p.90 (note 640)

⁶⁴⁴ WHC-09/33.COM, “the Committee should not delete a site without consulting the State Party”, p.90 (note 640) and OG (2005), para. 196 “The Committee will examine all the information available and will take a decision. Any such decision shall, in accordance with Article 13 (8) of the Convention, be taken by a majority of two-thirds of its members present and voting. The Committee shall not decide to delete any property unless the State Party has been consulted on the question.” (note 426)

The idea was emitted to change the boundary of the site according to chapter 3.1 OG,⁶⁴⁵ or alternatively to modify the criteria for which the Dresden Elbe Valley had been inscribed on the World Heritage List in 2004. However, the location of the *Waldschlößchenbrücke* in the core of the Dresden Elbe Valley would render it difficult, if not impossible, to modify the boundary of the WHS without losing its significance. It was proposed to examine a possible re-inscription under criterion (vi), which had been mentioned during the discussion on the inscription of the Dresden Elbe Valley in 2004 and in the decision⁶⁴⁶ to inscribe the site on the World Heritage List. Nevertheless, criterion (vi) is expected to be combined with other criteria.⁶⁴⁷ However, the issue of boundaries and the modification of criteria refers first to the State Party Germany to the WHC, which initially identifies the cultural and natural heritage located on its territory, according to art. 3 WHC,⁶⁴⁸ and secondly to the internal decision-making process of the World Heritage Committee.

Accordingly, the Mayor of Dresden requested the World Heritage Committee to keep the Dresden Elbe Valley on the World Heritage List.⁶⁴⁹ References were subsequently made to the social function of the bridge, linking two dynamic neighbourhoods, to the positive result of the referendum, as well as the confirmation of this referendum and its legal value by the Federal Constitutional Court.⁶⁵⁰ The Mayor of Dresden detailed the dilemma⁶⁵¹ for Dresden and appealed to the emotions⁶⁵² of the members of the World Heritage Committee while begging for pardon.⁶⁵³ However, these arguments cannot counterbalance the possibility of the World Heritage Committee deciding to delist the Dresden Elbe Valley from the World Heritage List.

⁶⁴⁵ OG (2013), paras.163-167, III.I. Modifications to the boundaries, to the criteria used to justify inscription or to the name of a World Heritage property” (note 15)

⁶⁴⁶ Decision 28 COM 14B.40 (note 4)

⁶⁴⁷ OG (2013), para. 77 (vi) “The Committee considers that this criterion should preferably be used in conjunction with other criteria.” (note 15)

⁶⁴⁸ World Heritage Convention [WHC], art. 3 (note 478)

⁶⁴⁹ WHC-09/33.COM, “Waldschlösschen Bridge is part of a developing cultural landscape – and will permit unforgettable views over this landscape”, p.91 (note 640)

⁶⁵⁰ For more information on this court decision, see section 3.1.4 of this thesis

⁶⁵¹ WHC-09/33.COM, “this places us in a difficult situation in Dresden: we want to preserve the World Heritage status. But we cannot ignore the law to do so”, p.91 (note 640)

⁶⁵² WHC-09/33.COM, “the World Heritage Site is an expression of the love of Dresden’s citizens for their city”, p.91 (note 640)

⁶⁵³ WHC-09/33.COM, “view the World Heritage Site in Dresden in its entirety. Take the new legal situation into account in your decision. Give us time and please help us to achieve a consensus. Dresden is able and willing to contribute wherever it can”, p.91 (note 640)

Furthermore, in the case of the *Waldschlößchenbrücke*, its impact on the OUV and integrity of the cultural landscape are such that it does not sound convincing to argue that it would offer a panoramic view over the landscape. These arguments within the negotiation process refer to the political and diplomatic dispute settlement.

Another argument raised in favour of the non-delisting of the site referred to cultural landscapes.⁶⁵⁴ Therefore, there was a strong opposition to the delisting of the site, with alternatives proposed such as removing this part of the landscape from the WHS or accepting the bridge as an example of contemporary architecture. It was also suggested that the postponement of the decision would permit setting up an international expert meeting to further discuss this issue.⁶⁵⁵ Thus, this argument is related to the idea that change is comprised in the concept of cultural landscapes, as shown in section 4.1.4 of this thesis. This argument is related to both the political and diplomatic dispute settlement as well as the decision-making process of the World Heritage Committee.

However, the contrasting issue of delisting the site from the World Heritage List was also raised. The argument for the delisting comprised the need to support the local community and academic institutions.⁶⁵⁶ Consequently, it was proposed to delist the Dresden Elbe Valley from the World Heritage List and suggested that a new nomination should be prepared in the future, based on new boundaries and criteria. It was also added that the decision to delist the site from the World Heritage List would take place after four years of discussion.⁶⁵⁷ The decision to delist would take place after going through all instruments at the disposal of the World Heritage Committee to find a solution to this conflict. This issue is related to both the political and diplomatic dispute settlement and the internal decision-making process of the World Heritage Committee.

However, the question of the possibility to find a compromise was raised; for example, modifying the boundaries of the site and removing the part where the bridge is built from the

⁶⁵⁴ WHC-09/33.COM, “were places for people, and that they must accommodate their needs”, p.94 (note 640)

⁶⁵⁵ WHC-09/33.COM, “the purpose of adjourning the Decision to delete the property from the World Heritage List for another year was to give time to the World Heritage Centre to organize an international expert meeting to discuss ways of solving the problem”, p.99 (note 640)

⁶⁵⁶ WHC-09/33.COM, p.92 (note 640)

⁶⁵⁷ WHC-09/33.COM, “the World Heritage Committee could not be accused of taking the Decision in haste”, p.95 (note 640)

protected area. It was requested to report the decision to delist to the next session of the World Heritage Committee, invoking para. 196 OG⁶⁵⁸ to explain that all possible consultations with the State Party did not take place, whereas the State Party had always been “a good pupil”.⁶⁵⁹ Following this, the potential decision to delist was criticised.⁶⁶⁰ It was suggested to provide help⁶⁶¹ to the State Party; however, is not the World Heritage Committee already this international committee of experts? Furthermore, consultation had taken place continuously with the State Party Germany to the WHC since 2006, and once the OUV was irreversibly damaged, why should a WHS remain on the World Heritage List or the List of World Heritage in Danger? This issue is again related to the political and diplomatic dispute settlement and the internal decision-making process of the World Heritage Committee.

The credibility of the World Heritage Committee was mentioned.⁶⁶² Therefore, in order to maintain the credibility of the World Heritage Committee, the only solution was to delist the site from the World Heritage List, as was stated in the draft decision. It was also added that not only the credibility of the World Heritage Committee was at stake, but also that of the WHC, since two impact assessment reports had already been presented at previous sessions and the decision of the World Heritage Committee had already been delayed. Given that the State Party did not seem to be willing to find a compromise, the credibility of the World Heritage Committee was again mentioned and the decision to delist the Dresden Elbe Valley from the World Heritage List was even seen as one that could in the long term “strengthen the World Heritage Convention”.⁶⁶³ This issue concerns the decision-making process of the World Heritage Committee, whose credibility could be at stake.

⁶⁵⁸ OG (2005), para. 196 (note 426)

⁶⁵⁹ WHC-09/33.COM, personal translation from the French “un bon élève”, p.92 (note 640)

⁶⁶⁰ WHC-09/33.COM, “was not the best way to preserve the heritage values embedded in the property”, p.94 (note 640)

⁶⁶¹ WHC-09/33.COM, “creating an international committee of experts that could agree on a proposal to resolve the issue”, p.94 (note 640)

⁶⁶² WHC-09/33.COM, “three chances had been given to the State Party over recent years but [...] [there was no] sign of a commitment to demolish the bridge”, p.92 (note 640)

⁶⁶³ WHC-09/33.COM, p.95 (note 640)

Focus was also placed on the OUV of the site.⁶⁶⁴ Some further information was requested to ICOMOS in order for the World Heritage Committee to evaluate whether the damage caused to the cultural landscape was irreversible. Therefore, while declaring that this issue had been addressed during the previous session of the World Heritage Committee, a representative of ICOMOS reminded the initial decision.⁶⁶⁵ Emphasis was placed on the landscape element, its visual and historical importance.⁶⁶⁶ This representative also referred to the irreversibility limit for the OUV.⁶⁶⁷ There was still need for clarification⁶⁶⁸ with the supposition, given that since the Dresden Elbe Valley had been inscribed based on four criteria, some of them were possibly still justifiable. However, a representative of ICOMOS replied negatively to this request.⁶⁶⁹ Nevertheless, another opinion was offered with the idea that the notion of OUV was not fixed and static, but rather can evolve with time. Thus, the core of the problem was raised, namely the threat of the *Waldschlößchenbrücke* to the OUV and integrity of the Dresden Elbe Valley in relation to both the political and diplomatic dispute settlement and the decision-making process of the World Heritage Committee.

The issue of the tunnel alternative was raised again⁶⁷⁰ in order to find an alternative solution to the delisting of the Dresden Elbe Valley from the World Heritage List. However, a contrary opinion was subsequently emitted, stating that the tunnel would have environmental impacts on the landscape. While the tunnel represents the alternative suggested by the World Heritage Committee, solely the authorities in the State Party Germany to the WHC can decide to build a bridge or tunnel. This issue is part of the mediation and negotiation process within the political and diplomatic dispute settlement.

⁶⁶⁴ WHC-09/33.COM, “that the concern was not so much the construction of the bridge itself, but the impact that this would have on the Outstanding Universal Value of the World Heritage property”, p.93 (note 640)

⁶⁶⁵ WHC-09/33.COM, “recalled that the property had been inscribed on the World Heritage List on the basis of a Statement of Significance and under four different criteria, supported by corresponding attributes”, p.93 (note 640)

⁶⁶⁶ WHC-09/33.COM, “determined the way Dresden had been planned since the 19th century”, p.93 (note 640)

⁶⁶⁷ WHC-09/33.COM, “there had to be a point when the on-going work would be considered to have irreversibly affected the Outstanding Universal Value of the property [...] this point had now been reached”, p.93 (note 640)

⁶⁶⁸ WHC-09/33.COM, “the loss of the landscape element would imply the complete loss of the site’s Outstanding Universal Value”, p.94 (note 640)

⁶⁶⁹ WHC-09/33.COM, “the landscape and its visual integrity was a crucial attribute underpinning all of the four criteria used for this property, and that it was mentioned in their justification”, p.95 (note 640)

⁶⁷⁰ WHC-09/33.COM, “the task of the World Heritage Committee was to protect heritage without hampering development”, p.94 (note 640)

However, recalling the support of the FRG to the WHC and conservation as well as explaining the more general problems of dealing with conservation and development, it was then stated that this case had already been discussed several times at World Heritage Committee sessions.⁶⁷¹ The question of urban development within WHS or their buffer zones needs to be addressed since it is a general problem encountered by various WHS. This question was related to the internal decision-making process of the World Heritage Committee.

The major issue discussed during the 33rd session of the World Heritage Committee concerned the possibility of voting as a procedure of decision-making. The procedure for a vote was summarised by the legal adviser. In this situation, it was the responsibility of the Chairperson to choose the farthest proposed amendment from the original text of the draft decision, and the vote would start with this paragraph. Subsequently, once the World Heritage Committee had voted for the paragraphs one by one, from the farthest to the closest to the original text of the draft decision, it could vote on the whole draft decision. The legal adviser also explained that there were two options of the voting procedure. The first option would involve applying Rule 31⁶⁷² of the Rules of Procedure of the Committee and adjourning the discussion on the issue of the Dresden Elbe Valley. The second option would comprise introducing an amendment to the draft decision, which would propose postponing the discussion on the possible delisting of the site to the next session of the World Heritage Committee. It was added that in the event that the World Heritage Committee would choose the second option, a vote on this amendment should take place, and according to the legal adviser, a simple majority would be sufficient for this vote. Nevertheless, the Chairperson expressed that the matter under consideration was not a simple procedural issue but rather involved the possible delisting of the site from the World Heritage List, and consequently suggested that a two-thirds majority vote should take place. The legal adviser thus added that the Committee had to decide the type of vote it required concerning the

⁶⁷¹ WHC-09/33.COM, “wondered how this might affect other cases where deletions from the World Heritage List could be under consideration”; “whether, should the Committee decide not to remove the property from the World Heritage List, this could not be interpreted as arrogance on the part of the Committee”, p.92 (note 640)

⁶⁷² UNESCO, 2011. *Rules of Procedure of the Intergovernmental Committee for the Protection of the World Cultural and Natural Heritage: WHC.2-2011/5*. Paris: UNESCO World Heritage Centre, Rule 31, “During the discussion of any matter, any State member of the Committee may move the adjournment of the debate on the item under discussion. On moving the adjournment the State member shall indicate whether he moves the adjournment *sine die* or to a particular time which he shall specify. In addition to the proposer of the motion, one speaker may speak in favour of, and one against, the motion.”

question raised, according to Rule 38⁶⁷³ of its Rules of Procedure.⁶⁷⁴ It was subsequently decided that this proposal should be split into two paragraphs (11 and 12) before proceeding to a vote, given that there were legal implications of the possible decision to delist the site from the World Heritage List in the draft amendment. Thus, the second part of the draft amendment or new para. 12 contained only “the proposal to postpone the Decision to delete the property from the World Heritage List”.⁶⁷⁵ In addition to the procedure for a vote, information was provided that two tellers from two different Delegations of States Parties members of the World Heritage Committee were needed. In order to proceed with the vote, 21 ballots were distributed, one per Delegation of the World Heritage Committee. This issue concerning the vote as a possible decision-making is related to the internal decision-making process of the World Heritage Committee.

The vote took place by a two-thirds majority concerning the proposed amendment.⁶⁷⁶ The results of this vote showed “eight votes in favour of the amendment and 13 against”.⁶⁷⁷ Consequently, the amendment was not adopted. In this context, the legal adviser stated that the discussion could continue on the delisting of the site from the World Heritage List since the amendment had not been accepted. It was added that in the case that the discussion did not reach a conclusion, the site would be maintained on the List of World Heritage in Danger.

Therefore, the Chairperson proposed that a vote by a two-thirds majority and by show of hands should take place concerning para. 9 of the draft decision that “decides to delete the Dresden Elbe Valley (Germany) from the World Heritage List”.⁶⁷⁸ However, a request for a secret vote was emitted, which prompted the question of the advantages of a secret vote, to which the

⁶⁷³ UNESCO, “38.1 Except where otherwise specified in the present Rules, all other decisions of the Committee shall be taken by a majority of the States members present and voting. 38.2 Decisions as to whether a particular matter is covered by the provisions of the Convention and decisions on any other matters not covered by the present Rules shall be taken by majority of the States members present and voting.” (note 672)

⁶⁷⁴ WHC-09/33.COM, p.98 (note 640)

⁶⁷⁵ WHC-09/33.COM, pp.98-99 (note 640)

⁶⁷⁶ WHC-09/33.COM, “would give the State Party an additional year and send a high-level expert mission to the site before the Committee considered the deletion of the property from the World Heritage List, i.e. ‘to adjourn the consideration of the subject until the forthcoming session of the Committee’”, p.101 (note 640)

⁶⁷⁷ WHC-09/33.COM, p.101 (note 640)

⁶⁷⁸ WHC-09/33.COM, pp.102-103 (note 640)

Chairperson responded that it was part of the rules.⁶⁷⁹ Thus, the vote took place and the Chairperson announced the results of the second vote: “two blank votes, 14 votes in favour of the proposal and five votes against”.⁶⁸⁰ With this vote, the Dresden Elbe Valley had just been delisted from the World Heritage List. The vote with secret ballot was the procedure followed by the World Heritage Committee for its final decision-making.

The Chairperson commented the decision that the World Heritage Committee had taken,⁶⁸¹ referring to the importance of the paragraphs of the final decision.⁶⁸² The wording used to conclude the decision can be seen as rather emotional (“difficult”, “sad”, “collective failure”, “pain”) for a decision taken based on an international treaty, i.e. the WHC and an administrative regulation, i.e. the OG. Furthermore, these comments refer to the decision-making process of the World Heritage Committee.

Finally, issues related to both the political and diplomatic dispute settlement (consensual decision, compromise, OUV, tunnel alternative) and the internal decision-making process (vote, delisting, non-delisting, credibility, conservation vs. development) of the World Heritage Committee were raised during this session.

This final section of the chapter concerning the legal background of the conflict between the State Party Germany to the WHC and UNESCO attempted to deconstruct the step-by-step decisions from the inscription of the Dresden Elbe Valley on the World Heritage List in 2004 to its delisting from the World Heritage List in 2009. Therefore, the decision-making process was observed through its chronological steps, including the inscription in 2004, the transfer of the site to the List of World Heritage in Danger in 2006, the search for a compromise in 2007 and 2008, and finally the delisting in 2009.

⁶⁷⁹ WHC-09/33.COM, “if two Delegations had asked for a secret vote, the Committee had no option but to carry one out”, p.102 (note 640)

⁶⁸⁰ WHC-09/33.COM, p.103 (note 640)

⁶⁸¹ WHC-09/33.COM, “a very difficult and sad decision”; “that the failure to preserve a World Heritage Site on the World Heritage List was a collective failure [...] [and] that all presents shared the pain of the State Party”, p.103 (note 640)

⁶⁸² WHC-09/33.COM, “the other paragraphs be looked at carefully, as they constituted the message that the Committee wanted to convey”, p.103 (note 640)

During each session of the World Heritage Committee between 2006 and 2009, issues related to both a political and diplomatic dispute settlement and the internal decision-making process of the World Heritage Committee were raised as summarised in Annex IV of this thesis. Thus, after having reviewed the step-by-step decision-making process, it can be argued that a political and diplomatic dispute settlement was utilised through mediation with the State Party between each session of the World Heritage Committee, either during activities such as workshops, meetings and reinforced monitoring missions or through letters and progress reports. This type of dispute settlement was also based on enquiry and fact-findings, since a VIS had been conducted in early-2006 prior to the decision to transfer the Dresden Elbe Valley to the List of World Heritage in Danger. Finally, negotiation also took place throughout this dispute settlement during the sessions of the World Heritage Committee.

However, since the political and diplomatic dispute settlement failed with the final decision of the World Heritage Committee to delist the Dresden Elbe Valley from the World Heritage List, could a judicial dispute settlement have taken place through arbitration or judicial bodies? The question is open as to whether a judicial dispute settlement could have been followed in order to solve the conflict. Neither the WHC nor the OG or the Rules of Procedure of the World Heritage Committee preclude modalities for dispute settlements, and thus a legal gap in the WHC concerning modalities of dispute settlements in case of conflicts is apparent. To proceed further in this discussion, it can be questioned whether the State Party Germany to the WHC and UNESCO could have sought the International Court of Justice (henceforth ICJ) to settle the dispute concerning the Dresden Elbe Valley. This question can be answered negatively, given that only States have the capacity to appear at the ICJ. However, international organisations of the United Nations are entitled to seek the advisory jurisdiction of the IJC according to art. 96 para. 2 UN Charter⁶⁸³, and thus UNESCO could have followed this procedure.

⁶⁸³ Charter of the United Nations [UN Charter] 26 June 1945, art. 96 para. 2 “Other organs of the United Nations and specialized agencies, which may at any time be so authorized by the General Assembly, may also request advisory opinions of the Court on legal questions arising within the scope of their activities.”

4.4. Summary

To summarise, this chapter on the legal background of the conflict between UNESCO and the State Party Germany to the WHC concerning the case of the Dresden Elbe Valley has attempted to address the issue of legality through three perspectives.

Given that the Dresden Elbe Valley had been inscribed on the World Heritage List as a continuing cultural landscape the legality of the concept of cultural landscapes in the context of the WHC has been analysed. In addition, since the OUV and integrity of the Dresden Elbe Valley were threatened by the construction of the *Waldschlößchenbrücke* in the core of the WHS, the notions of OUV and integrity related to cultural landscapes have also been reviewed. Finally, the issue of change comprised in the concept of cultural landscapes has been addressed regarding the specific situation at the Dresden Elbe Valley.

Subsequently, a second perspective was adopted to describe the conflict based on the legality of the WHC concerning the legally binding effects for States Parties to the WHC in general and following the inscription of a site located on their territories in particular. Thus, the legal classification of a site on the World Heritage List was demonstrated, as well as the responsibilities of States Parties to the WHC related to the inscription of a site on the World Heritage List and more generally as soon as they ratify the WHC. Another point raised in this section concerns the legal nature of the OG, i.e. administrative regulation, and the decisions of the World Heritage Committee, i.e. internal bureaucracy. Since the conflict took place within a Federal State, the argumentation led to the need to harmonise the decisions related to the WHC at the different decisional levels, as well as involving local communities.

The final section of this chapter focused on the legality of the step-by-step decision-making process of the World Heritage Committee from the inscription of the Dresden Elbe Valley on the World Heritage List in 2004 to its delisting from the World Heritage List in 2009, including its transfer to the List of World Heritage in Danger in 2006 as well as the two years when it was retained on the List of World Heritage in Danger, in 2007 and 2008. It was demonstrated that a political and diplomatic dispute settlement was implemented, starting with an enquiry or fact-findings process, with a VIS conducted in early-2006. A process of mediation also took place

between the sessions of the World Heritage Committee through workshops, meetings, reinforced monitoring missions, letters and progress reports. Negotiation was also conducted during the sessions of the World Heritage Committee. It was also shown that the World Heritage Committee focused equally on the modalities of decision-making process throughout the discussion during its yearly sessions between 2006 and 2009.

Despite these various attempts to find a solution to the conflict, this dispute settlement failed because the construction of the bridge was not halted and the World Heritage Committee decided to delist the Dresden Elbe Valley from the World Heritage List without the consent of the State Party Germany to the WHC.

CHAPTER 5

THE HISTORIC URBAN LANDSCAPE: AN ACTION PLAN CAPABLE OF SOLVING THE CONFLICT BETWEEN URBAN DEVELOPMENT AND HERITAGE PROTECTION?

The applicability of the newly-developed concept of HUL in the FRG in relation with the Dresden Elbe Valley is assessed in this chapter.

The concept of HUL in the context⁶⁸⁴ of UNESCO has been developed in parallel with the conflict between the State Party Germany to the WHC and UNESCO concerning the Dresden Elbe Valley. While the search for an alternative solution to the *Waldschlößchenbrücke* to retain the Dresden Elbe Valley on the World Heritage List took place between 2006 and 2009, the concept of HUL as such appeared in the Vienna Memorandum in 2005.

Despite the specificity of the case of the Dresden Elbe Valley, which does not permit generalising the findings to other WHS, conflicts between urban development and heritage protection, as was the case in Dresden, regularly occur in WHS, whether involving cities or cultural landscapes. In addition, even though the Dresden Elbe Valley was inscribed as a cultural landscape on the World Heritage List and not as a historic centre, historical cultural features are at the location of the *Waldschlößchenbrücke* as presented in section 2.1.4 of this thesis, and the whole cultural landscape former WHS is located within the City of Dresden. Therefore, I argue that the HUL concept, which integrates the tangible and intangible dimensions of heritage, the cultural and natural features as well as the spirit of place, has the potential to solve the conflict between urban

⁶⁸⁴ The concept of historic urban landscape is not a newly created concept but is used in urban geography and by historians and planners, see Bandarin, F., 2012. From paradox to paradigm? Historic urban landscape as an urban conservation approach. In: K. Taylor & J. L. Lennon, eds. *Managing Cultural Landscapes*. London and New York: Routledge, p.222

development and heritage protection while proposing a sustainable integrative urban development respectful of heritage.

Accordingly, this chapter aims at reviewing and assessing the concept of HUL – considered as a tool or action plan for urban conservation – in order to evaluate it as a potential solution to such conflicts while adapting it to the German context.

First, a brief history of the concept of HUL in the context of UNESCO is presented. Secondly, an overview of the potential and limits of the concept of HUL to solve the problems between urban development and heritage protection is elaborated. Thirdly, the concept of HUL is applied to the German context, with its possible integration in German law discussed.

5.1. History of the concept

From the outcome of a conference organised related to the management of the HUL in May 2005, UNESCO adopted a Declaration and subsequently a Recommendation about the conservation of the HUL. However, before this new impulse in the attention to the concept of HUL provoked by the Vienna Memorandum, some previous UNESCO Recommendations related to the conservation of historic urban areas had been adopted. Thus, a brief history of this concept in the context of the UNESCO Recommendations related to urban conservation⁶⁸⁵ is implemented.

To date, four Recommendations have been adopted by UNESCO concerning urban conservation. First, in 1962, ten years before the adoption of the WHC, the General Conference of UNESCO adopted the Recommendation concerning the Safeguarding of the Beauty and Character of Landscapes and Sites during its 12th session.⁶⁸⁶ Art. 1⁶⁸⁷ refers to the natural or man-made aspect

⁶⁸⁵ For a broader historical overview including the main Charters, Recommendations, Declarations, and Conventions related to urban conservation, see Bandarin, F. & van Oers, R., 2012. *The Historic Urban Landscape: Managing Heritage in an Urban Century*. West-Sussex: Wiley-Blackwell, pp.45-61

⁶⁸⁶ UNESCO, pp.139-142 (note 388)

⁶⁸⁷ UNESCO Recommendation concerning the Safeguarding of the Beauty and Character of Landscapes and Sites, art. 1 “For the purpose of this recommendation, the safeguarding of the beauty and character of landscapes and sites is taken to mean the preservation and, where possible, the restoration of the aspect of natural, rural and urban

of landscapes and sites, whether natural, urban or rural, and art. 2⁶⁸⁸ specifies that natural features are included in the safeguarding of landscapes and sites. Thus, this recommendation already brought the landscape approach and linked the natural surroundings with the cultural features. The Recommendation targets authorities in charge of landscapes and sites' protection and authorities competent for regional development, as well as authorities responsible for nature protection, organisations dealing with tourism and youth organisations. The threats identified are regional, urban and rural planning over the landscapes and sites, including both natural and cultural features (i.e. the work of man). The Recommendation suggests the scheduling of these landscapes and sites in order to protect them. The object of this Recommendation is the safeguarding of landscapes and sites, and despite various authorities having been identified to remedy the possible conflict between heritage protection and urban development, it is not mentioned that a bridge should be built in order for them to cooperate. Thus, the dimensions of the later HUL approach are fragmented, given that they are managed separately.

Secondly, the General Conference of UNESCO adopted the Recommendation concerning the Preservation of Cultural Property Endangered by Public or Private Works at its 15th session on 20 November 1968.⁶⁸⁹ Art. 1⁶⁹⁰ considers cultural property as cultural features while considering them within their setting. Furthermore, art. 2⁶⁹¹ intends to include sites and structures of both historical and recent periods. Here, sites and historic quarters in their settings, whether urban or

landscapes and sites, whether natural or man-made, which have a cultural or aesthetic interest or form typical natural surroundings", p.139 (note 388)

⁶⁸⁸ UNESCO Recommendation concerning the Safeguarding of the Beauty and Character of Landscapes and Sites, art. 2 "The provisions of this recommendation are also intended to supplement measures for the protection of nature", p.139 (note 388)

⁶⁸⁹ UNESCO, 1969. Records of the General Conference, Resolutions, Fifteenth Session, Paris, 15 October - 20 November 1968. Paris: UNESCO, pp.139-145

⁶⁹⁰ UNESCO Recommendation concerning the Preservation of Cultural Property Endangered by Public or Private Works, art. 1 "For the purpose of this recommendation, the term 'cultural property' applies to: (a) immovable, such as archaeological and historic or scientific sites, structures or other features of historic, scientific, artistic or architectural value, whether religious or secular, including groups of traditional structures, historic quarters in urban or rural built-up areas and the ethnological structures of previous cultures still extant in valid form. It applies to such immovables constituting ruins existing above the earth as well as to archaeological or historic remains found within the earth. The term cultural property also includes the setting of such property; (b) movable property of cultural importance including that existing in or recovered from immovable property and that concealed in the earth, which may be found in archaeological or historical sites or elsewhere", p.140 (note 689)

⁶⁹¹ UNESCO Recommendation concerning the Preservation of Cultural Property Endangered by Public or Private Works, art. 2 "The term 'cultural property' includes not only the established and scheduled architectural, archaeological and historic sites and structures, but also the unscheduled or unclassified vestiges of the past as well as artistically or historically important recent sites and structures", p.140 (note 689)

rural, are included in the definition of cultural property. Furthermore, authorities in charge of public or private works and those competent for the protection of monuments and sites, as well as organisations in charge of education programmes and related to tourism constitute the target of this Recommendation. The threats identified are the public or private works for cultural properties located in rural or urban areas. The Recommendation suggests the creation of a specific body, co-ordinating or consultative, in order to preserve cultural properties endangered by public or private works, and to avoid and solve conflicts of interest related to the need for public or private works and the need to preserve cultural properties. In addition, it is suggested that organisations responsible for the preservation of cultural properties and those in charge of public or private works coordinate their work. Another suggestion lies in the preparation of several projects of public or private work, in order that the least disturbing project for cultural properties and the most economically efficient one might be selected. In this Recommendation, a first bridge is built, since organisations in charge of heritage protection and those in charge of urban development are recommended to work together.

Thirdly, the Recommendation concerning the Protection, at National Level, of the Cultural and Natural Heritage⁶⁹² was adopted by the General Conference of UNESCO at its 17th session on 16 November 1972. This recommendation was adopted in parallel with the WHC. Art. 1⁶⁹³ and art. 2,⁶⁹⁴ and are similar yet not identical to the respective art. 1 and 2 WHC⁶⁹⁵. Although the definitions of the cultural and natural heritage in the Recommendation concerning the Protection,

⁶⁹² UNESCO, pp.146-154 (note 213)

⁶⁹³ UNESCO Recommendation concerning the Protection, at National Level, of the Cultural and Natural Heritage, art. 1 “For the purposes of this Recommendation, the following shall be considered as ‘cultural heritage’: Monuments: architectural works, works of monumental sculpture and painting, including cave dwellings and inscriptions, and elements, groups of elements, or structures of special value from the point of view of archaeology, history, art or science; groups of buildings: groups of separate or connected buildings which, because of their architecture, their homogeneity or their place in the landscape, are of special value from the point of view of history, art or science; sites: topographical areas, the combined works of man and of nature, which are of special value by reason of their beauty or their interest from the archaeological, historical, ethnological or anthropological points of view”, p.147 (note 213)

⁶⁹⁴ UNESCO Recommendation concerning the Protection, at National Level, of the Cultural and Natural Heritage, art. 2 “For the purposes of this Recommendation, the following shall be considered as ‘natural heritage’: Natural features consisting of physical and biological formations or groups of such formations, which are of special value from the aesthetic or scientific point of view; Geological and physiographical formations and precisely delineated areas which constitute the habitat of species of animals and plants, valuable or threatened, of special value from the point of view of science or conservation; Natural sites or precisely delineated natural areas of special value from the point of view of science, conservation or natural beauty, or in their relation to the combined works of man and of nature.”, p.147 (note 213)

⁶⁹⁵ World Heritage Convention [WHC], art. 1 (note 289) and art. 2 (note 386)

at National Level, of the Cultural and Natural Heritage and in the WHC are developed under the same categories⁶⁹⁶, their content mainly varies in relation to the nature of the value of the heritage, being of special value in the Recommendation and of OUV in the Convention. While preparing regional development plans and planning more generally, it is suggested that the conservation of the cultural and natural heritage should be taken into account and even represent an essential aspect of such planning. Moreover, it is also suggested that organisations responsible for the conservation of the cultural and natural heritage work together with organisations in charge of regional development, especially in the case of large-scale projects. In this Recommendation, a next step is brought beside the coordination of organisations responsible for heritage protection and those responsible for urban development, given that both cultural and natural heritage in the sense of the WHC are identified for protection.

Fourthly, the General Conference of UNESCO adopted the Recommendation concerning the Safeguarding and Contemporary Role of Historic Areas at its 19th session on 26 November 1976.⁶⁹⁷ Art. 1⁶⁹⁸ defines the key terms of this Recommendation in which the connection between historic areas and their environment is established. The target of this Recommendation comprises organisations at the different levels within Member States in charge of the safeguarding of historic areas, including their environment. The Recommendation suggested developing studies on town-planning aspects of historic areas and their environment, as well as the interconnections between safeguarding and planning. It is also suggested to encourage the craftsmen and their craft, which are threatened by the processes of industrialisation. The next step is added in this

⁶⁹⁶ (1) monuments; (2) groups of buildings; and (3) sites for the cultural heritage and (1) natural features consisting of physical and biological formations or groups of such formations; (2) geological and physiographical formations; and (3) natural sites for the natural heritage

⁶⁹⁷ UNESCO, 1977. *Records of the General Conference, Resolutions, Nineteenth Session, Nairobi, 26 October - 30 November 1976*. Paris: UNESCO, Annex I, pp.20-28

⁶⁹⁸ UNESCO Recommendation concerning the Safeguarding and Contemporary Role of Historic Areas, art. 1 “For the purposes of the present recommendation: (a) “historic and architectural (including vernacular) areas” shall be taken to mean any group of buildings, structures and open spaces including archaeological and paleontological sites, constituting human settlements in an urban or rural environment, the cohesion and value of which, from the archaeological, architectural, prehistoric, historic, aesthetic or socio-cultural point of view are recognized. Among these “areas”, which are very varied in nature, it is possible to distinguish the following in particular: prehistoric sites, historic towns, old urban quarters, villages and hamlets as well as homogeneous monumental groups, it being understood that the latter should as a rule be carefully preserved unchanged. (b) the “environment” shall be taken to mean the natural or man-made setting which influences the static or dynamic way these areas are perceived or which is directly linked to them in space or by social, economic or cultural ties. (c) “safeguarding” shall be taken to mean identification, protection, conservation, restoration, renovation, maintenance and revitalization of historic or traditional areas and their environment.”, p.21 (note 697)

Recommendation, since apart from the coordination of organisations competent for heritage protection and those competent for urban development, as well as the identification of cultural and natural heritage to be protected, the intangible dimension is mentioned in reference to craft and craftsmen. However, a reference to the spirit of place is still missing.

Almost 30 years after the adoption of this fourth Recommendation and at the request⁶⁹⁹ of the World Heritage Committee at its 27th session, a conference was organised in May 2005 in Vienna (Austria) on the theme “World Heritage and Contemporary Architecture – Managing the Historic Urban Landscape”.⁷⁰⁰ The outcome of the conference is the Vienna Memorandum, which, in addition to its preamble and definitions, principles and aims, ways and means, also elaborates guidelines for conservation management on the one hand and guidelines for urban development on the other, as well as recommendations. Para. 5 Preamble Vienna Memorandum states that the HUL comprises an integrated approach linking three elements: (1) contemporary architecture; (2) sustainable urban development; and (3) landscape integrity. However, the conservation element related to heritage is missing, although the concept is developed following the previous Recommendation, since art. 7 Vienna Memorandum⁷⁰¹ defines the HUL based on the Recommendation concerning the Safeguarding and Contemporary Role of Historic Areas.

In the continuation of the Vienna Memorandum, the General Assembly of States Parties to the WHC adopted the Declaration on the Conservation of Historical Urban Landscapes.⁷⁰² It is notably declared that:

“the central challenge of contemporary architecture in the historic urban landscape is to respond to development dynamics in order to facilitate socio-economic changes and growth on the one hand, while simultaneously respecting the inherited townscape and its landscape setting on the

⁶⁹⁹ Decision 27 COM 7B.108 adopted at the 27th session of the World Heritage Committee, Paris, France

⁷⁰⁰ UNESCO, 2005. *Vienna Memorandum on “World Heritage and Contemporary Architecture – Managing the Historic Urban Landscape”*. Paris: UNESCO

⁷⁰¹ Vienna Memorandum, art. 7 “The historic urban landscape, building on the 1976 “UNESCO Recommendation concerning the Safeguarding and Contemporary Role of Historic Areas”, refers to ensembles of any group of buildings, structures and open spaces, in their natural and ecological context, including archaeological and paleontological sites, constituting human settlements in an urban environment over a relevant period of time, the cohesion and value of which are recognized from the archaeological, architectural, prehistoric, historic, scientific, aesthetic, socio-cultural or ecological point of view. This landscape has shaped modern society and has great value for our understanding of how we live today.” (note 700)

⁷⁰² UNESCO, 2005. *Convention Concerning the Protection of the World Cultural and Natural Heritage, Fifteenth General Assembly of the States Parties to the World Heritage Convention, Paris, France, 10 - 11 October 2005: WHC-05/15.GA/7*. Paris: UNESCO

*other. Living historic cities, especially World Heritage cities, require a policy of city planning and management that takes conservation as a key point of departure. In this process, the historic city's authenticity and integrity, which are determined by various factors, must not be compromised".*⁷⁰³

In the aftermath of the Vienna Memorandum and the Declaration on the Conservation of Historic Urban Landscapes, several experts meetings⁷⁰⁴ took place to prepare a recommendation on this approach. Thus, the Recommendation on Historic Urban Landscape⁷⁰⁵ was adopted at the 36th session of the UNESCO General Conference on 10 November 2011. In accordance with art. 8,⁷⁰⁶ the HUL follows a landscape approach that takes into account the various historical layers found in urban areas. Furthermore, art. 9⁷⁰⁷ details the wider context comprised in the HUL approach compared to a more traditional approach viewing historic centres or ensembles. It is recommended that the Member States first adopt the HUL in their legal frameworks, and secondly inform organisations in charge of urban conservation about the HUL approach. It is suggested that local authorities take into account the area's values, including the landscape, while preparing urban development plans. Furthermore, measures should be conducted for the conservation of the tangible and intangible elements comprised in the urban heritage. Thus, the HUL approach integrates the contributions of each of the four previous Recommendations related to urban conservation.

For the application of the HUL approach by States Parties, the General Conference also recommended that:

"Member States and relevant local authorities identify within their specific contexts the critical steps for implementing the HUL approach, which may include the following: (a) to undertake

⁷⁰³ WHC-05/15.GA/7, p.1 (note 702)

⁷⁰⁴ Notably in Jerusalem (Israel, June 2006), Saint Petersburg (Russian Federation, January 2007), Olinda (Brazil, November 2007), Zanzibar (Tanzania, December 2009), Rio de Janeiro (Brazil, December 2009), UNESCO Headquarters (France, September 2006, November 2008, February 2010, May 2011)

⁷⁰⁵ UNESCO, 2012. *Records of the General Conference, Resolutions Thirty-sixth Session, Paris, 25 October - 10 November 2011*, pp.50-55

⁷⁰⁶ UNESCO Recommendation on the Historic Urban Landscape, art. 8 "The historic urban landscape is the urban area understood as the result of a historic layering of cultural and natural values and attributes, extending beyond the notion of "historic centre" or "ensemble" to include the broader urban context and its geographical setting." (note 705)

⁷⁰⁷ UNESCO Recommendation on the Historic Urban Landscape, art. 9 "This wider context includes notably the site's topography, geomorphology, hydrology and natural features, its built environment, both historic and contemporary, its infrastructures above and below ground, its open spaces and gardens, its land use patterns and spatial organization, perceptions and visual relationships, as well as all other elements of the urban structure. It also includes social and cultural practices and values, economic processes and the intangible dimensions of heritage as related to diversity and identity" (note 705)

comprehensive surveys and mapping of the historic cities' natural, cultural and human resources; (b) to reach consensus using participatory planning and stakeholder consultations on what values to protect for transmission to future generations, and to determine the attributes that bear these values; (c) to assess the vulnerability of such attributes to socio-economic pressures and the impacts of climate change; (d) to integrate urban heritage values and their vulnerability status into a wider framework of city development, which shall provide indications of areas of heritage sensitivity which require careful attention to planning, design and implementation of development projects; (e) to prioritize actions for conservation and development; (f) to establish the appropriate partnerships and local management frameworks for each of the projects identified for conservation and development, as well as to develop mechanisms for the coordination of the various activities between different actors, both public and private".⁷⁰⁸

The specificity of the HUL approach lies in its holistic approach comprising the various dimensions of heritage. First, it reflects a landscape approach, in contrast to the single monument approach or “groups of buildings” approach as defined by art. 1 para. 2 WHC,⁷⁰⁹ which is usually applied to urban heritage.⁷¹⁰ In addition, the adoption of a landscape approach permits to incorporate the importance of the visual characteristics of the historic urban landscape.⁷¹¹ In this sense, the HUL approach suits the City of Dresden, whose cultural landscape, Dresden Elbe Valley former WHS, includes a combination of historical cultural features and natural scenery, with both aspects representing integral components of this historic urban landscape. Secondly, the HUL approach has been developed with the view to comprehend urban areas as layers of significance, thus incorporating the cultural and natural features included in urban areas.⁷¹² This notion is particularly relevant for the City of Dresden, in which the cultural features, monuments, villas, castles and bridges are harmoniously integrated in the natural features represented by the river, meadows and hills. Thirdly, the tangible and intangible dimensions of heritage are integrated in this approach, and the conservation of intangible values understood as spiritual, cultural, traditional, symbolic tends to represent a goal of urban conservation.⁷¹³ The intangible dimension is also pertinent for the City of Dresden, given that vineyards are still cultivated on the

⁷⁰⁸ UNESCO Recommendation on the Historic Urban Landscape, p.50 (note 705)

⁷⁰⁹ World Heritage Convention [WHC], art. 1 para. 2 “groups of buildings: groups of separate or connected buildings which, because of their architecture, their homogeneity or their place in the landscape, are of outstanding universal value from the point of view of history, art or science”

⁷¹⁰ Bandarin, p.217 (note 684)

⁷¹¹ Moggridge, H., 2010. Visual analysis: tools for conservation of urban views during development. In: R. van Oers & S. Haraguchi, eds. *World Heritage papers 27, Managing Historic Cities*. Paris: UNESCO World Heritage Centre, p.66

⁷¹² Bandarin, p.225 (note 684)

⁷¹³ Bandarin, p.223 (note 684)

hills and festivals are organised on the Elbe River meadows. Finally, the spirit of place⁷¹⁴ is a further component of the HUL approach, and is also an essential element while considering the City of Dresden, since the Elbe River meadows mainly represent a recreational area. Finally, the holism of the HUL approach, as seen with the description of its characteristics, joins the four aspects of sustainable development: economic, environmental, cultural and social.⁷¹⁵

To conclude, the concept of HUL in the context of UNESCO is developed based on the four previous Recommendations related to urban conservation and is applicable to the City of Dresden. Nevertheless, it is not supposed to become a new category of sites to be inscribed on the World Heritage List, but rather reflects an action plan or tool to be applied to urban areas in general and to WHS in particular for urban conservation.

5.2. Potential and limits of this concept

The HUL can be considered as an innovative approach, given that it is a holistic concept that takes into account all aspects of heritage: cultural and natural, the tangible and intangible⁷¹⁶ dimensions of heritage, as well as the values of the place, i.e. the spiritual values, comprised in the spirit of place. In this sense, the approach of the HUL represents an innovative tool that is applicable to urban areas in general and all categories of WHS which deal with urban conservation in particular.

⁷¹⁴ ICOMOS (note 445)

⁷¹⁵ Rodwell, D., 2010. Historic urban landscapes: concept and management. In: R. van Oers & S. Haraguchi, eds. *World Heritage papers 27, Managing Historic Cities*. Paris: UNESCO World Heritage Centre, p.100

⁷¹⁶ Intangible heritage is defined in the Convention for the Safeguarding of the Intangible Cultural Heritage (2003) in art. 2 “1. The “intangible cultural heritage” means the practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artefacts and cultural spaces associated therewith – that communities, groups and, in some cases, individuals recognize as part of their cultural heritage. This intangible cultural heritage, transmitted from generation to generation, is constantly recreated by communities and groups in response to their environment, their interaction with nature and their history, and provides them with a sense of identity and continuity, thus promoting respect for cultural diversity and human creativity. For the purposes of this Convention, consideration will be given solely to such intangible cultural heritage as is compatible with existing international human rights instruments, as well as with the requirements of mutual respect among communities, groups and individuals, and of sustainable development. 2. The “intangible cultural heritage”, as defined in paragraph 1 above, is manifested inter alia in the following domains: (a) oral traditions and expressions, including language as a vehicle of the intangible cultural heritage; (b) performing arts; (c) social practices, rituals and festive events; (d) knowledge and practices concerning nature and the universe; (e) traditional craftsmanship.”

Furthermore, this approach attributes a central role to the landscape, which represents an interplay between the natural and built environment where continuity is a keyword and the integrity is protected.⁷¹⁷ In the context of the HUL, integrity includes three elements: (1) the sense of *integrity* produced by the combined pursuit of spiritual, emotional and material expressions that are in conjunction with each other; (2) the *differentiation* of physical structures through a continuous and incremental evolution; and (3) the *mutual interaction* between people and their built environment.⁷¹⁸ Moreover, the social-functional integrity of a place is defined through “the identification of the functions and processes on which its development over time has been based, such as those associated with interaction in society, spiritual responses, utilization of natural resources, and movements of people”.⁷¹⁹

Thus, both the physical features and social values of a city are taken into account in this concept. The city is viewed as a process rather than a static approach, which is why contemporary architecture should be integrated in the HUL with respect of the multiple historical layering present in the city.

However, as the Recommendation on the Historic Urban Landscape is defined in international law as “soft” law,⁷²⁰ because it is not legally binding for the UNESCO Member States, its success will highly depend on how these Member States interpret and implement it.

⁷¹⁷ van Oers, R., 2010. Managing cities and the historic urban landscape initiative – an introduction. In: R. van Oers & S. Haraguchi, eds. *World Heritage papers 27, Managing Historic Cities*. Paris: UNESCO World Heritage Centre, p.12

⁷¹⁸ Bianca, S., 2010. Historic cities in the 21st century: core values for a globalizing world. In: R. van Oers & S. Haraguchi, eds. *World Heritage papers 27, Managing Historic Cities*. Paris: UNESCO World Heritage Centre, p.28 (emphasis by the author)

⁷¹⁹ Jokilehto, J., 2010. Reflection on historic urban landscapes as a tool for conservation. In: R. van Oers & S. Haraguchi, eds. *World Heritage papers 27, Managing Historic Cities*. Paris: UNESCO World Heritage Centre, p.60

⁷²⁰ Bandarin & van Oers, p.xvi (note 685) In the context of World Heritage, the UNESCO Recommendations are referred to as “soft law” in comparison with the WHC considered as “hard law”. In international law while “hard law” is legally binding, “soft law” is not. However the UNESCO Recommendations such as the Recommendation on the Historic Urban Landscape are valuable concerning the innovative interpretations they can make of the WHC and their potential direct effects in the States Parties to the WHC due to their flexibility as legal documents

5.3. Can it be integrated in German law?

The HUL represents a tool for both city planners and urban conservationists, who are encouraged to work together for an integrative development of urban areas respectful of their past and present tangible and intangible heritage.

Prior to the adoption of the Recommendation on the Historic Urban Landscape, the UNESCO Member States were invited to comment on a draft of this recommendation, with ICOMOS and 30 Member States⁷²¹ sending their comments. The FRG also commented on a general basis while acknowledging the importance of such an international instrument for the management and protection of HUL. Nevertheless, attention was brought to the reception of the Declaration on the Conservation of Historic Urban Landscape, adopted in 2005, which tended to “legitimize rather than prevent problematic interference in historic structures and the traditional urban landscape”.⁷²² In addition, several specific comments were given. First, it was noted that the focus of the Recommendation should not be the concept “managing the change”. Secondly, the idea that the Recommendation should represent a practical guidance for the managers of such sites was emitted. Thirdly, it was suggested that a collection of good and bad practices could be useful. Fourthly, the need for speeding up the decision-making process within the World Heritage Committee for urgent urban development measures was emphasised, due to the strict deadlines that States Parties might face. In this context, it was mentioned that there is a need to reinforce the staff capacity of the World Heritage Centre and the Advisory Bodies regarding questions of States Parties concerning urban development projects. Fifthly, the importance to set up clear guidance for VIS was expressed. Finally, it was also suggested to develop strategies for conflict management at the World Heritage Committee sessions”.⁷²³

As seen in this research, the *Länder* of the FRG are competent for the protection of historical

⁷²¹ Australia, Austria, Belgium, Bulgaria, Canada, China, Czech Republic, Denmark, Dominican Republic, Estonia, Finland, France, Germany, Greece, Hungary, Israel, Japan, Kyrgyzstan, Lithuania, Mauritius, Monaco, Norway, Pakistan, Philippines, Poland, Saudi Arabia, Switzerland, United Arab Emirates, United States of America, Venezuela

⁷²² UNESCO, 2010. *Letter from the Permanent Delegation of the Federal Republic of Germany to UNESCO on the subject of the UNESCO-Recommendation on the Historic Urban Landscape: Activity-707-13*. Paris: Permanent Delegation of the Federal Republic of Germany to UNESCO, p.2

⁷²³ Activity-707-13, p.2 (note 722)

monuments. Thus, there are 16 Monument Protection Acts within the FRG, as noted in section 3.2.4 of this thesis; however, none of them mention the HUL as such. In terms of urban development, the Federation and its *Länder* have concurrent legislative powers concerning regional planning according to art. 74 para. 1 GG.⁷²⁴ In addition, art. 72 para. 3 GG⁷²⁵ in relation to concurrent legislative powers stipulates that the *Länder* may legislate in the event that the Federation would not have done so. Again, none of the Construction Act⁷²⁶, Federal Land Utilisation Ordinance⁷²⁷, Planning Design Ordinance⁷²⁸, or Property Valuation Ordinance⁷²⁹ mention the HUL as such. Nevertheless, the integration of the concept of HUL in the legislation concerning conservation and urban development would represent a necessary step for the implementation of this tool or action plan within the FRG.

However, the Construction Act contains some of the principles of the HUL approach. For instance, its art. 1 para. 5⁷³⁰ notably refers to sustainable development, and it is sensible to the visual protection of natural and cultural features. Furthermore, the Federal Land Utilisation Ordinance⁷³¹ also mentions some elements of the HUL approach. In art. 11 para. 3 Federal Land Utilisation Ordinance,⁷³² references are made to the environment, as well as cultural and natural

⁷²⁴ Grundgesetz [GG] [Basic Law], art. 74 para. 1 (note 318)

⁷²⁵ Grundgesetz [GG] [Basic Law], art. 72 para. 3 (note 322)

⁷²⁶ Baugesetzbuch [BauGB] [Construction Act] 23 June 1960, last amended on 22 July 2011 (Fed. Law Gazette I, p.1509)

⁷²⁷ Baunutzungsverordnung [BauNVO] [Federal Land Utilisation Ordinance] 26 June 1962, last amended on 22 April 1993 (Fed. Law Gazette I, p.466)

⁷²⁸ Planzeichenverordnung [PlanZVO] [Planning Design Ordinance] 18 December 1990 (Fed. Law Gazette 1991 I, p.58)

⁷²⁹ Immobilienwertermittlungsverordnung [ImmoWertV] [Property Valuation Ordinance] 19 May 2010 (Fed. Law Gazette I, p.639)

⁷³⁰ Baugesetzbuch [BauGB] [Construction Act], art. 1 para. 5 “The urban land-use plans should ensure a sustainable urban development which brings the social, economic and environmental protection requirements in harmony with the responsibility toward future generations, and a socially just land use which meets the needs of the general public. They should contribute to create an environment fit for human habitation, to protect and develop the natural foundations of life and to encourage the climate protection and the climate change, in particular in the urban development, as well as to preserve and develop the urban physical structure and the architectural-cultural cityscape and landscape.” (personal translation)

⁷³¹ Baunutzungsverordnung [BauNVO] [Federal Land Utilisation Ordinance] 26 June 1962, last amended on 22 April 1993 (Fed. Law Gazette I, p.466)

⁷³² Baunutzungsverordnung [BauNVO] [Federal Land Utilisation Ordinance], art. 11 para. 3 “[...] Repercussions in terms of sentence 1 Nr. 2 and 3 are in particular harmful environmental impacts as defined by Art. 3 Federal Pollution Control Act as well as repercussions on the infrastructural equipment, on the traffic, on the supply of the population in the catchment area of the designated firms by sentence 1, on the development of central supply areas in the municipality or in other municipalities, on the cityscape and landscape and on the ecosystem [...]” (personal translation)

visual protection. As for the Planning Design Ordinance, its art. 13 and 14⁷³³, which respectively regulate the designs, land-use regulations, measures, surfaces for measures related to nature and landscape conservation, preservation, and development first, and the regulations for city preservation and cultural heritage protection secondly, cite the Construction Act. Concerning the Property Valuation Ordinance, its art. 4 para. 3 clause 6⁷³⁴ refers to the need to take potential interferences with nature and landscape into account.

In terms of heritage protection, cultural heritage is defined in the Saxon Monument Protection Act⁷³⁵ in its art. 2 para. 1⁷³⁶ and art. 2 para. 5 clauses b and c⁷³⁷. In addition, according to art. 12 para. 2 Saxon Monument Protection Act,⁷³⁸ not only are the monuments protected, but also their visibility in the landscape, since their surroundings should also be protected.

To summarise, even though the HUL approach does not appear word-by-word in the German legal framework related to urban development and heritage protection, some of its characteristics

⁷³³ Planzeichenverordnung [PlanZVO] [Planning Design Ordinance], art. 13 “1. Limitation of areas for measures of protection, conservation and development of nature and landscape (§ 5 para. 2 clause 10 and para. 4, § 9 para. 1 clause 20 und para. 6 BauGB), Measures of protection, conservation and development of nature and landscape, insofar as such determinations cannot be taken from other provisions (§ 9 Abs. 1 Nr. 20 und Abs. 6 BauGB). The measures are to be qualified in the development plan. 2. The planting of trees, bushes and other plantings and for the preservation of trees, bushes and other plantings as well as water bodies (§ 9 Abs. 1 Nr. 25 und Abs. 6 BauGB). Determinations on parts of built facilities are to be qualified in the development plan. 1) Limitation of areas for the planting of trees, bushes and other plantings (§ 9 Abs. 1 Nr. 25 Buchstabe a) und Abs. 6 BauGB). 2) Limitation of areas with bindings for plantings and for the preservation of trees, bushes and other plantings as well as water bodies (§ 9 Abs. 1 Nr. 25 Buchstabe b) und Abs. 6 BauGB). 3) Limitation of protected areas and protected objects in the sense of nature conservation legislation (§ 5 Abs.4, § 9 Abs. 6 BauGB). When needed differentiations in the limitation signature are permitted for greater precision of the protected areas and protected objects” and art. 14 “1. Limitation of preservation areas, when designated in the development plan (§ 172 Abs. 1 BauGB). 2. Limitation of ensembles, which are subject to monument protection (§ 5 Abs. 4, § 9 Abs. 6 BauGB). 3. Individual assets (immovable cultural monuments, which are subject to monument protection (§ 5 Abs. 4, § 9 Abs. 6 BauGB))” (personal translation)

⁷³⁴ Immobilienwertermittlungsverordnung [ImmoWertV] [Property Valuation Ordinance], art. 4 para. 3 clause 6 “Besides the development state (Art. 5) is for the evaluation in particular to be taken into account whether at the effective date [...] areas in compensation for the interferences in nature and landscape are exploited or whether legally protected biotope are to be found on the areas.” (personal translation)

⁷³⁵ Sächsisches Denkmalschutzgesetz [SächsDSchG] [Saxon Monument Protection Act] (note 287)

⁷³⁶ Sächsisches Denkmalschutzgesetz [SächsDSchG] [Saxon Monument Protection Act], art. 2 para. 1 (note 290)

⁷³⁷ Sächsisches Denkmalschutzgesetz [SächsDSchG] [Saxon Monument Protection Act], art. 2 para. 5 clauses b and c “b) Settlements or districts, street scenes or square scenes or site views of particular town-planning or folkloric significance [...] c) Creations of the garden and landscape architecture, historical landscape assets such as territories, slope landscapes [...]” (personal translation)

⁷³⁸ Sächsisches Denkmalschutzgesetz [SächsDSchG] [Saxon Monument Protection Act], art. 12 para. 2 “Physical or garden and landscape structures in the surrounding of a cultural monument, as far as they are of considerable significance for its appearance, may only be constructed, changed or removed with the authorisation of the office for monument conservation.” (personal translation)

are comprised in the regulations of the Federation and the Free State of Saxony.

Beyond the legislation, the adoption of policies related to the HUL constitutes another possibility for the implementation of this holistic approach, which would permit an integrative development respectful of heritage in urban areas. In this context, two programmes developed by the Federal Ministry of Transport, Building and Urban Development warrant mention. First, the programme “Protection of Urban Historical Monuments” aims at the safeguarding, protection, modernisation and sustainable further development of historical ensembles in German cities. Figure 29 shows the German cities that benefited from this programme. From the creation of this programme in 1991 until 2012 (inclusive), around 2.14 billion € (table 4) was spent by the Federation towards the protection of urban historical monuments. Table 5 shows the repartition of the expenses between the new⁷³⁹ *Länder* and the old⁷⁴⁰ *Länder*, and table 6 indicates the number of cities that benefited from this programme. Thus, the implementation of such a programme permits building a bridge between city planners and conservationists, while the approach of protecting historical ensembles might represent a first step towards the introduction of the concept of HUL in the future.

⁷³⁹ The *Länder* which acceded to the FRG on 3 October 1990 are Brandenburg, Mecklenburg-Vorpommern, Saxony, Saxony-Anhalt, Thuringia, and East Berlin.

⁷⁴⁰ The old *Länder* are the following: Baden-Württemberg, Bavaria, Bremen, Hamburg, Hesse, Lower Saxony, North Rhine-Westphalia, Rhineland-Palatinate, Saarland, Schleswig-Holstein, and West Berlin

Städtebaulicher Denkmalschutz Ost und West

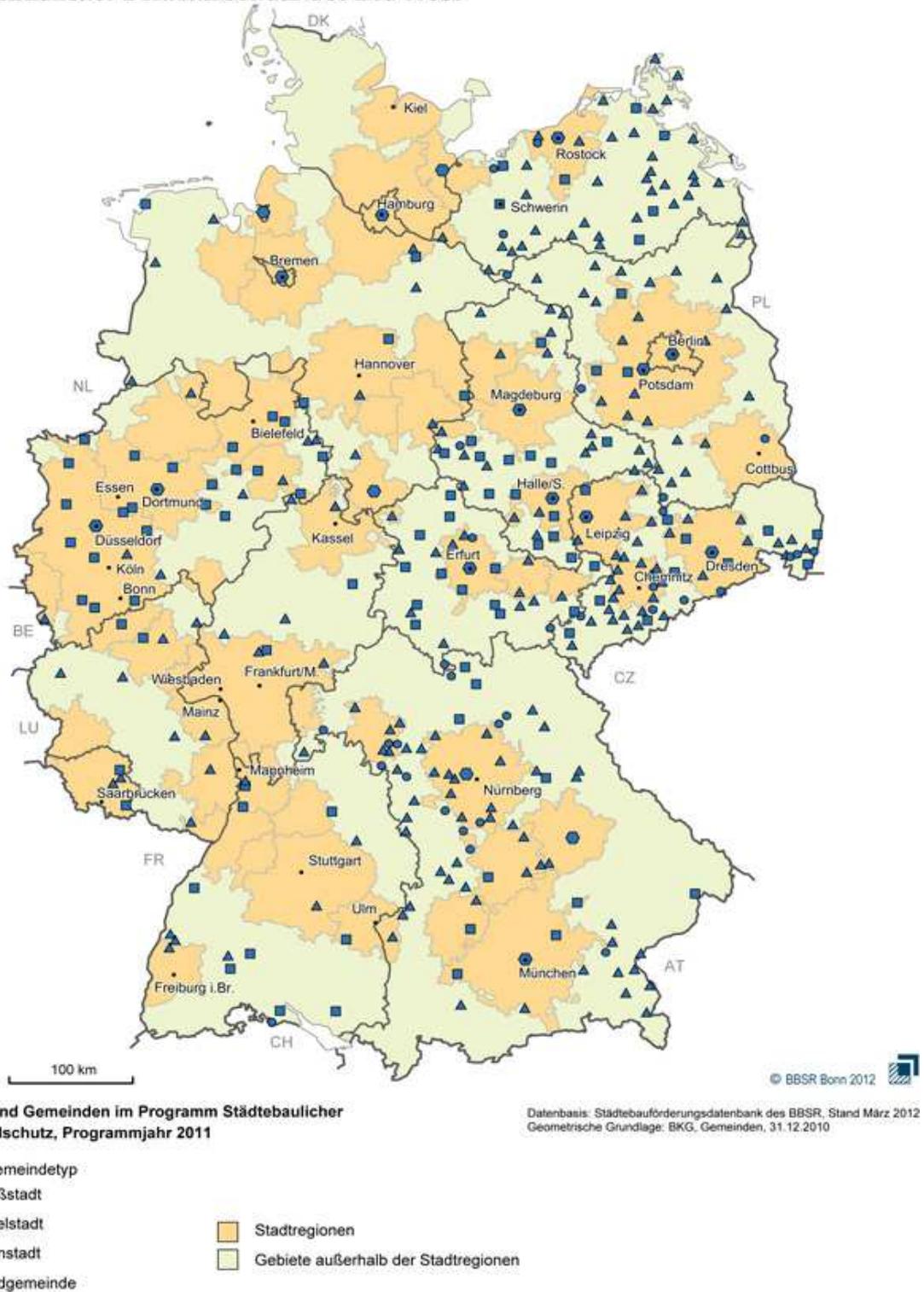


Figure 30: Cities and municipalities of the FRG in the programme “Protection of Urban Historical Monuments” in 2011. Source: BMVBS

Period	New Länder	Old Länder	Total
1991 -2012	2 billion €	0.1 billion €	2.14 billion €
2013	64 million €	32 million €	96 million €

Table 4: Federal expenses for the programme “Protection of Urban Historical Monuments”. Source: BMVBS

Period	New Länder		Old Länder	
	Measures	Cities	Measures	Cities
1991 - 2012	243	201	204	197

Table 5: Number of measures taken in the German cities of the former new and old Länder. Source: BMVBS

Secondly, the programme “Investment Programme in the national World Heritage Sites” involves financial support for the municipalities on the territory in which German WHS are located. Table 6 indicates the number of projects conducted and their expenses, with the Federal Ministry of Transport, Building and Urban Development allocating around 220 million € to projects for German WHS between 2009 and 2014, as shown in table 7. In addition, even though 38 German WHS are inscribed on the World Heritage List (as of July 2013), the higher number of municipalities involved (47 for 2009-2013 and 48 for 2010-2014) can be explained by the fact that some WHS are located on the territory of several municipalities. Furthermore, as table 7 shows, 33 German WHS received funds in the frame of this project, while the five remaining German WHS⁷⁴¹ did not request any funds from this programme.

⁷⁴¹ Primeval Beech Forests of the Carpathians and the Ancient Beech Forests of Germany inscribed in 2007; Fagus Factory in Alfeld inscribed in 2011; Prehistoric Pile dwellings around the Alps inscribed in 2011; the Margravian Opera House Bayreuth inscribed in 2012; and the Bergpark Wilhelmshöhe inscribed in 2013 on the World Heritage List

Period	Projects	Municipalities	Expenses
2009-2013	119	47	150 million €
2010-2014	94	48	70 million €

Table 6: Expenses and number of projects conducted in German municipalities of WHS.

Source: BMVBS, Investment Programme in the national WHS

German WHS	Total Expenses (2009-2014)
1. Historic Centres of Stralsund and Wismar	22.614.250 €
2. Upper Middle Rhine Valley	19.740.724 €
3. Hanseatic City of Lübeck	16.840.000 €
4. Zollverein Mine Coal Industrial Complex in Essen	13.750.000 €
5. Collegiate Church, Castle and Old Town of Quedlinburg	13.539.572 €
6. Berlin Modernism Housing Estates	12.317.000 €
7. Old Town of Regensburg with Stadtamhof	9.893.222 €
8. Classical Weimar	8.688.333 €
9. Luther Memorials in Eisleben and Wittenberg	8.218.800 €
10. Town of Bamberg	8.138.047 €
11. Mines of Rammelsberg, Historic Town of Goslar and Upper Harz Water Management System	7.022.133 €
12. St Mary's Cathedral and St Michael's Church at Hildesheim	6.707.991 €
13. Frontiers of the Roman Empire	6.049.626 €
14. Palaces and Parks of Potsdam and Berlin	5.877.430 €
15. Maulbronn Monastery Complex	5.614.400 €
16. Aachen Cathedral	5.495.466 €
17. Bauhaus and its sites in Weimar and Dessau	5.293.799 €
18. Cologne Cathedral	5.000.000 €

19. Abbey and Altenmünster of Lorsch	4.800.000 €
20. Muskauer Park / Park Mużakowski	4.354.400 €
21. Völklingen Ironworks	4.000.000 €
22. Museumsinsel (Museum Island), Berlin	2.667.000 €
23. Roman Monuments, Cathedral of St Peter and Church of Our Lady in Trier	2.573.100 €
24. Garden Kingdom of Dessau-Wörlitz	2.531.149 €
25. The Wadden Sea	2.083.145 €
26. Wartburg Castle	1.900.000 €
27. Würzburg Residence with the Court Gardens and Residence Square	1.690.500 €
28. Pilgrimage Church of Wies	1.571.267 €
29. Speyer Cathedral	1.450.000 €
30. Monastic Island of Reichenau	1.244.400 €
31. Messel Pit Fossil Site	1.122.424 €
32. Castles of Augustusburg and Falkenlust at Brühl	800.000 €
33. Town Hall and Roland on the Marketplace of Bremen	636.000 €
	214.224.177 €

Table 7: Expenses between 2009 and 2014 per WHS located on the territory of the FRG.

Source: BMVBS, Investment Programme in the national WHS

Therefore, after reviewing the German legislation related to heritage protection and urban development at the level of the Federation and of the Free State of Saxony, it can be concluded that the legal basis exists for the adoption of the HUL. In addition, the implementation of several policies aiming at developing an integrative urban development respectful of heritage represents a first step for the broader adoption of the concept of HUL.

5.4. Summary

Applying the various characteristics of the HUL approach to the case of the Dresden Elbe Valley has enabled emphasising the relevance of this approach to urban conservation.

The origins and main characteristics of the HUL approach could be determined through the interpretation of texts, UNESCO Recommendations related to urban conservation on the one hand, while on the other hand, the interpretation of German legislations concerning urban development and heritage protection revealed the existence of some characteristics of the HUL approach.

Consequently, a legal basis seems to exist for the adoption of the HUL approach in the FRG, as the 2011 UNESCO Recommendation on the Historic Urban Landscape suggests to the Member States. However, in order for the existing potential of the HUL approach to be practically applicable, the reconciliation between conservationists and urban planners depends on their good will of both to adopt this approach in order to reach an integrated urban development respectful of the various dimensions of heritage.

To conclude, taken as a tool for the conservation of urban areas, the concept of HUL represents a possibility to solve the conflict between urban development and heritage protection, although this potential requires being further developed and implemented within policies and legislation.

CHAPTER 6

CONCLUSION

The reasons for the conflict between the State Party Germany to the WHC and UNESCO concerning the Dresden Elbe Valley have been addressed from a historical and legal perspective in this research. A detailed analysis has been conducted in the form of a “zoom out” of the decisional levels involved in this conflict, starting with the City of Dresden, moving to the FRG and continuing with UNESCO.

The objective of this chapter is to draw respective recommendations concerning the City of Dresden, the Free State of Saxony, the FRG and UNESCO, based on the results of this research.

As a conclusion to this research on the conflict between the State Party Germany to the WHC and UNESCO related to the Dresden Elbe Valley, the results of the research are first summarised, before the lessons learned are subsequently presented as recommendations for the various institutions involved in this conflict.

6.1. Summary of the results

The aim of this research was to analyse the conflictive process of the delisting of the Dresden Elbe Valley from the World Heritage List, while investigating this conflict from a historical and legal perspective in order to ascertain the reasons for the conflict between UNESCO and the State Party Germany to the WHC.

First, the object of study – the conflict between the State Party Germany to the WHC and UNESCO – and the object of this conflict – the *Waldschlößchenbrücke* – were contextualised within the City of Dresden. This historical investigation contributed to shed light upon the

elements of the trigger of the conflict related to the *Waldschlößchenbrücke* and the Dresden Elbe Valley. The prevalent argument of the historical need for an Elbe crossing at the location of *Waldschlößchen* was counter-argued in the context of the long history of failed projects since 1862 in order to show that the city's needs have changed between the industrialisation period and present, especially in view of sustainable development. It was also demonstrated that the *Waldschlößchenbrücke* creates a rupture with the physical typology of the other Elbe bridges, and thus represents a threat for the OUV and integrity of the Dresden Elbe Valley, in accordance with the decision of the World Heritage Committee. Furthermore, it was highlighted through the depiction of the location of *Waldschlößchen*, including the cultural – monuments and castles – and natural features – Elbe River, meadows, hills, vineyards and forests – that this cultural landscape has remained a green area to date, and used as a recreational area whose integrity and OUV are threatened by the *Waldschlößchenbrücke*. It was subsequently argued that the misconception of the Dresden Elbe Valley due to the image of the “Florence of the Elbe” promoted a biased perspective of the Dresden Elbe Valley as a whole, leading to an under-estimation of the impact of the *Waldschlößchenbrücke*.

Secondly, the reasons for the conflict were investigated from the German legal context in order to determine the legal arguments that impeded the possibility to protect the OUV and integrity of the Dresden Elbe Valley. Both legal battles related to the planning approval decision for the *Waldschlößchenbrücke* in view of the WHC and the environmental concerns failed, thus implying the obligation to build the bridge. The bindingness of the WHC in German law was questioned, and indeed the WHC was not transposed in German law. Therefore, by considering the Basic Law, Lindau Agreement, Unification Treaty, principle of Federal loyalty and Federal Clause of the WHC, it was demonstrated that the FRG is not bound by the WHC. However, showing that heritage protection is an exclusive competence of the *Länder* yet nature protection is a concurrent competence of both the *Länder* and the Federation, it was argued that not only was the Free State of Saxony responsible for the protection of the Dresden Elbe Valley, but rather mostly the Federation. Reviewing the legal protection of cultural landscapes in German law proved that these areas are effectively protected, and in this context the Dresden Elbe Valley has been protected as a landscape conservation area since August 1996. Finally, some perspectives for the transposition of the WHC in German law were presented following the example of the

integration of a reference to the WHC in the Federal Nature Conservation Act in its version from 2009, as well as the reference to the WHC in the Lower Saxony Monument Protection Act, the Rhineland-Palatinate Monument Protection Act, the Saxony-Anhalt Monument Protection Act and the Schleswig-Holstein Monument Protection Act.

Thirdly, the legal background of the failure of UNESCO and the State Party Germany to the WHC to protect the OUV and integrity of the Dresden Elbe Valley was discussed based on three perspectives towards the issue of legality. The issue of the legality of cultural landscapes was addressed in the context of the WHC, demonstrating that the significance of integrity and OUV played a major role in the conflict, given that they were both threatened by the construction of the *Waldschlößchenbrücke*. Furthermore, it was argued that a limited change is accepted within the definition of continuing cultural landscapes, with the initial description of the OUV representing a crucial element to later assess the acceptance for change. Subsequently, the issue of the legality of the WHC in view of the legally binding effects for States Parties to the WHC was discussed, arguing that States Parties are in general legally bound to the WHC as soon as they ratify it, and in particular they have duties and responsibilities when a site located on their territory is inscribed on the World Heritage List. It was also demonstrated that the OG represent an administrative regulation to which the States Parties to the WHC are not bound and that the decisions of the World Heritage Committee are part of internal bureaucracy. Finally, the need for a harmonisation of the different decisional levels concerning decisions on matters of the WHC within States Parties to the WHC was discussed. The final issue of the legality discussed concerns the decision-making process of the World Heritage Committee from the inscription of the Dresden Elbe Valley on the World Heritage List in 2004 until its delisting in 2009. It was argued that a diplomatic and political dispute settlement took place, involving a fact finding process, mediation and negotiation. Moreover, it was also demonstrated that the World Heritage Committee equally discussed its modalities of decision-making process during its discussion concerning the Dresden Elbe Valley at its yearly sessions.

Fourthly, the potential of the recently developed concept of HUL to solve conflicts between urban development and heritage protection was evaluated in the context of World Heritage adapted to the City of Dresden and to the FRG. It was demonstrated that since the HUL

represents a holistic approach that considers the cultural and natural features of heritage, its tangible and intangible dimensions and the spirit of place, this action plan or tool could contribute to an integrative urban development respectful of heritage. However, it was pointed out that the success of the HUL largely depends on its transposition in the legislations, as well as its implementation in the policies developed by the States Parties to the WHC.

Finally, the lessons learned for the City of Dresden, the Free State of Saxony, the FRG and UNESCO based on the conflict towards the Dresden Elbe Valley are presented in the following section.

6.2. Recommendations...

The presentation of the recommendations follows the “zoom out” approach elaborated throughout the chapters of this thesis, starting with the City of Dresden, continuing with the Free State of Saxony, the FRG and finally UNESCO. However, the content of the recommendations is constituted based on a “zoom in”, with the results of all the chapters used to prepare the recommendations to the institutions at different decisional levels.

6.2.1. ... to the City of Dresden

Based on the object of the conflict – the construction of the *Waldschlößchenbrücke* – and the results of the assessment of the concept of HUL, it is recommended that a bridge should be built between urban planners and conservationists. The adoption of the HUL as an action plan would permit taking into better consideration the different heritage dimensions of the City of Dresden in order to plan sustainable projects of urban development that are respectful of heritage.

The Dresden CC could integrate the concept of HUL in the Statute of the Capital City of Dresden for the monument conservation area Elbe River⁷⁴² from 10 May 1996 in particular and the other Statutes related to monument conservation in general (*Blasewitz/Striesen-Nordost; Weißer Hirsch/Oberloschwitz; Dresden Radeberger Vorstadt -Prussian District-; Löbtau; Plauen; Historic Village Centre Laubegast; and Settlement Briesnitz*).

Equally, the concept of HUL could be integrated in the urban development policy and transport concept of the City of Dresden. Furthermore, the City of Dresden benefits from the “Protection of Urban Historical Monuments” programme of the Federal Ministry of Transport, Building and Urban Development, presented in section 5.3 of this thesis. Thus, the integration of the concept of HUL within the implementation of this programme could represent a first step towards the implementation of policies for an integrative urban development respectful of heritage.

6.2.2. ... to the Free State of Saxony

Based on the conflict between the State Party Germany to the WHC and UNESCO due to the non-transposition of the WHC in German law, it is recommended that the Free State of Saxony transposes the WHC in the Saxon Monument Protection Act. The WHC should also be transposed in the Saxon Nature Conservation Act, following the example of art. 2 para. 5 Federal Nature Conservation Act⁷⁴³. Furthermore, the concept of HUL should be integrated in the Saxon Building Code and in the Saxon Regional Planning Act.⁷⁴⁴

Besides, the equivalent of an EIA for cultural features – a “cultural impact assessment” – could be adopted following the model of the Environmental Impact Assessment Act,⁷⁴⁵ and both

⁷⁴² City of Dresden, 27 March 1997. *Satzung der Landeshauptstadt Dresden für das Denkmalschutzgebiet Elbhänge*. Dresden: Dresden Official Journal Nr. 13/97

⁷⁴³ Bundesnaturschutzgesetz [BNatSchG] [Federal Nature Conservation Act], art. 2 para. 5 clause 2 (note 278)

⁷⁴⁴ Sächsische Bauordnung [SächsBO] [Saxon Building Code] 28 May 2004 (Saxon Law and Ordinance Gazette, p.200) and Gesetz zur Raumordnung und Landesplanung des Freistaates Sachsen [SächsLPIG] 11 June 2010, last amended on 2 April 2014 (Saxon Law and Ordinance Gazette, p.234)

⁷⁴⁵ Umweltverträglichkeitsgesetz [UVPG] [Environmental Impact Assessment Act] 12 February 1990 (Fed. Law Gazette I, p.205)

assessments should be implemented in line with art. 5 WHC⁷⁴⁶ for projects of urban development in the core and buffer zone of WHS.

6.2.3. ... to the Federal Republic of Germany

The Standing Conference could check the transposition of the WHC in the respective legislation of the *Länder* for monument protection and nature protection (Monument Protection Act and Nature Conservation Act) during the evaluation for the Tentative List planned in 2015. Consequently, it could decide to only accept WHS nomination on the territory of the *Länder* that have transposed the WHC in their legislation.

The Bundestag could transpose the WHC according to art. 59 para. 2 WHC⁷⁴⁷. Alternatively, the WHC could be transposed in the respective federal legislations, such as the Building Code, Regional Planning Act, Federal Forest Act, Federal Highways Act, Land Consolidation Act, Environmental Impact Assessment Act and Telecommunications Act,⁷⁴⁸ which can interfere with WHS, following the example of the Federal Nature Conservation Act.

6.2.4. ... to UNESCO

Based on the conflict between the State Party Germany to the WHC and UNESCO concerning the Dresden Elbe Valley, it can be recommended for a joint evaluation of ICOMOS and IUCN to be conducted for sites nominated as cultural landscapes, as is already implemented for mixed sites. Moreover, the HUL tool should be encouraged to be adapted in the management plans of the WHS, and guidance could be provided by the World Heritage Centre and the Advisory Bodies to the States Parties in this regard.

⁷⁴⁶ World Heritage Convention [WHC], art. 5 (note 138)

⁷⁴⁷ Grundgesetz [GG] [Basic Law], art. 59 para. 2 (note 10)

⁷⁴⁸ Möller, C. & Scholles, F., 2010. UNESCO-Welterbekonvention und Umweltprüfungen – Zusammenhänge und Folgerungen für die Umsetzung in Deutschland. *UVP-Report*, 24(1+2), p.4

Furthermore, the World Heritage Committee could develop a reflection on various options for dispute settlement in case of conflicts. Following the example of art. 25 Convention on the Protection and Promotion of the Diversity of Cultural Expressions⁷⁴⁹, a paragraph could be added in the OG and the Rules of Procedures of the World Heritage Committee concerning dispute settlement.

Following the principle of precaution, the World Heritage Committee should not inscribe new WHS – especially cultural landscapes – located on the territory of the *Länder* that have not transposed the WHC. This recommendation is also valid for other States Parties to the WHC that have not transposed the WHC in their internal legislation.

It can be added that the nomination files should be examined in more precise details by the World Heritage Centre, the World Heritage Committee and the Advisory Bodies in order to identify potential conflicts of interests prior to the evaluation, and more importantly, prior to the inscription of the sites in question. In this context, the World Heritage Committee should prioritise the reviewing of the state of conservation of those WHS already inscribed on the World Heritage List, rather than inscribing new sites. In relation to the feasibility study⁷⁵⁰ of organising an additional ordinary session of the World Heritage Committee per year, the potential second session could be entirely consecrated to the revision of the state of conservation of the WHS.

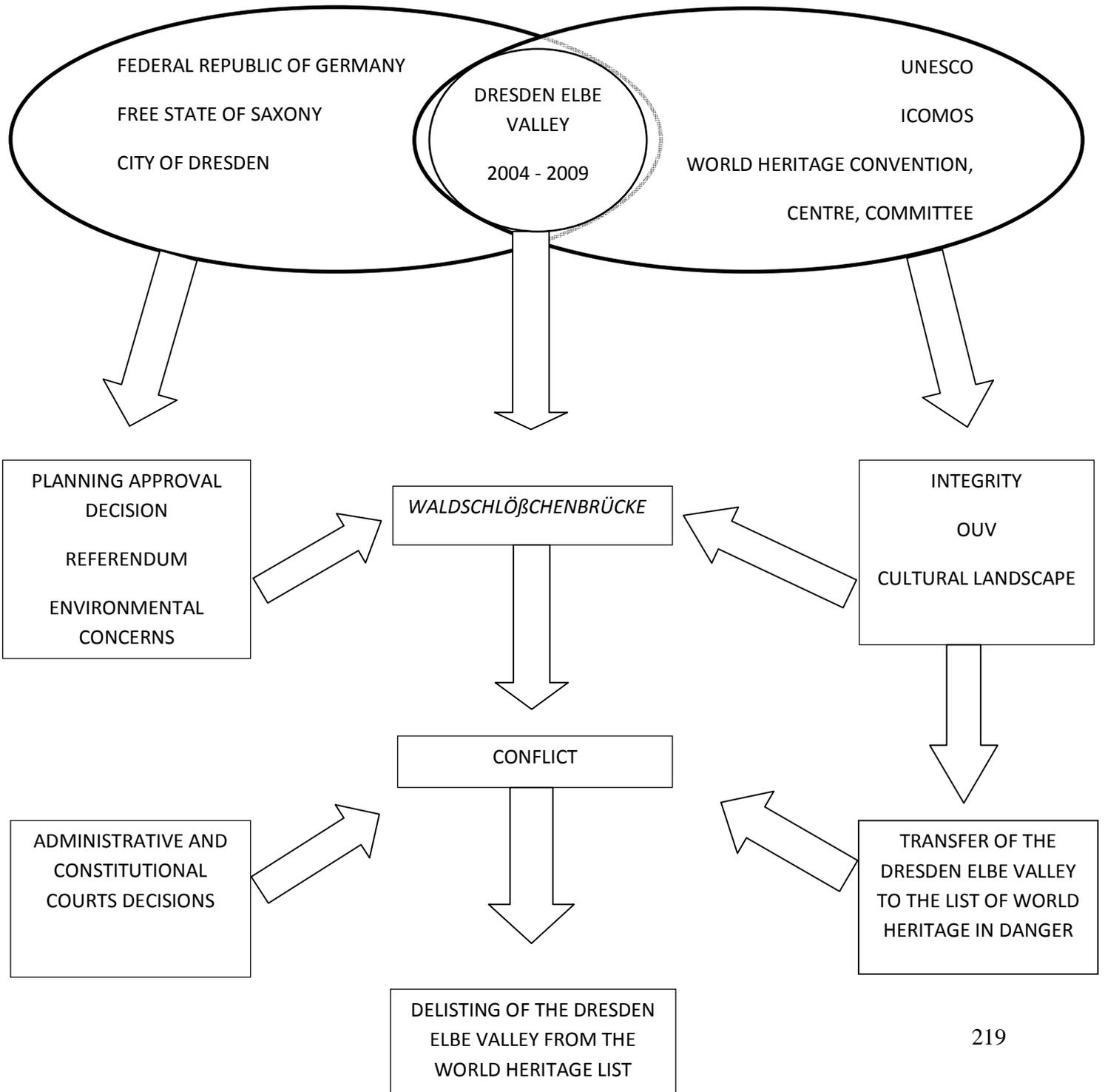
Finally, it is hoped that further research will be conducted based on the results of this research, which has combined both the German and the UNESCO perspectives and focused on the reasons for this conflict towards the Dresden Elbe Valley.

⁷⁴⁹ Convention on the Protection and Promotion of the Diversity of Cultural Expressions, 20 October 2005 (UNESCO, Paris), art. 25 “1. In the event of a dispute between Parties to this Convention concerning the interpretation or the application of the Convention, the Parties shall seek a solution by negotiation. 2. If the Parties concerned cannot reach agreement by negotiation, they may jointly seek the good offices of, or request mediation by, a third party. 3. If good offices or mediation are not undertaken or if there is no settlement by negotiation, good offices or mediation, a Party may have recourse to conciliation in accordance with the procedure laid down in the Annex of this Convention. The Parties shall consider in good faith the proposal made by the Conciliation Commission for the resolution of the dispute. 4. Each Party may, at the time of ratification, acceptance, approval or accession, declare that it does not recognize the conciliation procedure provided for above. Any Party having made such a declaration may, at any time, withdraw this declaration by notification to the Director-General of UNESCO.”

⁷⁵⁰ UNESCO (2013) *Convention Concerning the Protection of the World Cultural and Natural Heritage, World Heritage Committee Thirty-seventh Session, Phnom-Penh, Cambodia, 16 - 27 June 2013: WHC-13/37.COM/18B*. Paris: UNESCO World Heritage Centre

Annexes

ANNEX I: SCHEME OF THE CONFLICT BETWEEN UNESCO AND THE STATE PARTY GERMANY TO THE WORLD HERITAGE CONVENTION TOWARDS THE DRESDEN ELBE VALLEY



ANNEX II: CHRONOLOGY OF THE DECISION-MAKING PROCESS OF UNESCO AND THE STATE PARTY GERMANY TO THE WORLD HERITAGE CONVENTION

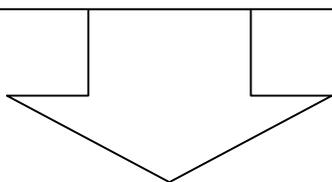
<i>UNESCO</i>
1989. NOMINATION OF THE BAROQUE ENSEMBLE OF DRESDEN
JANUARY 2003. RECEPTION OF THE NOMINATION FILE FOR THE DRESDEN ELBE VALLEY
SEPTEMBER 2003. ICOMOS EVALUATION
2 JULY 2004. INSCRIPTION OF THE DRESDEN ELBE VALLEY ON THE WORLD HERITAGE LIST

STATE PARTY GERMANY

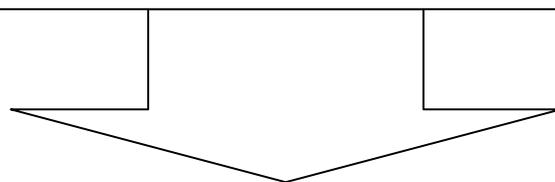
<p>FEBRUARY 1994. TRAFFIC CONCEPT PLAN</p> <p>28/29 FEBRUARY 1996. ELBE BRIDGE WORKSHOP</p> <p>AUGUST 1996. DECISION OF THE CITY OF DRESDEN TO BUILD THE <i>WALDSCHLÖßCHENBRÜCKE</i></p> <p>1997. INTERNATIONAL COMPETITION FOR THE PROJECT OF THE <i>WALDSCHLÖßCHENBRÜCKE</i></p> <p>10 NOVEMBER 2000. CC VOTE FOR THE CONSTRUCTION OF THE BRIDGE</p> <p>29 NOVEMBER 2000. GROUND-BREAKING CEREMONY</p> <p>2 JANUARY 2003. NOMINATION PROPOSAL FOR THE DRESDEN ELBE VALLEY</p> <p>FEBRUARY 2003. RC PREPARES PLANNING APPROVAL</p> <p>2 APRIL 2003. TRANSMISSION OF THE NOMINATION FILE BY THE STANDING CONFERENCE</p> <p>24 APRIL 2003. LETTER OF THE CITY OF DRESDEN TO THE RC AGAINST THE CONSTRUCTION OF THE BRIDGE</p> <p>25 FEBRUARY 2004. PLANNING APPROVAL DECISION OF THE RC</p> <p>27 FEBRUARY 2005. REFERENDUM</p> <p>26 MAY 2005. RC CONTINUES THE PLANNING</p> <p>7 JULY 2005. DECISION OF THE DRESDEN ADMINISTRATIVE COURT</p> <p>8 DECEMBER 2005. DECISION OF THE SAXON HIGHER ADMINISTRATIVE COURT</p> <p>20 JULY 2006. CC DECISION TO STOP CONSTRUCTION, SUGGESTION TO IMPLEMENT ANOTHER REFERENDUM</p> <p>10 AUGUST 2006. CC DECISION TO STOP CONSTRUCTION</p> <p>14 AUGUST 2006. RC'S NOTIFICATION AGAINST CC'S DECISION</p> <p>24 AUGUST 2006. CC ILLEGAL ORDER</p>	<p>30 AUGUST 2006. DECISION DRESDEN ADMINISTRATIVE COURT</p> <p>31 AUGUST 2006. COMPLAINT OF THE FREE STATE OF SAXONY</p> <p>19 SEPTEMBER 2006. PLEADING OF THE FREE STATE OF SAXONY</p> <p>12 OCTOBER 2006. PLEADING OF THE RC</p> <p>8 NOVEMBER 2006. PUBLIC HEARING AT THE SAXON HIGHER ADMINISTRATIVE COURT</p> <p>25 JANUARY 2007. REQUEST OF THE FREE STATE OF SAXONY TO CONTINUE THE PROCEDURE</p> <p>31 JANUARY 2007. PLEADING OF THE FREE STATE OF SAXONY</p> <p>26 FEBRUARY 2007. PLEADING OF THE CITY OF DRESDEN</p> <p>6 MARCH 2007. PLEADING OF THE FREE STATE OF SAXONY</p> <p>9 MARCH 2007. DECISION SAXON HIGHER ADMINISTRATIVE COURT</p> <p>2 APRIL 2007. APPEAL OF THE CITY OF DRESDEN</p> <p>3 MAY 2007. DECISION CONSTITUTIONAL COURT OF THE FREE STATE OF SAXONY</p> <p>11 MAY 2007. PLEADING OF THE CITY OF DRESDEN</p> <p>29 MAY 2007. DECISION FEDERAL CONSTITUTIONAL COURT</p> <p>9 AUGUST 2007. DECISION DRESDEN ADMINISTRATIVE COURT</p> <p>10 AUGUST 2007. COMPLAINT OF THE FREE STATE OF SAXONY</p> <p>27 AUGUST 2007. COMPLAINT OF THE FREE STATE OF SAXONY</p> <p>12 NOVEMBER 2007. DECISION SAXON HIGHER ADMINISTRATIVE COURT</p> <p>19 NOVEMBER 2007. BEGINNING OF THE CONSTRUCTION</p> <p>24/25 AUGUST 2013. <i>BRÜCKENFEST</i> (BRIDGE FESTIVAL)</p> <p>26 AUGUST 2013. OFFICIAL OPENING OF THE BRIDGE FOR TRAFFIC</p>
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ANNEX III: SCHEME OF THE LEGAL PROCEDURE IN THE FEDERAL REPUBLIC OF GERMANY

<u>FACTS</u>
<p><i>FEDERAL REPUBLIC OF GERMANY</i></p> <hr/>
<p>25 FEBRUARY 2004. PLANNING APPROVAL DECISION <i>WALDSCHLÖßCHENBRÜCKE</i> BY THE REGIONAL COUNCIL</p>
<p>27 FEBRUARY 2005. REFERENDUM</p>
<p><i>UNESCO</i></p> <hr/>
<p>2 JULY 2004. INSCRIPTION OF THE DRESDEN ELBE VALLEY ON THE WORLD HERITAGE LIST</p>
<p>11 JULY 2006. TRANSFER OF THE DRESDEN ELBE VALLEY TO THE LIST OF WORLD HERITAGE IN DANGER</p>
<p>25 JUNE 2009. DELISTING OF THE DRESDEN ELBE VALLEY FROM THE WORLD HERITAGE LIST</p>



<u>LEGAL PROCEDURE</u>
<p><i>CONCERNING THE WORLD HERITAGE CONVENTION</i></p> <hr/>
<p>30 AUGUST 2006. DRESDEN ADMINISTRATIVE COURT (12 K 1768/06)</p>
<p>9 MARCH 2007. SAXON HIGHER ADMINISTRATIVE COURT (4 BS 216/06)</p>
<p>3 MAY 2007. CONSTITUTIONAL COURT OF THE FREE STATE OF SAXONY (Vf 53-IV-07 (HS) / Vf 54-IV-07 (e.A.))</p>
<p>29 MAY 2007. FEDERAL CONSTITUTIONAL COURT (2 BvR 695/07)</p>
<p><i>CONCERNING THE ENVIRONMENTAL CONCERNS</i></p> <hr/>
<p>7 JULY 2005. DRESDEN ADMINISTRATIVE COURT (3 K 922/04)</p>
<p>8 DECEMBER 2005. SAXON HIGHER ADMINISTRATIVE COURT (5BS 184/05)</p>
<p>9 AUGUST 2007. DRESDEN ADMINISTRATIVE COURT (3 K 712/07)</p>
<p>12 NOVEMBER 2007. SAXON HIGHER ADMINISTRATIVE COURT (5 BS 336/07)</p>



ANNEX IV: ISSUES RELATED TO THE POLITICAL AND DIPLOMATIC DISPUTE SETTLEMENT AND TO THE INTERNAL DECISION-MAKING PROCESS OF THE WORLD HERITAGE COMMITTEE DISCUSSED BY THE WORLD HERITAGE COMMITTEE AT ITS 30TH, 31ST, 32ND, AND 33RD SESSIONS

POLITICAL AND DIPLOMATIC DISPUTE SETTLEMENT

31ST SESSION (2007)

OUTSTANDING UNIVERSAL VALUE; ALTERNATIVE SOLUTIONS; LEGAL MATTERS; SECOND REFERENDUM; TIME NEEDED; REINFORCED MONITORING MECHANISM

32ND SESSION (2008)

COURTS DECISIONS; COMMUNITY IN DRESDEN; NEW DESIGN OF THE BRIDGE; MONTHLY MONITORING

33RD SESSION (2009)

COMPROMISE ; TUNNEL

INTERNAL DECISION-MAKING PROCESS OF THE WORLD HERITAGE COMMITTEE

30TH SESSION (2006)

POSSIBLE DELISTING; ICOMOS EVALUATION; CONSENT OF THE STATE PARTY NEEDED TO TRANSFER A SITE TO THE LIST OF WORLD HERITAGE IN DANGER; CONFLICT BETWEEN CONSERVATION AND DEVELOPMENT; COMPARISON BETWEEN THE CASE OF THE TOWER OF LONDON AND THE DRESDEN ELBE VALLEY; POOR COMMUNICATION/MISINFORMATION; COMMUNITY IN DRESDEN; CREDIBILITY

31ST SESSION (2007)

PRECEDENT OF THE DECISION (IF DELISTING); SOVEREIGNTY OF STATES PARTIES; GOALS OF THE WORLD HERITAGE CONVENTION; CREDIBILITY ; CO-SIGNATURE OF THE WORLD HERITAGE CONVENTION BY ALL LEVELS OF DECISIONS WITHIN STATES PARTIES; CONFLICT BETWEEN DEVELOPMENT AND HERITAGE PROTECTION; DELISTING

32ND SESSION (2008)

2 OPTIONS: DELIST OR RETAIN ON THE RED LIST; DELISTING; PRECEDENT OF THE DECISION; LEGALITY OF THE PROCEDURE; OUTSTANDING UNIVERSAL VALUE; SUPPORT OF THE STATE PARTY TO THE WORLD HERITAGE CONVENTION; CREDIBILITY; CONFLICT BETWEEN ECONOMIC CONSIDERATION AND CULTURE; RESPONSIBILITY OF STATES PARTIES; DUTY OF THE WORLD HERITAGE COMMITTEE

33RD SESSION (2009)

VOTE; NOT TO DELIST; TO DELIST; CREDIBILITY; OUTSTANDING UNIVERSAL VALUE; ARROGANCE OF NOT DELISTING

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