Cultural Heritage Considerations in International Investment Arbitration

Sebastián Green Martínez
International Arbitration

International Investment Arbitration is an international law dispute settlement mechanism. It is established by international legal instruments, such as treaties, and involves international legal rights and obligations and, unlike international commercial arbitration, it requires the interpretation and application of public international law principles. Even though the law to be applied to specific Investor-State Dispute Settlement ("**ISDS**") proceedings is commonly determined by Bilateral Investment Treaties ("**BITs**"), it is not rare to find that such clauses refer to the domestic law of the state that is party to the dispute, the BIT itself, and international law in general. In the latter category, we may find international agreements that regulate the administration and protection of tangible and intangible cultural heritage which, in turn, can play a vital role in ISDS.

Various ISDS proceedings have involved cultural heritage. Even though cultural heritage law can be considered as foreign to most arbitrators, in the seminal award rendered in the "Pyramids Case", a tribunal -presided by the former President of the International Court of Justice, Eduardo Jiménez de Aréchaga- observed that the UNESCO Convention Concerning the Protection of World Cultural and Natural Heritage (the "**World Heritage Convention**") was relevant in deciding that dispute,[1] which involved a tourism project in the vicinity of the Great Pyramids, a site included on the World Heritage List. Since then, several investment cases involving cultural heritage law considerations have followed. This article briefly analyses the decisions

1 Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt, ICSID Case No. ARB/84/3, Award, ¶ 78 (20 May 1992).

URÍA MENÉNDEZ

rendered in the following cases: *Parkerings Compagniet v. Lithuania*; *MHS v. Malaysia*; and *Glamis Gold v. United States.* Additionally, references will be made to the facts in the ongoing proceedings in *Elitech and Razvoj v. Croatia.*

In *Parkerings Compagniet v. Lithuania,* the tribunal intervened in a dispute that involved an agreement to build underground garages in Vilnius. The historic centre of Vilnius is a living remnant of the capital city of the Grand Duchy of Lithuania of the 15th Century, with historic buildings built in a variety of styles. In 1994 it was registered in the World Heritage List, in conformity with the World Heritage Convention. The claimant challenged the decision to terminate the construction agreement and the authorisation for another foreign company to build a project on the same site, arguing that such action breached the obligation to accord treatment no less favourable than the treatment accorded to investors of a third state. The tribunal, however, observed that the fact that the original project "extended significantly more into the Old Town as defined by UNESCO [than the project authorised afterwards, was] decisive".[2] Considering that only one project significantly extended into the Old Town, the tribunal concluded that the two investors were not in like circumstances and rejected the claim.

The *Malaysian Historical Salvors v Malaysia* case -commonly referred to as MHS-, involved an agreement for the location and salvage of the cargo of the British vessel "Diana" that sank off the coast of Malacca in 1817. In a controversial award, the sole arbitrator concluded that "the Contract did not benefit the Malaysian public interest in a material way or serve to benefit the Malaysian economy in the sense developed by ICSID jurisprudence, namely that the contributions were significant."[3] Although the award was annulled for not applying the definition of investment as provided in the UK-Malaysia BIT, it is worth considering whether a salvage contract with important cultural elements can be considered to contribute to a State's economy. From an economic perspective it could be argued that the salvage of cultural treasures, in one way or another, would have a favourable impact on the host state's economy and, in the same vein, such a view would discourage unlicensed salvage operators, thus protecting cultural and historical treasures from falling into the bottomless pit of the black market.[4]

In the seminal award rendered in the "Pyramids Case", a tribunal observed that the UNESCO Convention Concerning the Protection of World Cultural and Natural Heritage was relevant in deciding that dispute

2 Parkerings-Compagniet AS v. Republic of Lithuania, ICSID Case No. ARB/05/8, Award, ¶¶ 363, 392 (11 September 2007).

3 Malaysian Historical Salvors, SDN, BHD v. The Government of Malaysia, ICSID Case No. ARB/05/10, Award on Jurisdiction, ¶ 131 (17 May 2007).

4 See V. Vadi, Cultural Heritage in International Investment Law and Arbitration (2014) pp. 155-158.

In *Glamis Gold v United States*, a mining project was affected by measures adopted to protect the *trail of dreams,* a trail of religious and cultural importance to the Quechan People, a Native American tribe. During the proceedings it was pointed out that the trail had the same religious relevance as Jerusalem or Mecca and, in this context, the tribunal analysed the relevance and applicability of the World Heritage Convention. Despite the fact that the *trail of dreams* was not on the World Heritage List, the tribunal held that it could still be considered to have outstanding universal value and, therefore, the World Heritage Convention should at least be taken into consideration.

In the end, the mining company's claims were rejected by the tribunal because it acknowledged the cultural and religious relevance of the site, concluding that the measure adopted was fairly associated with the public purpose of protecting the *trail of dreams*.[5]

There is currently an ongoing ICSID arbitration involving relevant cultural heritage issues. In *Elitech and Razvoj v. Croatia* the claimants argue that their project -the construction of a golf resort- has been arbitrarily affected by Croatia. On the other hand, it has been reported that Croatia contends that NGOs have filed an administrative claim against the project because it could potentially affect the Old City of Dubrovnik -a landmark of the Mediterranean sea coast and a World Heritage Site- and that in a non-binding referendum 85% of the voters voted against the project because, allegedly, it could jeopardize the city's status as a World Heritage Site.[6]

In an increasingly dynamic and intertwined international legal arena, international investment arbitration proceedings involving cultural heritage no longer come as a surprise

In an increasingly dynamic and intertwined international legal arena, international investment arbitration proceedings involving cultural heritage no longer come as a surprise. Cultural heritage sites, buildings, and pieces are unique and irreplaceable traces of humanity's culture and history that can be threatened by a myriad of circumstances, including the incorrect interpretation of international law. As the analysed awards indicate, arbitrators have aptly balanced states' BIT obligations with international cultural heritage rights and duties. However, the *Elitech* case shows that more cases involving cultural heritage are to be expected in the future. In this line, arbitrators must endeavour to properly research and apply international cultural heritage law when, paraphrasing the *Glamis* award, the challenged measures are reasonably linked to the public purpose of protecting cultural heritage.

5 Glamis Gold, Ltd. v. The United States of America, UNCITRAL case, Award, ¶¶ 84, 111, 166-177 (8 June 2009). For further comments, see S. Green Martínez, Cultural Heritage Challenges in Investment Arbitration: Review of Cultural Heritage in International Investment Law and Arbitration, 50(2) Israel Law Review 227 (2017) 233.

6 Elitech B.V. and Razvoj Golf D.O.O. v. Republic of Croatia (ICSID Case No. ARB/17/32). See IAReporter, Balkans Round-Up: new disputes for Albania and Croatia; updates on other pending investor-state arbitrations in the region (20 February 2017).