



LALIVE
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Cultural Heritage in Investment Arbitration

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2.1 Relevant provisions

2.2 Relevant jurisprudence

Article 1: definition of “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 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.

Article 4: duties of the Parties to the WHC

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.

Article 5: discharging the duties under WHC

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:

- (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

Article 5: discharging the duties under WHC

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- (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

Article 12: effect of non-inclusion on World Heritage List

The fact that a property belonging to the cultural or natural heritage has not been included in either of the two lists mentioned in paragraphs 2 and 4 of Article 11 shall in no way be construed to mean that it does not have an outstanding universal value for purposes other than those resulting from inclusion in these lists.

- The protection of cultural heritage no longer falls within the exclusive domestic jurisdiction of the States parties to the WHC but constitutes an *erga omnes partes* obligation.
- O’Keefe: the obligation imposed by Article 4 is owed not merely to States Parties but to “the international community as a whole ... with the result that any State, regardless of whether it is party to the Convention, has the right—whether individually or in concert with other States—to compel a State Party’s performance.”
- Protection is not limited to cultural heritage included on the World Heritage List.
- WHC lacks a dispute settlement mechanism.

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2.1 Relevant provisions

2.2 Relevant jurisprudence

- *Southern Pacific Properties vs Egypt* (1992)



- *Santa Elena vs Costa Rica* (2000)



- *Parkerings-Compagniet vs Lithuania* (2007)



- *Glamis Gold Ltd v United States of America* (2009)



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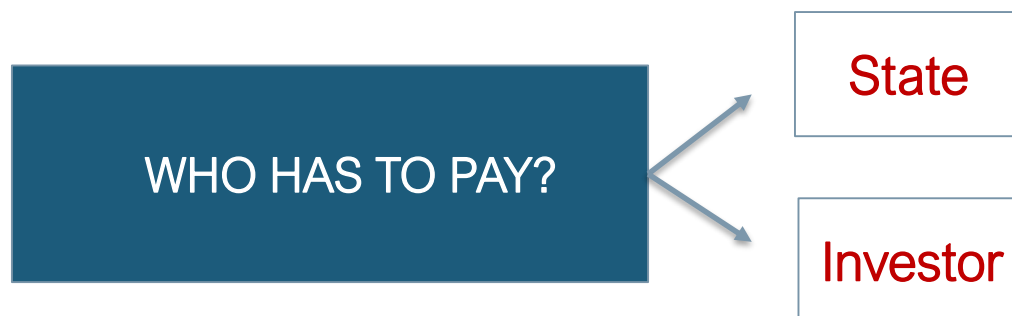
Reconciling these obligations

4.1 Expropriation

4.2 Legitimate Expectations

4.3 Standard of compensation

- Obligation to compensate for direct expropriation (whether lawful or unlawful)
 - Indirect expropriation
 - Breach of FET or MFN
- OR
- Lawful government measures taken in the public interest ?
- Measures must be implemented in a fair, non-discriminatory fashion, following principles of due process



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4.3 Standard of compensation

- *Parkerings vs Lithuania*

- “The historical and archaeological preservation and environmental protection could be and in this case were a justification for the refusal of the [Claimant’s] project.” (Award, para. 392)
- No explicit promise or guaranty from the host-State (Award, para. 331)



- *MTD vs Chile*

- The investor has to investigate the state’s regulatory, legal and socioeconomic framework (Award, paras. 53, 74-75)



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4.3 Standard of compensation

- Compensation for expropriation in *Santa Elena vs Costa Rica*
 - The fact that property was taken for a legitimate public purpose does not alter the level of compensation that must be paid.
 - The international source of the obligation to protect the environment makes no difference to the level of compensation payable
- Are public interest considerations relevant when determining the quantum of damages ?
 - *Chorzów Factory* standard (legal vs illegal expropriation)
 - *ADC vs Hungary*: application of full reparation standard and potential implications on valuation date

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Exceptions to State liability for measures imposed for the protection of cultural heritage

- Singapore-Jordan BIT (2004), Art. 18(d)
- Singapore-India Comprehensive Economic Cooperation Agreement (2005), Art. 6.11
- Canada-Thailand BIT (1997), Art. XVII(3)(d)
- Laos-Japan BIT (2008), Art. 18(1)
- Canada Jordan BIT (2009); Art. 10.1

Applying these principles:
a hypothetical case