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Considerations Before Investing Near a UNESCO World Heritage Site by L.I. de Germiny

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Considerations Before Investing Near a UNESCO World Heritage Site

Lorraine de Germiny*

Introduction

Since its signature in 1972, the World Heritage Convention has proved to be the most emblematic UNESCO Convention.¹ Promoting both natural and cultural conservation, the Convention calls for the creation of an international registry of sites of “outstanding universal value:” the World Heritage List. Today, this List contains 962 sites that range from the City of Cuzco and the Church of the Nativity in Bethlehem to the Sumatran rainforest and the Everglades Sanctuary.² Under the Convention, each State Party is required to identify the cultural and natural heritage of outstanding universal value situated on its territory.³ The World Heritage Committee then decides whether to include these proposals in the World Heritage List.⁴ Regardless though of whether these sites are included in the List, each State Party must ensure their “identification, protection, conservation, presentation and transmission to future generations” and commits to “do all it can to this end...”⁵ In particular, each State Party “shall endeavor” *inter alia* “to take the appropriate legal ... [and] administrative ... measures necessary” to achieve this goal.⁶ States must thus reconcile their obligations under the Convention with those resulting from any bilateral or multilateral investment treaties to which they are a party.

This article outlines considerations for a party seeking to invest near a World Heritage site and frames these considerations in the context of international investment law. Thus, Section I examines the three ICSID cases to date in which the Convention has played a role. Although the role differed each time, these cases show in and of themselves that the proximity of a World Heritage site (or possible site in the future) is a risk factor with respect to an investment project. Section II addresses the power of the World Heritage Committee to call upon a State Party to cease activities that harm a registered site. Where a State Party ceases these activities by, for instance, revoking a construction permit or a hydrocarbon exploration license legally obtained by a foreign investor, it may be breaching an obligation under a bilateral investment treaty (BIT). Section III discusses an investor’s possible BIT claims under such circumstances. Section IV, however, notes that certain BITs contain exceptions to state liability with respect to measures destined to protect cultural and/or natural heritage.

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¹ Convention Concerning the Protection of the World Cultural and Natural Heritage (the “Convention” or WHC), 16 November 1972, in force 17 December 1975, 1037 UNTS 151, available at <http://whc.unesco.org/archive/convention-en.pdf>.

² See <http://whc.unesco.org/en/list/>.

³ WHC, Arts. 1-3.

⁴ WHC, Arts. 8 and 11. The Committee is composed of 21 State Parties that change on a rotating basis.

⁵ WHC, Art. 4.

⁶ WHC Art. 5.

1. Teachings of Relevant Case Law

1.1 Southern Pacific Properties v. Egypt

In the 1970s, the Egyptian Ministry of Tourism, the Egyptian General Organization for Tourism and Hotels (EGOTH), and Southern Pacific Properties (SPP) agreed to establish a joint venture that would develop tourist complexes at the Pyramids.⁷ In 1975, the government approved the joint venture by decree and EGOTH, the owner of the land in question, transferred its right of usufruct for the sites “irrevocably” and “without restriction of any kind” to the joint venture.⁸ By 1977, excavation and construction works were underway.⁹

However, in 1978, after discovering the presence of antiquities in the western part of the pyramids region, the Egyptian Ministry of Information and Culture declared by decree that the land surrounding the pyramids was “public property.”¹⁰ Shortly thereafter, the government withdrew its approval of the project and the Prime Minister issued a decree declaring these lands to be “*d’utilité publique*.”¹¹

In 1984, SPP initiated ICSID proceedings, alleging that Egypt had violated its agreements with SPP.¹² In response to these allegations, Egypt invoked in part its obligations under the Convention, which had entered into force in December 1975.¹³ Furthermore, the Pyramid Fields had become a World Heritage site in 1979.¹⁴ The claimant in turn alleged that Egypt’s obligations under the Convention did not justify Egypt’s cancellation of the project, nor did it exonerate it from fully compensating the Claimant. The tribunal held that the Convention was “relevant” and that, “as a matter of international law,” Egypt was justified in canceling the project to protect its antiquities:

Clearly, as a matter of international law, the Respondent was entitled to cancel a tourist development project situated on its own territory for the purpose of protecting antiquities. This prerogative is an unquestionable attribute of sovereignty. The decision to cancel the project constituted a lawful exercise of the right of eminent domain. *The right was exercised for a public*

⁷ *Southern Pacific Properties v. Egypt*, ICSID Case No. ARB/84/3, Award, 20 May 1992, ¶¶ 42-43.

⁸ *Id.* at ¶¶ 54 and 56.

⁹ *Id.* at ¶ 61.

¹⁰ *Id.* at ¶ 63.

¹¹ *Id.* at ¶ 65.

¹² For earlier studies on this case, see e.g. V. Vadi, ‘Cultural Heritage & International Investment Law: A Stormy Relationship’, 15 *International Journal of Cultural Property* 1 (2008) 1-23; V. Vadi, ‘Culture Clash? World Heritage and Investors’ Rights in International Investment Law and Arbitration’ 28(1) *ICSID Foreign Investment Law Review* (2013) 1-21; V. Vadi, ‘Culture, Development and International Law: The Linkage between Investment Rules and the Protection of Cultural Heritage’, in S. Borelli and F. Lenzerini (eds.) *Cultural Heritage, Cultural Rights, Cultural Diversity- International Law Perspectives* (Brill: Leiden/Boston 2012) 413-434; and V. Vadi, ‘Culture Clash: Valuing Heritage in Investment Disputes’ in A. Perry Kessaris (ed.) *Socio-Legal Approaches to International Economic Law: Text, Context, Subtext* (Routledge: Abingdon 2012) 181-194.

¹³ *Id.* at ¶ 150.

¹⁴ *Id.* at ¶ 154.

*purpose, namely, the preservation and protection of antiquities in the area.*¹⁵

Although the expropriation was in the public interest, the tribunal found that Egypt was liable because it had not properly compensated SPP.¹⁶

Notably, the tribunal concluded that “... the date on which the Convention entered into force with respect to the Respondent is not the date on which the Respondent became obligated by the Convention to protect and conserve antiquities on the Pyramids Plateau;” rather, it was when the World Heritage Committee added the pyramid fields to the World Heritage List that “the relevant international obligations emanating from the Convention became binding on the Respondent.”¹⁷ As at least one commentator has observed, this finding appears misguided since the Convention’s operation does not depend on whether or not a particular site is on the World Heritage List.¹⁸ Indeed, as a legal matter, a State Party must protect its cultural and natural heritage, regardless of whether it is on the World Heritage List.¹⁹ As an evidentiary or factual matter though, a state’s obligation to protect a cultural or natural heritage site that is not yet registered commences upon that state’s determination that a particular site is of cultural or natural significance.

The date of inclusion of the site on the World Heritage List affected the amount of damages since, according to the Tribunal, it could only award damages for lost profits up until that date.²⁰ After that date, lot sales in areas inscribed in the World Heritage List would have been illegal under both Egyptian and international law and “any profits that might have resulted from such activities are consequently non-compensable.”²¹

1.2 Santa Elena v. Costa Rica

One year after ratifying the WHC, Costa Rica expropriated property located in Guanacaste Province in order to expand the Santa Rosa National Park – described by the expropriation decree as containing “flora and fauna of great scientific, recreational, educational, and tourism value, as well as beaches that are especially important as spawning grounds for sea turtles.”²² Unsatisfied with the amount that Costa Rica proposed as compensation for the expropriation, a landowner initiated domestic court proceedings.²³ When the latter proved unsuccessful, in 1995, the landowner commenced ICSID arbitration proceedings. Three years later, and while these arbitration proceedings were pending, Costa Rica nominated the

¹⁵ *Id.* at ¶¶ 78, 158 (emphasis added); *see also* ¶ 156 (“The Respondent determined-as it was entitled to do under the Convention-that the Pyramids Oasis Project was not compatible with its obligations under the Convention to protect and conserve antiquities in the areas registered with the World Heritage Committee.”)

¹⁶ *Id.* at ¶¶ 163-64.

¹⁷ *Id.* at ¶ 154.

¹⁸ Patrick J. O’Keefe, “Foreign Investment and the World Heritage Convention,” 3 *Int’l J. of Cultural Prop.* 259, 261, 264 (1994).

¹⁹ WHC, Art. 12.

²⁰ *Southern Pacific Properties v. Egypt*, Award, ¶ 191.

²¹ *Id.* at ¶¶ 190-91.

²² *Compañía de Desarrollo de Santa Elena, S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/96/1, Award, 17 February 2000, ¶ 18.

²³ For an earlier examination of this case, see V. Vadi, ‘Culture Clash? World Heritage and Investors’ Rights in International Investment Law and Arbitration’, *ICSID Foreign Investment Law Review* 28(1) (2013) 1-21.

Guanacaste Conservation Area for inclusion on the World Heritage List. In 1999, the World Heritage Committee approved this nomination and, the following year, the ICSID tribunal rendered its award.

The sole issue in dispute was that of the amount of compensation owed to the claimants. Although there was no claim for lost profits (unlike in *SPP*), the parties disagreed regarding the assessment of the fair market value of the property. During the proceedings, an advisor to Costa Rica's Minister of Foreign Affairs testified "as to Costa Rica's efforts to have the *Area de Conservación Guanacaste*, including the Santa Elena Property, designated as a World Heritage site, due to its biological and geological significance."²⁴ However, neither Costa Rica's efforts to see the area designated a World Heritage Site, nor its "environmental reasons" for expropriating the claimants affected the tribunal's assessment of damages:

...While an expropriation or taking for environmental reasons may be classified as a taking for a public purpose, and thus may be legitimate, the fact that the Property was taken for this reason does not affect either the nature or the measure of the compensation to be paid for the taking. That is, the purpose of protecting the environment for which the Property was taken does not alter the legal character of the taking for which adequate compensation must be paid. The international source of the obligation to protect the environment makes no difference.

Expropriatory environmental measures – no matter how laudable and beneficial to society as a whole – are, in this respect, similar to any other expropriatory measures that a state may take in order to implement its policies: where property is expropriated, even for environmental purposes, whether domestic or international, the state's obligation to pay compensation remains.²⁵

Thus, the tribunal did "not analyse the detailed evidence submitted regarding what Respondent refers to as its international legal obligation to preserve the unique ecological site that is the Santa Elena Property," because it did not deem it relevant to its quantum analysis.²⁶ It held that the claimant was entitled to recover the fair market value of the property at the time of the expropriation, plus compound interest up to the date of the award.²⁷

1.3 *Parkerings v. Lithuania*

Composed of Gothic, Renaissance, Baroque and classical buildings, Vilnius, Lithuania became a World Heritage site in 1994.²⁸ In 1997, the city announced a tender for the purpose of creating a multi-storey parking system that would facilitate traffic flow and thereby help to

²⁴ *Compañía de Desarrollo de Santa Elena, S.A. v. Republic of Costa Rica*, Award, at ¶ 46.

²⁵ *Id.* at ¶¶ 71-72.

²⁶ *Id.* at ¶ 71, n. 32.

²⁷ *Id.* at ¶¶ 83, 95, and 107.

²⁸ See <http://whc.unesco.org/en/list/541/> (last visited on 24 June 2013)

protect the historic city center.²⁹ Parkerings, a Norwegian investor, won the bid on the basis of a project that included a plan to excavate under the historic city center and near the cathedral.³⁰ The Municipality of Vilnius terminated the agreement in part due to concerns that the excavation for the project would destroy a significant portion of the city center's archaeological heritage and that its use of new materials and technologies would damage the city center's authenticity.³¹ Vilnius then opted for a similar agreement with a competing Dutch firm that did not involve excavation under the cathedral.³²

Parkerings initiated ICSID arbitration proceedings, in part claiming that Lithuania had violated its obligation to accord its investments treatment no less favorable than that accorded to investments made by investors of any third state.³³ The claimant alleged that Vilnius had rejected its plans in part for cultural heritage concerns and yet authorized another company to build a parking facility on the same site.³⁴ The tribunal rejected these arguments, finding that the different treatment of the two investors was justified because they were not in like circumstances.³⁵ Parkerings' construction plan was much larger than that of the competing investor and extended significantly into the historic city center as defined by UNESCO.³⁶ The tribunal qualified this latter factor as "decisive" and held that "[t]he historical and archaeological preservation and environmental protection could be and in this case were a justification for the refusal of the claimant's project."³⁷ Ultimately, it found that Lithuania had not breached the BIT and dismissed all claims.

The cases above show that the proximity of a World Heritage site is a risk factor with respect to foreign investment. In all three cases, the presence of a World Heritage site ultimately directly or indirectly hindered an investment. Accordingly, before investing in a particular area, an investor should determine, first, whether the host state has ratified the Convention and, second, whether the targeted investment area is near or may negatively impact a listed site.³⁸ Notably, according to at least one author, in certain industries such as mining, companies are increasingly taking into account the existence of World Heritage sites in their risk assessment of possible investment projects.³⁹

A fortiori, an investor should also examine whether the investment area is near a site in the List of World Heritage in Danger.⁴⁰ This list comprises sites whose protection the World Heritage Committee believes requires "major operations ... and for which assistance

²⁹ For an analysis of this case, see V. Vadi, 'Culture Clash? World Heritage and Investors' Rights in International Investment Law and Arbitration', ICSID Foreign Investment Law Review 28(1) (2013) 1-21

³⁰ *Parkerings-Compagniet AS v. Republic of Lithuania* ICSID Case No.ARB/05/8, Award, 11 September 2007, ¶¶ 1, 51, 72, 385.

³¹ *Id.* at ¶¶ 147, 190, 392, 396.

³² *Id.* at ¶¶ 363, 365.

³³ *Id.* at ¶ 362 *et seq.*

³⁴ *Id.* at ¶ 363.

³⁵ *Id.* at ¶¶ 375, 396.

³⁶ *Id.* at ¶¶ 385, 392, 396.

³⁷ *Id.* at ¶ 392.

³⁸ The Convention currently counts 190 State Parties as of 12 September 2012. See <http://whc.unesco.org/en/statesparties/> (last visited on 24 June 2013).

³⁹ See N. Affolder, 'The Market for Treaties', Chicago J. of Intl. Law 11 (2010), 159.

⁴⁰ See <http://whc.unesco.org/en/danger/>.

has been requested.”⁴¹ Registration of a site in this list not only alerts the international community, but also enables the World Heritage Committee to allocate to it immediate assistance from the World Heritage Fund. Presently 38 sites are “threatened by serious and specific dangers,” including but not limited to “large-scale public or private projects,” “the outbreak or the threat of an armed conflict,” or natural disasters.⁴² Investment near endangered World Heritage sites necessarily presents a heightened risk factor.

An investor should further consider whether the targeted investment area is near a *possible* World Heritage site. An investor may for instance check the State Party’s “Tentative List” of World Heritage sites.⁴³ These lists include properties that State Parties consider to be cultural and/or natural heritage of outstanding universal value and therefore suitable for inscription on the World Heritage List. As shown above, in both *SPP* and *Santa Elena*, the investors had invested in the host states before they had even ratified the Convention. A party, however, that invests in a state that has ratified the Convention and that does so near a potential World Heritage site (whether it be on the state’s Tentative List or not) should be aware of the state’s duties under the Convention to protect that site.

2. The World Heritage Committee Plays an Active Role in Policing World Heritage Sites

Where an investor’s activities threaten a World Heritage site, the State Party must take the appropriate legal and other measures to preserve the site. In many cases though, the state is also responsible for the harm to the site – perhaps because it granted a concession or permit to the investor. The possible tension between a State Party’s duties under the Convention and its desire to attract foreign investment are well illustrated by developments in the energy and mining sectors.⁴⁴ Indeed, while mineral and hydrocarbon extraction may be economically rewarding to states, it may also run counter to a state’s obligations under the WHC. Cognizant of this tension, the members of the International Council on Mining and Metals published a position statement in 2003 expressly agreeing to “not explore or mine in World Heritage Properties” and affirming that:

All possible steps will be taken to ensure that existing operations in World Heritage properties as well as existing and future operations adjacent to World Heritage properties are not incompatible with the outstanding universal value for which these properties are listed and do not put the integrity of these properties at risk.⁴⁵ Nevertheless, according to the World Heritage Committee’s resolutions at its 36th session in 2012, mining or hydrocarbon activities presented an actual or potential threat to sites in over 14 states.⁴⁶

⁴¹ WHC, Art. 11(4).

⁴² *Id.*

⁴³ See <http://whc.unesco.org/en/tentativelists/>.

⁴⁴ See generally S.D. Turner, “World Heritage Sites and the Extractive Industries” (20 June 2012) <<http://www.icmm.com/library/independent-report-world-heritage-sites-and-the-extractive-industries>>.

⁴⁵ ICMM Position Statement on Mining and Protected Areas (20 September 2003), <<http://www.icmm.com/publications?rootTagId=95>>.

⁴⁶ See Decisions Adopted by the World Heritage Committee at its 36th Session, Saint Petersburg 2012, WHC-12/36.COM/19.

Where an investor's activities endanger a World Heritage site and the State Party fails to take remedial action (or is even responsible for the harm along with the investor), the World Heritage Committee has limited means to intervene. It cannot force states to comply with their obligations under the Convention, nor can it legally penalize them. However, the World Heritage Committee can, and does, publicly admonish State Parties in breach of their obligations. Thus, for instance, at its 36th session, with respect to energy and mining operations, the Committee reprimanded certain states for their granting of concessions or exploration licenses for areas that encroached on World Heritage sites and urged these states to cancel such permits and/or to refrain from issuing such permits in the future.⁴⁷ Such censure can in turn cause cuts in funding, both from the World Heritage Fund and other sources.

Significantly, the World Heritage Committee also addresses entities other than State Parties whose actions threaten registered sites. For instance, it has appealed to certain companies not to undertake petroleum and mining operations within certain sites.⁴⁸ The Committee thus has the power to cast bad publicity on the actions of not only states, but also investors in those states and thereby damage their reputation.

3. State Party's Efforts to Comply with its Obligations under the Convention May Trigger BIT Claims

When faced with pressure from the World Heritage Committee and the international community, a state may resolve to protect its cultural and natural heritage of outstanding universal value and/or, more specifically, its World Heritage sites. In doing so, however, it may turn to adopting laws or other measures that hinder or terminate foreign investment projects. If a BIT applies, the foreign investor may be able to bring a claim against the state, claiming that state action amounted to an expropriation or a breach of the state's obligation to treat foreign investors fairly and equitably.

⁴⁷ *Id.* at 7a.5 (re *Kahuzi-Biega National Park*, Democratic Republic of the Congo), ¶ 5; *id.* at 7a.13 (re *Tropical Rainforest Heritage*, Sumatra, Indonesia), ¶ 8; *id.* at 7a.8 (re *Okapi Wildlife Reserve*, Democratic Republic of the Congo), ¶ 6; *id.* at 7a.4 (re *Virunga National Park*, Democratic Republic of the Congo), ¶ 5-6; *see also* resolutions requesting more information from State Parties for instance at *id.* at 7a.3 ¶¶ 6 and 8; 7a. ¶ 5; and 7a.7 ¶ 5.

⁴⁸ *See, e.g., id.* at 7a.4 (re *Virunga National Park*) (“appeal[ing] to [2 named companies] to adhere to commitments already made by [inter alia] ...ICMM not to undertake petroleum and mining exploration or exploitation within World Heritage properties”) ¶ 7 and 7a.36 (“consider[ing] that the recent permit which has been granted to the international oil and gas company ... to start oil exploration activities in Virunga National Park is not in conformity with commitments made by the State Party in the Kinshasa Declaration”) ¶ 5; *see also id.* at 7a.3 (re *Mount Nimba Strict Nature Reserve*) ¶ 8 (“...requests the State Party of Liberia to submit to the World Heritage Centre the ESIA of the potential [company name] mining project in Libya, situated 20 kms from the property and which could have negative effects on the Outstanding Universal Value of the property.”); *id.* at 7B.1 (re the *Dja Wildlife Reserve*, Cameroon), ¶ 3 (noting concern over the State Party's failure to suspend the [named company] mining license); *id.* at 7b.2 (re *Tai National Park*, Côte d'Ivoire) (“call[ing] on [named company] to subscribe to the no-go commitment, already supported by the ... ICMM ..., not to explore or exploit oil or minerals inside World Heritage properties.”) ¶ 9; *id.* at 7b.19 (re *Scandola Reserve*, France) (“not[ing] with concern the request for renewal of the prospection license for liquid or gaseous hydrocarbons by [2 named companies]...”), ¶ 4; *id.* at 7b.25 (re *Golden Mountains of the Altai*, Russia) (“express[ing] its utmost concern that ... the pipeline developer [named company] is conducting preparatory work on the pipeline route, including within the World Heritage property in violation of Russia's protected area legislation”), ¶ 5.

Most investment treaties prohibit host states from expropriating foreign investments, unless those expropriations are made in the public interest, on a non-discriminatory basis, under due process of law, and against prompt, adequate and effective compensation. In such cases, the expropriation is considered lawful and must be compensated via payment of the “value of the undertaking at the moment of dispossession, plus interest to the day of payment.”⁴⁹ By contrast, an unlawful expropriation triggers a right to full restitution or, if that is not possible, its monetary equivalent at the time of judgment.⁵⁰

If a state expropriates a foreign investment in order to comply with its obligations under the WHC, the “public interest requirement” for a lawful expropriation may be satisfied. Arbitral tribunals generally defer to a host state’s determination that expropriation measures are necessary in light of a public purpose.⁵¹ As explained above, in *SPP*, the tribunal found that the state had invoked a legitimate public purpose: the protection of antiquities. However, at least one tribunal has noted that the host state must demonstrate that a “genuine interest of the public” justifies the measures in question:

a treaty requirement for ‘public interest’ requires some genuine interest of the public. If mere reference to ‘public interest’ can magically put such interest into existence and therefore satisfy this requirement, then this requirement would be rendered meaningless since the Tribunal can imagine no situation where this requirement would not have been met.⁵²

In light of the deference generally accorded to a state’s invocation of a public purpose, a state’s demonstration that its measures were necessary in order to protect a World Heritage site would in all probability satisfy this requirement. A foreign investor convinced of the contrary would need to show that the state measures in fact do not serve a genuine interest of the public.

If, in an effort to protect its cultural and natural heritage, a state passes a law or other measure that affects the foreign investor’s enjoyment of its investment, the state may also be violating its duty (under any investment agreements to which it is a party) to treat foreign investors fairly and equitably. An important component of that standard is invariably the investor’s legitimate expectations at the time it made the investment. As the tribunal held in *Tecmed v. Mexico*, “[t]he foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that govern its investments...”⁵³

In assessing whether a host state treated a foreign investor fairly and equitably, tribunals have affirmed that states have a sovereign power to enact or cancel legislation at their discretion. For instance, in *Parkerings*, the tribunal referred to this power and noted that “any businessman... knows that laws will evolve over time.” It added that “[w]hat is

⁴⁹ *Factory at Chorzów* (Germ. v. Pol.), 1928 P.C.I.J. (ser. A) No. 17, (Sept. 13), ¶ 124.

⁵⁰ *Id.* at ¶ 125.

⁵¹ *LIAMCO v. Libya*, Award. as cited in M. Sornarajah, *The International Law on Foreign Investment* (Cambridge: CUP 2004), 397–98. (“each state [is] free to judge for itself what it considers useful or necessary for the public good”); see also *Goetz v. Burundi*, ICSID Case No. ARB/95/3, Award, 10 February 1999, ¶ 126.

⁵² *ADC v. Hungary*, ICSID Case No. ARB/03/16, Award, 2 October 2006, ¶ 432.

⁵³ *Tecmed v. Mexico*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003, ¶ 154.

prohibited however is for a State to act unfairly, unreasonably or inequitably in the exercise of its legislative power.”⁵⁴ Accordingly, in determining whether a host state treated the foreign investor fairly and equitably, its legitimate regulatory interests must be weighed against a foreign investor’s legitimate and reasonable expectations.⁵⁵

In considering a party’s legitimate expectations, tribunals have examined whether the host state made any promises or assurances to the investor. In *Parkerings*, the tribunal held that “[t]he expectation is legitimate if the investor received an explicit promise or guaranty from the host-State, or if implicitly, the host-State made assurances or representation that the investor took into account in making the investment.”⁵⁶ Where the state made no such assurances or representations, the tribunal held that the “circumstances surrounding the conclusion of the agreement are decisive to determine if the expectation of the investor was legitimate.”⁵⁷

In determining whether a state has violated its duty to treat foreign investments fairly and equitably, tribunals have also considered whether the investor properly investigated the state’s regulatory, legal and socioeconomic framework. Investors may not blindly rely on the host state’s assurances. In *MTD v. Republic of Chile*, the respondent’s Foreign Investment Commission had allowed the construction of a property development, even though it violated the host state’s planning regulations.⁵⁸ Although this authorization gave rise to legitimate expectations on the part of the investor, the tribunal reduced its award of damages on the basis that the investor should have investigated the applicable and relevant legal regulations.⁵⁹ The tribunal stated that the host state is “not responsible for the consequences of unwise business decisions or for the lack of diligence of the investor.”⁶⁰

In light of this jurisprudence, an arbitral tribunal called upon to determine whether a host state, in an effort to comply with its obligations under the Convention, breached its duty to treat a foreign investor fairly and equitably may consider several elements. First, it should determine whether the host state was a party to the Convention at the time of the investment. Second, it should assess whether the investor knew or should have known that its investment area was near an actual or potential World Heritage site. Third, it may consider whether the host state made any assurances to the investor with respect to a possible conflict between the state’s obligations under the Convention and the investor’s projects. If the state made no particular assurances or representations in this respect, the tribunal may consider the circumstances surrounding the conclusion of the agreement in order to determine the investor’s legitimate expectations. Fourth, the tribunal may examine whether the foreign investor exercised due diligence in investigating the regulatory framework applicable to its investment.

Thus, an investor wishing to invest near a World Heritage site should carefully study not only the Convention, but also any environmental, planning or other regulations that may

⁵⁴ *Parkerings v. Lithuania*, Award, ¶ 332.

⁵⁵ *Saluka v. Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, ¶ 306.

⁵⁶ *Parkerings v. Lithuania*, Award, ¶ 331.

⁵⁷ *Id.*

⁵⁸ *MTD v. Chile*, ICSID Case No. ARB/017, Award, 25 May 2004, ¶¶ 53, 74-75.

⁵⁹ *Id.* at ¶¶ 242-43.

⁶⁰ *Id.* at ¶ 167.

affect its investment. It should also discuss with the host state the compatibility of the state's obligations under the Convention with the investor's projects. Any assurances made by the state may ultimately serve to reveal to a tribunal the extent of the investor's legitimate expectations with respect to its investment project.

4. The BIT May Contain An Exception To State Liability With Respect To Measures That Protect Natural Or Cultural Heritage

Finally, an investor that wishes to invest near a World Heritage site should verify whether the applicable investment treaty contains an exception to state liability for the purposes of protecting animal or plant life or cultural and archaeological treasures. Traditionally, any exceptions to liability in investment treaties were limited to regulatory measures in the areas of taxation or national security. Increasingly though, investment agreements and foreign trade agreements contain broader exceptions, which sometimes include exceptions for regulations relating to the protection of the environment and cultural sites. Accordingly, a host state that wishes to enact a law or regulation in order to protect its natural or cultural heritage, which may also be classified as a World Heritage Site, may have more room to maneuver if the investment agreements to which it is a party contain such a provision. For instance, Article XX of GATT provides:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

...

(b) necessary to protect human, animal or plant life or health;

...

(f) imposed for the protection of national treasures of artistic, historic or archaeological value; ...

A measure "necessary to protect ...animal or plant life or health" would include measures destined to safeguard a *natural* World Heritage site, which the Convention defines in part as "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."⁶¹ Similarly, a measure necessary to protect "national treasures of artistic, historic or archaeological value" would include measures destined to safeguard a *cultural* World Heritage site which the Convention in part defines as "works of man ...and areas including archaeological sites which are of outstanding universal value from the historical, aesthetic, ethnological or anthropological point of view."⁶² A number of BITs and trade agreements contain similar exceptions for the protection

⁶¹ WHC, Art. 2 (emphasis added).

⁶² WHC, Art. 1.

of human, animal or plant life and/or of sites of historic or archaeological value.⁶³ Furthermore, investment treaties also increasingly refer in their Preambles to a desire to balance the goals of economic cooperation and investment with that of protecting *inter alia* the environment.⁶⁴

Conclusion

In conclusion, a party wishing to invest in or near a World Heritage site should think twice. It should carefully consider and even discuss with the host state the investment project's possible impact on the site and the state's obligations under the Convention. The investor faces the risk that these obligations will later hinder the investment project. Should a dispute arise, and if a BIT or multilateral investment treaty applies, the investor may be able to claim, for instance, that the host state breached its obligations to treat foreign investors fairly and equitably and not to expropriate their assets.

⁶³ See GATS, Art. XIV; Singapore-Japan FTA (2007), Art. 83(1); Singapore-Jordan BIT (2004), Art. 18; Singapore-India Comprehensive Economic Cooperation Agreement (2005), Art. 6.11; Canada-Thailand BIT (1994), Art. XVII(3); Laos-Japan BIT (2008), Art. 18(1); China-New Zealand FTA (2008), Art. 200, Canada-Jordan BIT (2009); Art. 10.1, Model US BIT (2004), Art. 8(3)(c); Investment Agreement for the COMESA Common Investment Area (2007), Art. 22.

⁶⁴ See *e.g.* the preambles of the U.S.-Uruguay BIT; Australia-Chile FTA; Norway Model BIT; Singapore-India Comprehensive Economic Cooperation Agreement; Canada-Peru FTA; Canada-Colombia FTA.