Forever Young

Celebrating 50 Years of the World Heritage Convention

edited by
Elisa Baroncini, Bert Demarsin, Ana Gemma López Martín,
Raquel Regueiro Dubra, Ruxandra-Iulia Stoica

with the collaboration of Manuel Ganarin and Alessandra Quarta

Volume I

6 *Un'anima per il diritto: andare più in alto*

Collana diretta da Geraldina Boni

Mucchi Editore

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6

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L'orizzonte meramente tecnicistico su cui ogni tipo di riflessione sembra oggi rischiare di appiattirsi non solo non cancella quegli interrogativi fondamentali che si confermano ineludibili per ciascuna disciplina in cui si ramifica il pensiero giuridico: ma li rivela, anzi, in tutta la loro impellenza. È dunque a tale necessità che facciamo riferimento nel cogliere e sottolineare il bisogno che si avverte di 'un'anima per il diritto', ispirandoci in modo particolare a quegli ammonimenti che Aleksandr Solženicyn rivolgeva a studiosi e accademici dell'Università di Harvard nel 1978 e che, a distanza di decenni, mantengono intatta la loro validità. Muovendo dalla domanda «se mi chiedessero: vorrebbe proporre al suo paese, quale modello, l'Occidente così com'è oggi?, dovrei rispondere con franchezza: no, non potrei raccomandare la vostra società come ideale per la trasformazione della nostra. Data la ricchezza di crescita spirituale che in questo secolo il nostro paese ha acquistato nella sofferenza, il sistema occidentale, nel suo attuale stato di esaurimento spirituale, non presenta per noi alcuna attrattiva»* – dichiarazione che si riempie di significato alla luce della vicenda personale, tanto dolorosa quanto nota, di colui che l'ha pronunciata –, l'intellettuale russo individuava infatti con profetica lucidità i sintomi e le cause di tale declino. In questo senso, ad interpellarci in modo precipuo in quanto giuristi è soprattutto l'osservazione secondo cui «in conformità ai propri obiettivi la società occidentale ha scelto la forma d'esistenza che le era più comoda e che io definirei giuridica»: una 'forma d'esistenza' che tuttavia è stata assunta come fondamento esclusivo e per ciò stesso privata dell'anelito a una dimensione superiore capace di giustificarla. Con l'inevitabile, correlata conseguenza che «l'autolimitazione liberamente accettata è una cosa che non si vede quasi mai: tutti praticano per contro l'autoespansione, condotta fino all'estrema capienza delle leggi, fino a che le cornici giuridiche cominciano a scricchiolare». Sono queste le premesse da cui scaturisce quel complesso di valutazioni che trova la sua sintesi più efficace nella seguente affermazione, dalla quale intendiamo a nostra volta prendere idealmente le mosse: «No, la società non può restare in un abisso senza leggi come da noi, ma è anche derisoria la proposta di collocarsi, come qui da voi, sulla superficie tirata a specchio di un giuridismo senz'anima». Se è tale monito a costituire il principio ispiratore della presente collana di studi, quest'ultima trova nella stessa fonte anche la stella polare da seguire per cercare risposte. Essa, rinvenibile in tutti i passaggi più pregnanti del discorso, si scolpisce icasticamente nell'esortazione – che facciamo nostra – con cui si chiude: «E nessuno, sulla Terra, ha altra via d'uscita che questa: andare più in alto».

* La traduzione italiana citata è tratta da Aleksandr Solženicyn, *Discorso alla Harvard University, Cambridge (MA) 8 giugno 1978*, in Id., *Il respiro della coscienza. Saggi e interventi sulla vera libertà 1967-1974. Con il discorso all'Università di Harvard del 1978*, a cura di Sergio Rapetti, Jaca Book, Milano, 2015, pp. 219-236.

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TABLE OF CONTENTS

Volume I

Section II – The World Heritage Convention: its Relevance for Strengthening the Values of the International Community

Section II

The World Heritage Convention: its Relevance for Strengthening the Values of the International Community

Elisa Baroncini

THE UNESCO WORLD HERITAGE CONVENTION IN INTERNATIONAL INVESTMENT ARBITRATION*

Abtract: Ratified by 194 countries, the World Heritage Convention is one of the best-known treaty instruments in the general culture and one with the greatest impact on local realities as well as a central element of international cultural heritage law. Increasingly the object of interpretation in national and international judgments, the 1972 UNESCO Convention does not fail to be a benchmark also in international investment arbitration, and it is to this jurisprudence that the present chapter is dedicated. The awards on the relation between investment protection and world heritage protection have been selected and considered. The analysis of such international investment arbitration jurisprudence reveals a constantly growing attention by the adjudicators to the respect of sites of outstanding universal value. This involves the duty, for the investor, before planning and starting his/her business, to get the necessary information on the national and international rules disciplining the land and assets where a UNESCO site is present. Only a diligent and responsible investor can thus be protected by the rules of international investment law when his/her investment also concerns a site having an exceptional value transcending national borders.

1. *Introduction*

With the definition of the heritage of the humankind, or 'world heritage', the 1972 UNESCO Convention[1] made a fundamental

* Double-blind peer reviewed content.

[1] *Convention Concerning the Protection of the World Cultural and Natural Heritage* (World Heritage Convention, WHC) adopted in Paris on 16 November 1972 and entered into force on 17 December 1975, in *United Nations Treaty Series,* 1977, Vol. 1037, p. 151. The literature devoted to the 1972 UNESCO Convention is extensive: see *ex multis La protezione del patrimonio mondiale culturale e naturale a venticinque anni dalla convenzione dell'UNESCO del 1972*, edited by M.C. Ciciriello, Napoli, 1997; P. Strasser, *"Putting Reform Into Action" - Thirty Years of the World Heritage Convention: How to Reform a Convention without Changing Its Regulations*, in *International Journal of Cultural Property*, 2002, pp.

contribution to the protection of cultural goods and natural and landscape beauties. When such properties and sites have an 'outstanding universal value' (OUV)[2], i.e. an exceptional value that transcends national borders, they no longer represent a wealth just for the country that expresses them and in which they are located. Due to their unique significance, going beyond State frontiers, and thus having universal relevance, the protection, preservation and transmission to future generations of UNESCO sites are no longer the sole responsibility of individual countries, but of the international community as a whole.

Ratified by 194 countries, the World Heritage Convention (WHC) is one of the best-known treaty instruments in the general

216-266; *The 1972 World Heritage Convention: A Commentary*, edited by F. Francioni, Oxford, 2008; A. Vigorito, *Nuove tendenze della tutela internazionale dei beni culturali*, Naples, 2013, pp. 15-46; *40 Years World Heritage Convention: Popularizing the Protection of Cultural and Natural Heritage*, edited by M.-T. Albert, B. Ringbeck, Berlin-Boston, 2015; F.P. Cunsolo, *La tutela del patrimonio culturale e naturale mondiale nella Convenzione UNESCO del 1972*, in *Tutela e valorizzazione del patrimonio culturale mondiale nel diritto internazionale*, edited by E. Baroncini, Bologna, 2021, pp. 213-241; M. Gestri, *Teoria e prassi di un accordo pionieristico nella gestione di beni d'interesse generale: la Convenzione del 1972 sul patrimonio mondiale*, in *Tutela e valorizzazione del patrimonio culturale - Realtà territoriale e contesto giuridico globale*, edited by M.C. Fregni, M. Gestri, M.C. Santini, Torino, 2021, pp. 113-150. On the notion of world heritage and the role of UNESCO see L. Casini, *Potere globale – Regole e decisioni oltre gli Stati*, Bologna, 2018, ch. 2, para. 5; F. Francioni, *World Cultural Heritage*, in *The Oxford Handbook of International Cultural Heritage Law*, edited by F. Francioni, A.F. Vrdoljak, Oxford, 2020, pp. 250-271.

[2] Cf. recitals 7 and 8 of the preamble to the WHC, which state that «in view of the magnitude and gravity of the new dangers threatening ... [parts of the cultural or natural heritage], *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», as well as 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*, organised on a permanent basis and in accordance with modern scientific methods» (emphasis added).

culture[3] and one with the greatest impact on local realities[4], as well as a central element of international cultural heritage law, the development of which has been prodigious over the last 50 years[5]. Increasingly the object of interpretation in national[6] and international

[3] Issues on heritage and the UNESCO system often go beyond the realms of scientific discussion to make headlines: with specific reference to Italy, cf., most recently, R. Staglianò, *Nei palazzi dell'Unesco: Who enters and who leaves*, in *La Repubblica*, 1 November 2017; M. Gabanelli, *UNESCO: quanto paghiamo per diventare patrimonio dell'umanità*, in *Corriere della sera*, 29 January 2019; *UNESCO, i 55 siti italiani patrimonio dell'umanità*, in *La Repubblica*, 7 July 2019; M. Thatcher, *L'equilibrio difficile tra tutela del patrimonio e turismo di massa*, in *Il sole 24 ore*, 25 October 2019; R. Capozucca, *Il patrimonio culturale sfida il cambiamento climatico*, in *Il sole 24 ore*, 9 December 2019; *La Grande Barriera Corallina rischia di perdere lo status di patrimonio mondiale dell'Unesco,* in *La Stampa*, 4 December 2020.

[4] The interest aroused first by the candidature as a UNESCO heritage site and then by the eventual official recognition of a site significantly involves local administrators and communities, both in terms of the candidature process, often engaging and identifying, and with reference to the commitment required to prepare and comply with the management plans required to achieve and maintain the prestigious World Heritage Committee recognition. Again with reference to the Italian situation, cf., *inter alia*, *inter alia*, L. Boretto, *Pronta la candidatura delle "Alpi del Mediterraneo" a patrimonio dell'umanità Unesco*, in *La Stampa*, 26 gennaio 2018; G. Ricci, *Quei siti Unesco che nessuno valorizza*, in *Corriere Torino*, 20 ottobre 2018; G. dell'Orefice, *Unesco: le colline del Prosecco sono patrimonio mondiale dell'umanità*, in *Il sole 24 ore*, 7 luglio 2019; *Unesco: mura veneziane patrimonio mondiale dell'umanità*, in *Il sole 24 ore*, 7 luglio 2019; *Padova. Palazzo della Ragione i dubbi dell'Unesco sugli affreschi. Ora "indaga" il Bo*, in *Il mattino di Padova*, 16 febbraio 2020; *Petizione per la candidatura del Tagliamento a patrimonio Unesco*, in *FriuliSera*, 6 agosto 2020; *I nuraghe candidati alla lista del Patrimonio dell'Umanità dell'Unesco - Avviato l'iter per il riconoscimento dei siti dell'intera civiltà nuragica*, in *Corriere della sera*, 6 novembre 2020; M. Carta, "*Via Appia patrimonio dell'umanità" - la Regina delle strade candidata ufficiale Unesco: il 10 gennaio la firma*, in *La Repubblica*, 9 gennaio 2023; P. Panza, *"Il Duomo di Milano diventi patrimonio dell'umanità": avviata la candidatura per l'Unesco*, in *Corriere della sera*, 8 febbraio 2023.

[5] In this sense see F. Francioni, *Custom and General Principles of International Cultural Heritage Law*, in *The Oxford Handbook of International Cultural Heritage Law*, cit., pp. 531-550.

[6] Among the various national rulings that consider the 1972 UNESCO Convention, see the recent Italian case on the construction of a fast food restaurant in an area adjacent to the Baths of Caracalla: TAR Lazio, *McDonald's Development Italy Llc v. Ministero per i Beni e le Attività Culturali*, judgment 5757/2020 of 29

judgments,[7] the 1972 UNESCO Convention does not fail to be a benchmark also in international investment arbitration, and it is to this jurisprudence that the present work is dedicated. The adhesion of a State to the WHC and the presence on the national territory of a cultural or natural heritage of outstanding universal value, as well as the declaration of a site as a UNESCO heritage site, are legally qualified acts and situations affecting the protection of foreign investments provided by the BITs (Bilateral Investment Treaties)[8] or

May 2020, and the commentary by M.R. Calamita, *L'influenza della Convenzione UNESCO per la tutela del patrimonio culturale e naturale su alcune recenti pronunce del giudice amministrativo: il caso del McDonald's alle Terme di Caracalla*, in *Giustamm - Rivista di diritto amministrativo*, no. 8/2020.

[7] Very famous are the recent cases *Al Mahdi*, on which the International Criminal Court ruled in 2016 (International Criminal Court, *Prosecutor v Al Mahdi*, Judgment of 27 September 2016, ICC-01/12-01/15-171); and *Temple of Preah Vihear*, on which the International Court of Justice intervened in 2013 (*Request for Interpretation of the Judgment of 15 June 1962 in the Case Concerning the Temple of Preah Vihear (Cambodia v. Thailand) (Cambodia v. Thailand)*, Judgment of 11 November 2013, I.C.J., 2013, Rep. 281). On the international criminal case law see R. Pavoni, *La protezione internazionale del patrimonio culturale nei conflitti armati: stato dell'arte e nuovi sviluppi*, in *Tutela e valorizzazione del patrimonio culturale*, cit., pp. 161-187; G. Roversi Monaco, *La tutela dei beni culturali nei conflitti armati - Evoluzione e sviluppi della tutela internazionale dei beni culturali*, in *Tutela e valorizzazione del patrimonio culturale mondiale*, cit., pp. 127-146; on the ICJ jurisprudence cf. A. Ciampi, *Identifying and Effectively Protecting Cultural Heritage*, in *Rivista di diritto internazionale*, 2014, pp. 699-724; A. Chechi, *The 2013 Judgment of the ICJ in the Temple of Preah Vihear Case and the Protection of World Cultural Heritage Sites in Wartime*, in *Asian Journal of International Law*, 2016, pp. 353-378; G. Gagliani, *The International Court of Justice and Cultural Heritage - International Cultural Heritage Law Through the Lens of World Court Jurisprudence*? in *Intersections in Cultural Heritage Law*, edited by A.-M. Carstens, E. Varner, Oxford, 2020, pp. 223-242. More generally on the international case law on cultural heritage, see A. Chechi, *The Settlement of International Cultural Heritage Disputes*, Oxford, 2014, and A.M. Tanzi, P.E. Mason, *The Potential of the Singapore Convention on Mediation for Art and Cultural Property Disputes*, in *Journal of International Dispute Settlement*, 2021, pp. 669-692.

[8] UNCTAD (*United Nations Conference on Trade and Development*) currently (December 2020) registers 2901 BITs of which 2342 are in force (see data available at https://investmentpolicy.unctad.org/international-investment-agreements). For a presentation of BITs and international investment law see F. Costamagna, *Promozione e protezione degli investimenti esteri nel diritto internazionale*, in *Neoliberismo internazionale e global economic governance. Sviluppi istituzionali*

the chapters dedicated to investments in the broader agreements of international economic law[9].

We thus intend here to analyse the evolutionary path of the relevant arbitral awards, in order to assess the growing relevance, in international investment law, of the protection of cultural and natural heritage originating from UNESCO[10]. At the same time, we

e nuovi strumenti, edited by A. Comba, Torino, 2013, pp. 131-170; *International Investment Law*, edited by M. Bungenberg, J. Griebel, S. Hobe, A. Reinisch, Y. Kim, München, Oxford, Baden-Baden, 2015; C.L. Lim, J. Ho, M. Paparinskis, *International Investment Law and Arbitration*, Cambridge, 2018; R. Dolzer, U. Kriebaum, C. Schreuer, *Principles of International Investment Law*, Oxford, 2022.

[9] As an example see for all Chapter 8 of the *Comprehensive Economic and* Trade Agreement (CETA) between the European Union and Canada: Council Decision (EU) 2017/38 of 28 October 2016 on the provisional application of the Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part, in OJEU L11/1, 14.1.2017. On the European Union's latest generation of agreements that also regulate the protection and promotion of foreign investment see *Mega-Regional Trade Agreements: CETA, TTIP, and TiSA: New Orientations for EU External Economic Relations*, edited by S. Griller, W. Obwexer, E. Vrane, Oxford, 2017; *Foreign Investment Under the Comprehensive Economic and Trade Agreement (CETA)*, edited by M.M. Mbengue, S. Schacherer, Heidelberg, 2019; B. Cappiello, *Il diritto europeo degli investimenti. Prospettive per una politica europea sostenibile*, Torino, 2019. For a framing of the role of mega-regionals in International Economic Law see P.-T. Stoll, *Towards Mega-Regionalim in International Economic Law*, in *Elgar Encyclopedia of International Economic Law*, edited by T. Cottier, K. Nadakavukaren, Cheltenham UK, Northampton, MA, USA, 2017, pp. 37-38.

[10] On the relation between investment protection and cultural heritage protection see M. Hirsch, *Interactions Between Investment and Non-investment Obligations*, in *The Oxford Handbook of International Investment Law*, edited by P. Muchlinski, F. Ortino, C. Schreuer, Oxford, 2008, pp. 155-181; V.S. Vadi, *Cultural Heritage and International Investment Law: A Stormy Relationship*, in *International Journal of Cultural Property*, 2008, pp. 1-24; V.S. Vadi, *Fragmentation or Cohesion? Investment versus Cultural Protection Rules*, in *The Journal of World Investment & Trade*, 2009, pp. 573-600; L. de Germiny, *Considerations Before Investing Near a UNESCO World Heritage Site*, in *Transnational Dispute Management,* 2013, pp. 1-11; V.S. Vadi, *Culture Clash? World Heritage and Investors' Rights in International Investment Law and Arbitration*, in *ICSID Review*, 2013, pp. 123-143; V.S. Vadi, *Cultural Heritage in International Investment Law and Arbitration*, Cambridge, 2014, p. 93 ss.; G. Gagliani, *Pro Bono Pacis? Le interazio-*

will consider the emergence of the need for the investors to be familiar with the legal, international and domestic, framework for the preservation and management of monumental complexes and sites falling within the scope of the 1972 Convention, and, therefore, the implications that the presence of these assets has for the conduct of the business activities of the foreign economic operators.

2. *UNESCO heritage comes into the picture in international investment litigation: the* Pyramids *case*

For the first time, the 1972 UNESCO Convention and a UNESCO world heritage site were considered by an international arbitration tribunal in the case *Southern Pacific Properties (Middle East) Limited v. Egypt*[11]. The dispute arose from the impossibility for SPP(ME), a company registered in Hong Kong, to carry out the construction of a tourist village near the Pyramids of Giza, despite the fact that the proposed project had obtained all the authorisations required by the Egyptian State. In particular, on 23 September 1974, SPP(ME) signed a contract with the Egyptian Ministry of Tourism and the Egyptian General Organisation for Tourism and Hotels (EGOTH), establishing a joint venture for the development of the Pyramids Oasis Project[12]. Within a few months, this contract passed the formal inspection of the investment agency[13], and subsequently, on 2 May

ni tra diritto internazionale e degli investimenti e patrimonio culturale, in *Rivista di Diritto internazionale*, 2017, pp. 756-781; G. Gagliani, *The Controversial Definition of "Investment" on the Test of Culture and Cultural and Natural Heritage: Convergences, Divergences and Possible Integrations*, in *International Trade Law*, 2019, pp. 49-72.

[11] *Southern Pacific Properties v. Egypt*, ICSID Case No. ARB/84/3, Award, 20 May 1992. On this decision see L. Lankarani El-Zein, *Quelques Remarques sur la Sentence SPP v. La République arabe d'Égypte*, in *Revue belge de droit international*, 1994, pp. 534-558.

[12] For the factual part of the *Pyramids* case see *Southern Pacific Properties (Middle East) Limited v. Egypt*, Award, paras. 42-72.

[13] This is the *General Organisation for Investment of Arab Capital and Tax-Free Areas* (GIA) and its Decree No. 30/16-75 (see *Southern Pacific Properties (Middle East) Limited v. Egypt*, Award, para. 54).

1975, the joint venture was approved by Decree No. 475 of the President of the Egyptian Republic. EGOTH then transferred to the joint venture its right of usufruct over the land involved in the investment «irrevocably» and «without restriction of any kind»[14]. This was followed by all the formal steps for the approval, by the Ministry of economy and economic cooperation and the Ministry of tourism, of the contracts with the local agencies, the legal form of the investor, and the general and detailed plan of the tourist facilities.

In July 1977, construction work began: roads were built, water and sewage pipes were installed, excavations for artificial lakes and a golf course were undertaken, and the main water basin was almost completed. In addition, the planning of two hotels was at an advanced stage; and as many as 386 plots, on which villas and multi-family dwellings were to be built, were sold at a total cost of ten million USD. Towards the end of 1977, however, the Pyramids Oasis Project started encountering strong political opposition in Egypt and became the subject of a parliamentary enquiry. Those who objected to the project considered it as a threat to the undiscovered antiquities in the places affected by the investment. Soon, the Egyptian Antiquities Authority confirmed the presence of archaeological-artistic finds in the western part of the Giza Pyramids region, and, on the basis of the technical report of this Authority, the Minister of Information and Culture adopted a decree on 27 May 1978 to declare the territory surrounding the Pyramids as «public property (Antiquities)»[15]. In a very rapid sequence, the authorisations for the project were revoked, and, on 11 July 1978, the Egyptian Prime Minister proclaimed that territory «d'utilité publique»[16].

The intricate affair – after having also seen the annulment on appeal of an arbitration award of the International Chamber of Commerce in Paris, confirmed by the French Court of Cassation –

[14] See *Southern Pacific Properties (Middle East) Limited v. Egypt*, Award, para. 56.

[15] *Southern Pacific Properties (Middle East) Limited v. Egypt*, Award, para. 63.

[16] See *Southern Pacific Properties (Middle East) Limited v. Egypt*, Award, para. 65.

landed before an ICSID arbitration procedure[17] following the complaint presented on 24 August 1984 by SPP(ME), in which the latter claimed that the deals it had reached with Egypt for the realisation of its project had been breached, consequently asking to be compensated for the direct expropriation suffered[18]. In response to these allegations, Egypt justified itself by pointing out that it was a contracting party to the 1972 UNESCO Convention. As of 17 December 1975, the date of entry into force of this Convention, in the defendant view it became «obligatory, on the international plane, to cancel the Pyramids Oasis Project»[19]. Moreover, in 1979, the areas of the Pyramids of Giza had been proclaimed a world heritage site, making the regulations for the management of the new UNESCO site[20] even more stringent. On the other hand, the Hong Kong investor argued that Egypt had authorised the construction of the tourist complex the year after the ratification of the WHC, which

[17] ICSID (*International Centre for Settlement of Investment Disputes*) is the intergovernmental institution created by the World Bank under the 1965 Washington Convention to promote the settlement of disputes between States and private investors. ICSID thus manages the conciliation commissions and arbitration tribunals set up from time to time to settle disputes involving private individuals and States. On the ICSID Convention and the functioning of its arbitration mechanism see. C. Schreuer, *International Centre for Settlement of Investment Disputes (ICSID)*, in *Max Planck Encyclopedia of International Law*, 2013; C. Schreuer, *Arbitration: International Centre for Settlement of Investment Disputes (ICSID)*, in *Max Planck Encyclopedia of International Law*, 2018; *Schreuer's Commentary on the ICSID Convention - A Commentary on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, edited by S.W. Schill, L. Malintoppi, A. Reinisch, C.H. Schreuer, A. Sinclair, Cambridge, 2022. For the text of the Convention see *Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (International Centre for Settlement of Investment Disputes [ICSID])*, in *United Nations Treaty Series*, 1966, Vol. 575, p. 159.

[18] On the discipline of expropriation, direct and indirect, in international investment law see R. Dolzer, U. Kriebaum, C. Schreuer, *Principles of International Investment Law*, cit., p. 146 ss.; A. de Nanteuil, *International Investment Law*, Cheltenham-Northampton, 2020, p. 307 ss.

[19] *Southern Pacific Properties (Middle East) Limited v. Egypt*, Award, para. 150.

[20] See the presentation of the Egyptian Pyramids in the UNESCO site *Memphis and its Necropolis - the Pyramid Fields from Giza to Dahshur*, *https://whc.unesco.org/en/list/86/*.

took place on 7 February 1974, and that the ultimate stages of the approval of the master plan were finalised in 1976, thus one year after the UNESCO Convention came into force, to signify that, at least at an early stage, the North African State did not seem to have considered the Pyramids Oasis Project as incompatible with the international obligations it had undertaken by concluding the WHC. Moreover, SPP(ME) emphasised that Egypt could have taken measures, other than the cancellation of the tourist complex, that were in any case consistent with its WHC obligations to protect antiquities. Similarly, the investor pointed out that the Egyptian authorities had not invoked the UNESCO Convention in the national measures banning the project, thus considering the invocation of the WHC only as «a post hoc rationalization for an act of expropriation», since Egypt had designated the site of the Pyramids from Giza to Dahshur for the inclusion in the tentative list under Article 11 of the WHC to be proclaimed world heritage only nine months after the cancellation of the project[21].

The arbitral tribunal qualified the 1972 Convention as «relevant»[22] for the purposes of resolving the dispute and held «as a matter of international law» that Egypt was justified in cancelling the tourism project to preserve its heritage of 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

[21] *Southern Pacific Properties (Middle East) Limited v. Egypt*, Award, para. 153.

[22] «Nor is there any question that the UNESCO Convention is relevant: the Claimants themselves acknowledged during the proceedings before the French *Cour d'Appel* that the Convention obligated the Respondent to abstain from acts or contracts contrary to the Convention, stating "que les Etats étaient susceptibles d'engager leur responsabilité international envers les autres Etats signataires en persistant dans des actes ou contrats devenus contraires aux règles de la Convention"» (*Southern Pacific Properties (Middle East) Limited v. Egypt*, Award, para. 78).

exercised for a public purpose, namely, the preservation of antiquities in the area»[23].

Additionally, the adjudicating panel observed that «a hypothetical continuation of the Claimants' activities interfering with antiquities in the area could be considered as unlawful from the international point of view»[24] precisely because the continuation of building activities would be disrespectful of UNESCO law, which, more than permitting, actually *requires* the Contracting Parties to preserve the properties and sites of exceptional universal value.

However, the arbitrators affirmed that the 1972 UNESCO Convention and the sovereign right to preserve antiquities did not imply the exclusion of the Claimant's right to be compensated, and thus, while considering the cancellation of the Pyramids Oasis Project legitimate because it was made in the public interest, they established Egypt's liability because the defendant State had not adequately compensated the Claimant[25].

In defining the *quantum* of compensation[26], the Arbitral Tribunal made a temporal distinction between the periods before and after the Pyramids were inscribed on the UNESCO World Heritage List. In fact, according to the Arbitrators, the international obligation deriving from the UNESCO system to prohibit the construction of the tourist village had arisen from the moment of the proclamation of the Pyramids as a world heritage site, i.e. from 1979, and not, instead, as Egypt claimed, from the entry into force of the Convention, i.e. from 1975. Consequently, the Arbitrators decided to

[23] *Southern Pacific Properties (Middle East) Limited v. Egypt*, Award, para. 158, emphasis added.

[24] *Southern Pacific Properties (Middle East) Limited v. Egypt*, Award, para. 154.

[25] *Southern Pacific Properties (Middle East) Limited v. Egypt*, Award, para. 154.

[26] On compensation and damages in international investment law see R.R. Babu, *Standard of Compensation for Expropriation of Foreign Investment*, in *Handbook of International Investment Law and Policy*, edited by J. Chaisse, L. Choukroune, S. Jusoh, Heidelberg, 2020, pp. 1-18; C.L. Beharry, E. Méndez Bräutiga, *Damages and Valuation in International Investment Arbitration*, *ivi*, pp. 1-32.

award SPP(ME) the payment of the value of the investment made, together with compensation for the loss of the opportunity to realise the commercial success of the Pyramids Oasis Project until the Pyramids area was declared a UNESCO world heritage site. On the other hand, the ICSID Tribunal did not recognise any loss of profit (*lucrum cessans*) after 1979, when the site concerned was inscribed on the World Heritage List. From that time, in fact, the construction and therefore the sale of real estate in the Pyramids' buffer zone had become unlawful under both international and Egyptian law, with the consequence that the loss of profit resulting from such activities could not be compensated:

> «lot sales in the area registered with the World Heritage Committee under the UNESCO Convention would have been *illegal under both international law and Egyptian law* after 1979, when the registration was made. Obviously, the allowance of *lucrum cessans* may only involve those profits which are legitimate ... From that date [1979] forward, the Claimants' activities on the Pyramids Plateau would have been *in conflict with the Convention* and therefore *in violation of international law*, and *any profits* that might have resulted from activities are *consequently non-compensable*»[27].

In synthesis, in the award adopted in 1992, the Arbitral Tribunal modulated the amount of compensation for the expropriation suffered by SPP(ME) according to whether or not the site affected by the expropriation measures was a site already on the World Heritage List. The buffer zones and restrictive rules for building development that characterise a UNESCO property prevent an intensive exploitation of the territories surrounding it; and this situation, the Arbitrators in the *Pyramids* case argued, has obviously to be reflected in the calculation of the compensation owed by the State, which cannot in-

[27] *Southern Pacific Properties (Middle East) Limited v. Egypt,* Award, paras. 190-191, emphasis added.

clude, by way of *lucrum cessans*, compensation for economic activities prohibited on UNESCO sites[28].

The doctrine has rightly observed that, according to Article 12 of the WHC, the protection of heritage of outstanding universal value does not depend on its inclusion in the World Heritage List but derives from signing the UNESCO Convention. The latter, in fact, as will be more fully considered when dealing with the *Glamis Gold* case[29], establishes the obligation to preserve world heritage independently of formal proclamations. Therefore, once a State has ratified the WHC, it has to protect the world heritage assets present on its territory, even if they have not already been officially declared a UNESCO world heritage site. From this WHC obligation arose the doctrine's criticism of the Arbitral Tribunal in the *Pyramids* case, insofar as the ICSID adjudicators made a distinction in the calculation of compensation for the expropriation suffered depending on whether or not the site concerned had already been included in the UNESCO World Heritage List[30].

3. *The dispute over compensation for expropriation to preserve the Guanacaste Conservation Area*

UNESCO law comes to the fore again, although not explicitly in the text of the arbitral award, in an investment dispute in *Compañía del desarrollo de Santa Elena, S.A. v. The Republic of Costa Rica*[31]. In 1970, CDSA, a Costa Rican company whose majority shareholders were of US nationality, acquired the property of Santa Elena, which stretched for about 30 km on the western Pacific coast of the Cen-

[28] Against the plaintiff's request for compensation of almost $140,000,000, the Arbitral Tribunal instead ordered compensation of $27,661,000. Cf. *Southern Pacific Properties (Middle East) Limited v. Egypt*, Award, paras. 33 and 257.

[29] See below paragraph 5 of this chapter.

[30] Cf. P.J. O'Keefe, *Foreign Investment and the World Heritage Convention*, in *International Journal of Cultural Property*, 1994, pp. 259-265.

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

tral American state, bordering the Santa Rosa National Park[32]. This is a particularly beautiful natural area, unique for the diversity of its geological features, home to pumas and jaguars and a wide variety of plants, and on whose beaches sea turtles go to lay their eggs. The CDSA intended to build a tourist resort and a residential complex on a significant part of the purchased property and proceeded to draw up a technical project and a financial plan to identify how its investment would be used. On 5 May 1978, however, Costa Rica, which in the meantime had deposited its instrument of ratification of the 1972 Convention[33], approved the decree of expropriation of Santa Elena. Indeed, the Central American government considered it indispensable to acquire the CDSA's property in order to unite it with the Santa Rosa National Park, creating an area large enough to preserve unspoilt the varied habitat and the many animal and plant species of that part of the Costa Rican province of Guanacaste, which reflects two per cent of the world's marine and terrestrial biodiversity[34]. The CDSA did not contest the State's right of expropriation, as the public utility of the Costa Rican measure, adopted to maintain the uniqueness of an ecosystem, was evident; the company objected instead to the amount of compensation offered by the Central American country, which it considered inadequate as it would not correspond to the fair market value of the expropriated property. After unsuccessfully waging a protracted court battle before the Costa Rican courts, the CDSA, relying on US legislation

[32] For a reconstruction of the factual part of the dispute see *Compañía de Desarrollo de Santa Elena, S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/96/1, Award, paras. 15-26.

[33] The deposit, at UNESCO, took place on 23 August 1977. According to Article 33 of the World Heritage Convention, three months later, i.e. in November 1977, the Convention became binding for the Latin American country. On this information see the official UNESCO website *http://portal.unesco.org*.

[34] C.N. Brower, J. Wong, *General Valuation Principles: The Case of* Santa Elena, in *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law*, edited by T. Weiler, London, 2005, pp. 747-775, at p. 747.

protecting investments of US citizens and companies abroad[35], submitted a request for arbitration to ICSID in 1995, which it finalised the following year. The central issue before the arbitrators was to determine the amount of compensation to be paid by the host State to the CDSA for the expropriation of Santa Elena. The Respondent agreed on the obligation to compensate the Claimant; however, in seeking to reduce the amount due, it added to the considerations already entrusted to the grounds of the 1978 decree the international obligations of protection arising from the 1972 Convention. Furthermore, Costa Rica, in July 1998, during the ICSID arbitration proceedings, submitted the dossier to propose the nomination of the Guanacaste area as a world heritage site, obtaining the prestigious recognition in December 1999[36]. The defendant State thus argued that the international obligation to also preserve the uniqueness of the ecosystem and natural landscape of Santa Elena resulting from the inscription in the UNESCO List inevitably implied a more limited compensation[37].

[35] This is the so-called *Helms Amendment*, the legislation adopted by the United States that conditioned the granting of North American aid to developing countries, as well as the US government's positive vote for financing projects prepared by international organisations also on the willingness of those countries to agree to settle disputes over expropriations suffered by US citizens, or companies with at least 50 % US capital, by resorting to international arbitration. See 22 USC sec. 2370a (*Helms Amendment*, 30 April 1994), and *Compañía de Desarrollo de Santa Elena, S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/96/1, Award, para. 24.

[36] See the presentation of Guanacaste made by the UNESCO *Area de Conservación Guanacaste*, at *https://whc.unesco.org/en/list/928/*.

[37] Costa Rica, in its reply statement, cited a number of treaties on the protection of forests, wetlands and biodiversity in addition to the 1972 UNESCO Convention, from which it arose a large number of environmental protection requirements that limited large-scale commercial development on the Santa Elena property, as Brower and Wong report: «[a]dditional limitations were cited arising from the fact that Costa Rica is party to numerous treaties giving rise to obligations to protect the environment, including the Western Hemisphere Convention, the Convention Concerning the Protection of the World Cultural and Natural Heritage, the Convention on Wetlands of International Importance Especially as Waterfowl Habitat, the 1992 Convention on Biological Diversity and the Central American Regional Convention for the Management and Conservation of the Natural Forest Ecosystems ... Costa Rica also very meticulously document-

In the arbitral award of June 2000, the Tribunal held that Costa Rica's international obligations should not come into play in the recognition of the right to compensation, consisting of the fair market value of the investment made, for the expropriation of Santa Elena. Indeed, the arbitrators affirmed:

> «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 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*»[38].

It should be noted here that the Arbitral Tribunal calculated the fair market value of Santa Elena by identifying the date of the 1978 decree as the moment of expropriation, because «[a]s of that date, the practical and economic use of the Property by the Claimant was irretrievably lost»[39]. The ICSID arbitrators observed that if they had

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ed the Government's longstanding and comprehensive commitment to international and national environmental conservation and demonstrated how this policy had led to the creation of the Santa Rosa Park and to efforts undertaken ... to add the Guanacaste Conservation Area, embracing the Santa Rosa National Park, including Santa Elena, to the World Heritage List under the World Heritage Convention» (C.N. Brower, J. Wong, *General Valuation Principles: The Case of* Santa Elena, cit., at p. 761).

[38] *Compañía de Desarrollo de Santa Elena, S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/96/1, Award, paras. 71-72, emphasis added.

[39] *Compañía de Desarrollo de Santa Elena, S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/96/1, Award, para. 81.

set the time to calculate the compensation as that of the issuance of the arbitral award, i.e. the year 2000, they would have had to take into account that the strict environmental preservation policy defined by Costa Rica since 1978 «would very likely exclude the kind of tourist, hotel and commercial development that CDSE contemplated when it first acquired the Property»[40]. In doing so, however, the Arbitral Tribunal failed to take into account the fact that Costa Rica was still required to preserve the heritage of outstanding universal value present on its territory as of the entry into force of the WHC for the Respondent, i.e. from November 1977[41].

It can, however, be noted that the Tribunal, while incurring the shortcoming noted above, nevertheless identified the amount of compensation by striking an acceptable balance between the needs of Costa Rica and those of the private plaintiff. The ICSID Arbitrators, in fact, chose the mid-point between the valuation proposed by Costa Rica (USD 1.9 million) and that of the CDSA (USD 6.4 million). The sum thus recognised as compensation (USD 4.15 million), together with interest, has, on the one hand, allowed Costa Rica to be able to sustain the payment, avoiding the return of Santa Elena to the CDSE, with the risk of finding itself a 'Disney-fied' tourist complex in the UNESCO site of Guanacaste; on the other hand, the amount of the indemnity was sufficient to avert the continuation of the arbitration dispute[42], i.e. the CDSE's challenge of the arbitral award to request its annulment on the basis of Article 52 of the ICSID Convention[43].

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[40] *Compañía de Desarrollo de Santa Elena, S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/96/1, Award, para. 84.

[41] See *supra* note 33.

[42] For these considerations see C.N. Brower, J. Wong, *General Valuation Principles: The Case of* Santa Elena, cit., at p. 775, and K.I. Juster, *The Santa Elena Case: Two Steps Forward, Three Steps Back*, in *American Review of International Arbitration*, 1999, pp. 371-388.

[43] Article 52(1) of the ICSID Convention provides that any party to an arbitration proceeding may request the annulment of the award «on one or more of the following grounds: (a) that the Tribunal was not properly constituted; (b) that the Tribunal has manifestly exceeded its powers; (c) that there was corruption on the part of a member of the Tribunal; (d) that there has been a serious departure

4. *Foreign investment made subsequent to the proclamation of a site as a UNESCO heritage: the Arbitral Tribunal dismisses the complaint in the* Parkerings *case*

With the *Parkerings* case[44], the interaction between heritage protection and investment protection lands on the European continent. However, more than because of its geographical location, this dispute is distinguished by the fact that it arises over how to preserve the integrity and authenticity of a site declared UNESCO heritage not only before the arbitration procedure was requested, but also prior to the plaintiff entrepreneur's decision to invest in the construction of an infrastructure near a monumental complex already inscribed on the World Heritage List. Indeed, in 1994, the Old Town of Vilnius, characterised by an urban structure dating back to the Middle Ages and architecture ranging from Gothic to Classical style, with very well-preserved buildings, was proclaimed a world heritage site[45]. In 1997, the municipality of Vilnius published a call for tenders for the construction of a multi-storey car park in the historic centre of the Lithuanian capital[46]. In 1999, at the end of the intricate procedure, Parkerings, a Norwegian company, concluded an agreement with the Vilnius Municipality for the construction of this infrastructure. Shortly afterwards, however, in addition to a strong popular aversion, it followed a series of reports from national and

from a fundamental rule of procedure; or (e) that the award has failed to state the reasons on which it is based».

[44] *Parkerings-Companiet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007. On this case see L. Johnson, *Parkerings-Companiet AS v. Republic of Lithuania, ICSID Case No. ARB/05/8 (Parkerings v. Lithuania)*, in *International Investment Law and Sustainable Development - Key cases from 2000-2010*, edited by N. Bernasconi-Osterwalder, L. Johnson, IISD, 2011, pp. 97-104; C. Martini, *Balancing Investors' Rights with Environmental Protection in International Investment Arbitration: An Assessment of Recent Trends in Investment Treaty Drafting*, in *The International Lawyer*, 2017, pp. 529-583.

[45] See the presentation of the Vilnius Historic Centre by UNESCO *Vilnius Historic Centre*, at *https://whc.unesco.org/en/list/541/*.

[46] On the reconstruction of the facts of the dispute see *Parkerings-Companiet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, paras. 51-193.

local bodies for the preservation of state monuments that evaluated the Parkerings project negatively. The proposed car park, large in size and partly underground in Vilnius Old Town, was considered to have an excessive impact on the historic centre of the Lithuanian capital, destroying – due to the excavations and the part to be built underground – unexplored cultural layers rich in evidence of past civilisations, and damaging to the environment and for the increase in traffic. Such consequences would have also worsened the lifestyle of the population living in and around the area and weakened the Lithuanian capital's tourist appeal. Therefore, the municipality of Vilnius ran for cover, it did not go ahead with the agreement with Parkerings and chose instead the more restrained and UNESCO site-friendly project proposed by Pinus Proprius, a company with Dutch capital.

Hence, in 2005, the Norwegian investor filed its request for arbitration with the ICSID, complaining of the violation of several provisions of the Bilateral Investment Agreement between Lithuania and Norway signed in Vilnius on 16 August 1992[47]. In particular, Parkerings accused the respondent State of failing to comply with Article IV of the Norway/Lithuania BIT concerning the most-favoured-nation clause[48]. According to the Claimant, Pinus Proprius and Parkerings were in «similar circumstances»[49], and, therefore, Lithuania, by preferring Pinus Proprius' project, violated the principle of non-discrimination. The Arbitral Tribunal, comparing the two proposals of the Norwegian enterprise and the Dutch compa-

[47] *Agreement between the Government of the Republic of Lithuania and the Government of the Kingdom of Norway on the Promotion and Mutual Protection of Investments*, 16 August 1992, text available on the website of the Permanent Court of Arbitration *https://files.pca-cpa.org/pcadocs/bi-c/1.%20Investors/4.%20Legal%20Authorities/CA198.pdf*.

[48] «Investments made by Investors of one Contracting Party in the Territory of the other Contracting Party, as well as the Returns therefrom, shall be accorded treatment no less favourable than that accorded to investments made by Investors of any third state» (Article IV, para. 1 of the Lithuania / Norway BIT).

[49] *Parkerings-Companiet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, para. 364.

ny, came to the conclusion that those projects could not be considered similar: apart from its smaller size, the plan of Pinus Proprius was more respectful of the Old Town, in particular because it did not extend close to the Cathedral area. Therefore, the two investors were not «in like circumstances»[50], with the consequence that Lithuania had not violated the principle of non-discrimination, i.e. Article IV, para. 1 of the Lithuania/Norway BIT.

In the reasoning prepared to support its decision, the Court clearly relied on the UNESCO heritage status of Vilnius Old Town. The ICSID Arbitrators emphasised that «[t]he territory of the Old Town as defined by UNESCO is a protected area which requires the approval of various administrative Commissions in order, notably, to make any construction»[51] and recalled the negative opinions of the several Lithuanian administrative departments in charge of the protection of cultural heritage on the appropriateness of the Parkerings' project. In particular, the Tribunal highlighted the report of the National Commission for the Protection of State Monuments[52]. Such report asserted that the construction of under-

[50] *Parkerings-Companiet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, para. 396.

[51] *Parkerings-Companiet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, para. 382.

[52] «Another feature does ... call the Tribunal attention: the MSCP planned by BP extends significantly in the Old Town as defined by UNESCO and especially near the historical site of the Cathedral. The record shows that various administrative Departments and Commissions in Lithuania were opposed to the MSCP as planned by BP. On 20 October 2000, the State Monument Protection Commission of the Republic of Lithuania objected to the parking plan for the following reason: *Projects of such type and scale like the project of the construction of planned underground garages in the Old Town of Vilnius should be developed concurrently taking into consideration the possible direct and indirect environmental impact of planned works and also the impact on cultural properties. In the opinion of the State Monumental Protection Commission, the planned garages [...] would change the character of the Old Town of global value; destroy large areas of unexplored cultural layer. Also, the intensity of traffic and air pollution in the Old Town is likely to increase. The Old Town might become less attractive in terms of tourism and to the residents and visitor, and this would be a great loss. [The State Monumental Protection Commission] resolves: to object the project of construction of the underground garages in the Old Town of Vil-*

ground garages on the UNESCO site would affect «the authenticity of the old city of Vilnius»[53], a central requirement for the recognition and maintenance of a property on the World Heritage List, and it would also undermine Lithuania's compliance with the international obligations it undertook by ratifying the Convention for the Protection of the Architectural Heritage of Europe[54], and the European Convention for the Protection of the Archaeological Heritage[55]. Thus, the ICSID arbitrators concluded that:

> «the fact that BP's MSCP project[56] in Gedimino extended significantly more into the *Old Town as defined by the UNESCO*, is *decisive*. Indeed, the record shows that the opposition raised against the BP projected MSCP were important and contributed to the Municipality decision to refuse such a controversial project. *The historical and archaeological preservation and environmental protection could be and in this case were a justification for the refusal of the project*. The potential negative impact of the BP project in the Old Town was increased by its considerable size and its proximity with the culturally sensitive area of the Cathedral. Consequently, BP's MSCP in Gedimino was not similar with the MSCP constructed by Pinus Proprius ... the City of Vilnius did have legitimate grounds to distinguish between the two projects. Indeed, the refusal by the Municipality of Vilnius to authorise BP's project in Gedimino was justified by various concerns, espe-

nius [...] ...» (*Parkerings-Companiet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, para. 385, emphasis in the original).

[53] *Parkerings-Companiet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, para. 388.

[54] *Convention for the Protection of the Architectural Heritage of Europe*, adopted in Granada on 3 October 1985 (*The Granada Convention*, ETS No. 121), text available on the Council of Europe website at *www.coe.int/en/web/conventions/full-list?module=treaty-detail&treatynum=121*.

[55] *European Convention on the Protection of the Archaeological Heritage (Revised)*, adopted in Valletta on 16 January 1992 (*The Valletta Convention*, ETS No. 143), text available on the Council of Europe website at *https://rm.coe.int/168007bd25*.

[56] The Parkerings multi-storey car park.

cially in terms of historical and archaeological preservation and environmental protection»[57].

On 11 September 2007, Parkerings' request was thus dismissed in its entirety, with each party having to bear its own legal costs and share the expenses of the arbitration panel and the ICSID secretariat[58].

5. *World heritage protection beyond the World Heritage List: the* Glamis Gold *case*

Two years later, the dispute that has arisen over the complex legal framework set up by the US authorities to preserve the sacred sites of the Quechan Indian tribe shows an increasingly attentive and sensitive approach to the protection of cultural and natural heritage promoted by the 1972 UNESCO Convention – which, as it will be highlighted in this paragraph, requires the preservation of what has outstanding universal value regardless of its inclusion on the World Heritage List. The dispute over the Quechan ancestral lands stems from the dense series of administrative and regulatory interventions by the State of California, some federal agencies and the US Government, on the Imperial Project, the plan for the opening of an extensive gold and silver mine by the Canadian company Glamis Gold[59]. This activity was, in fact, to take place in the

[57] *Parkerings-Companiet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, parr. 392-396.

[58] *Parkerings-Companiet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, para. 465.

[59] Our reconstruction of the facts is mainly based on the findings of the arbitration award: see *Glamis Gold Ltd. v. United States of America*, ICSID Award, 8 June 2009, paras. 27-90. On this award see J.C. Kahn, *Striking NAFTA Gold: Glamis Advances Investor-State Arbitration*, in *Fordham International Law Journal*, 2009, pp. 101-155; E. Obadia, *Introductory Note to NAFTA/UNCITRAL: Glamis Gold Ltd. v. United States,* in *International Legal Materials*, 2009, pp. 1035-1037; E. Whitsitt, D. Vis-Dunbar, *Glamis Gold Ltd. v. United States of America: Tri-*

southern sector of the California Desert Conservation Area, an area considered sacred by Native Americans, and therefore protected by US law. In particular, after a prolonged interlocution with State and federal offices, which began in 1994, the Imperial Project was authorised in April 2003 on the condition, *inter alia*, that Glamis Gold would systematically and promptly fill in all mine voids to recreate the contours of the land that existed before mining. The part of the Californian desert on which Glamis Gold intended to operate was the site of the *Trail of Dreams*, a route of spiritual value for the Quechan, traversed to perform ceremonial rites, whose cultural importance for Native Americans is similar to that of Mecca or Jerusalem for the faithful of monotheistic religions.

A few months later, in July 2003, the Canadian company decided to request arbitration against the United States under the NAFTA Agreement[60]. For Glamis Gold, the series of Californian

bunal sets a high bar for establishing breach of 'Fair and Equitable Treatment' under NAFTA, in *Investment Treaty News*, 14 July 2009; S.W. Schill, *Glamis Gold Ltd. v. United States, NAFTA Chapter 11 Arbitral Tribunal, June 8, 2009,* in *American Journal of International Law*, 2010, pp. 253-259; M.C. Ryan, *Glamis Gold Ltd. v The United States and the Fair and Equitable Treatment Standard*, in *McGill Law Journal*, 2011, pp. 919-958.

[60] *North American Free Trade Agreement between Canada, Mexico and the United States* signed on 17 December 1992 and entered into force on 1 January 1994 (in *International Legal Materials*, 1993, p. 289 ss.). NAFTA was renegotiated during the Trump administration and is now replaced by the *United States-Mexico-Canada Agreement* (USMCA), which entered into force on 1 July 2020. The USMCA does not only liberalise trade and protect investments, but also protects workers' rights, it is more attentive to the needs of agri-food trade, preserves intellectual property rights, regulates digital trade, provides for rules to combat corruption and disciplines specifically dedicated to small and medium-sized enterprises. The text can be found on the official website created by the three contracting parties of the USMCA *https://can-mex-usa-sec.org/secretariat/agreement-accord-acuerdo/index.aspx?lang=eng*. With specific reference to the investment discipline in NAFTA see *NAFTA Investment Law and Arbitration: Past Issues, Current Practice, Future Prospects*, edited by T. Weiler, Ardsley, N.Y., 2004. On the same issues regarding the USMCA see D. Garcia-Barragan, A. Mitretodis, A. Tuck, *The New NAFTA: Scaled-Back Arbitration in the USMCA*, in *Journal of International Arbitration*, 2019, pp. 739-754.

and federal measures constituted a «continuum of acts»[61] that deprived the investment of its value, amounting to an indirect expropriation and thus a violation of Article 1110 of the NAFTA Agreement[62]. Moreover, in the applicant's view, the obligation to backfill the mine voids made mining uneconomic and was not «rationally related to its stated purpose of protecting cultural resources and [was] thus ... arbitrary»[63] , in contravention of Article 1105 of the NAFTA Agreement, which also requires respect for the fair and equitable treatment (FET) of foreign investments[64].

[61] *Glamis Gold Ltd. v. United States of America*, ICSID Award, para. 358.

[62] This is the provision devoted by the NAFTA Agreement to the discipline of expropriation, which established the prohibition of nationalisation or direct and indirect expropriation, unless the national measures were taken for reasons of public interest, on a non-discriminatory basis, respecting due process of law, and providing for equitable compensation based on the criteria set forth in paras. 2-6 of the provision.

[63] *Glamis Gold Ltd. v. United States of America*, ICSID Award, para. 867.

[64] The article referred to, in fact, stated that «[e]ach Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security». The FET clause is the most frequently invoked provision in international investment arbitration litigation because it provides a basic standard of protection for the investor even where there is no violation of the prohibitions of discrimination or expropriation. This 'catch-all provision' protects the investor's legitimate expectations created by the conduct of the host State. On this point, see V. Vadi, *Gravity and Grace: Foreign Investments and Cultural Heritage in International Investment Law*, in *Vanderbilt Journal of Transnational Law*, 2022, pp. 1007-1050, at pp. 1032-1033, who recalls the effective considerations of the *Unglaube* case on the circumstances that investors must prove in order to invoke a reasonable expectation with regard to the defendant State: «claimants must demonstrate reliance on specific and unambiguous State conduct, through definitive, unambiguous and repeated assurances, and targeted at a specific person or identifiable group» (*Unglaube v. Republic of Costa Rica*, ICSID Case No. ARB/09/20, Award, 16 May 2012, para. 270). On fair and equitable treatment and, more generally, on investment treaty standards see also, *ex multis,* M. Valenti, *The Protection of General Interests of Host States in the Application of the Fair and Equitable Treatment* Standard, in *General Interests of Host States in International Investment Law*, edited by G. Sacerdoti, with P. Acconci, A. De Luca, M. Valenti, Cambridge, 2014, pp. 26-57; F. Ortino, *The Origin and Evolution of Investment Treaty Standards: Stability, Value, and Reasonableness*, Oxford, 2019.

The Arbitral Tribunal, in its award of 8 June 2009, dismissed Glamis Gold's claims in their entirety. The Arbitrators found that the attacked measures did not have a sufficient economic impact to result in an expropriation of the plaintiff's investment («the California backfilling measures did not result in *a radical diminution in the value of* the Imperial Project»[65]), and therefore the mining activity carried out according to the local regulations remained profitable. The Canadian company complained that the FET standard was violated also because the national measures, far from preserving cultural resources, actually destroyed them – «[o]nce you take the material out [of] the ground and if there are cultural resources on the surface, they're destroyed. Putting the dirt back in the pit actually doesn't protect those resources»[66]. The Tribunal responded by endorsing the respondent State's considerations, which pointed out that, in the absence of the contested regulations, pits and rubbish heaps would have compromised the traditional landscape and its cultural value[67]. The Arbitrators hence considered the US regulation as rationally related to the stated aims of preserving cultural heritage and avoiding environmental degradation, emphasising that «governments must compromise between the interests of competing parties»[68]. Aware of the public nature of the investment protection system under Chapter 11 of the NAFTA Agreement, the Tribunal accentuated the need for detailed reasoning to induce compliance with the arbitral award and thus strengthen its legitima-

[65] *Glamis Gold Ltd. v. United States of America*, ICSID Award, para. 366, emphasis added.

[66] *Glamis Gold Ltd. v. United States of America*, ICSID Award, para. 387.

[67] «[I]t appears to the Tribunal that the government had a sufficient good faith belief that there was a reasonable connection between the harm and the proposed remedy and that Claimant is using too narrow a definition of artifacts. Respondent points out that there are, in addition to pot shards, spirit circles, and the like, sight lines, teaching areas and viewsheds that must be protected and would be harmed by significant pits and waste piles in the near vicinity» (*Glamis Gold Ltd. v. United States of America*, ICSID Award, para. 805).

[68] *Glamis Gold Ltd. v. United States of America*, ICSID Award, para. 804. For the findings of the Arbitral Tribunal, see paras. 534-536 and 830, as well as the executive summary of the arbitral award at paras. 10-26.

cy[69]. In support of their conclusions, the Arbitrators thus referred also to the 1972 UNESCO Convention, in the parts where it provides that damage to or destruction of a cultural and natural heritage asset is a deleterious impoverishment of the heritage of all peoples[70], and in particular its Article 12. In fact, the latter establishes that States Parties are obliged to preserve heritage regardless of whether it is included in the World Heritage List, since exceptional universal value is not created by the formal recognition of the UNESCO Committee but is inherent in the property to be protected[71].

[69] «[I]t is important that a NAFTA tribunal provide particularly detailed reasons for its decisions. All tribunals are to provide reasons for their awards and this requirement is owed to private and public authorities alike. In the Tribunal's view, however, it is particularly important that the State Parties receive reasons that are detailed and persuasive for three reasons. First, States are complex organisations composed of multiple branches of government that interact with the people of the State. An award adverse to a State requires compliance with the particular award and such compliance politically may require both governmental and public faith in the integrity of the process of arbitration. Second, while a corporate participant in arbitration may withdraw from utilising arbitration in the future or from doing business in a particular country, the three NAFTA State Parties have made an indefinite commitment to the deepening of their economic relations. In this sense, not only compliance with a particular award, but the long-term maintenance of this commitment requires both governmental and public faith in the integrity of the process of arbitration. Third, a minimum level of faith in the system is maintained by the mechanism for the possible annulment of awards. However, the time and expense of such annulments are to be avoided. The detailing of reasons may not avoid the initiation of an annulment procedure, but it is hoped that such reasons will aid the reviewing body in a prompt resolution of such motions» (*Glamis Gold Ltd. v. United States of America*, ICSID Award, para. 8).

[70] «[D]eterioration or disappearance of any item of the cultural or natural heritage constitutes a harmful impoverishment of the heritage of all the nations of the world» (second recital of the Preamble to the 1972 UNESCO Convention).

[71] See *Glamis Gold Ltd. v. United States of America*, ICSID Award, paras. 83-84, and footnote 194 of para. 84, where the Tribunal emphasised that «[*t*]*he Convention makes special note* that the fact of a site's non-inclusion on the register does not signify its failure to possess "outstanding universal value"» (emphasis added). In fact, according to Article 12 WHC «[t]he 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 [i.e. the *World Heritage List* and *the List of World Heritage in Danger*] shall in no way be construed to mean that it does not have an outstanding universal value for purposes other than those resulting from

6. *The Le Morne UNESCO site: the dispute between the British entrepreneur Gosling and the Republic of Mauritius*

Last but not least, international investment arbitration proceedings, in the recent *Gosling* case[72], made a further contribution to defining the relation between UNESCO sites and investment protection. The dispute at issue arose between Thomas Gosling, a British citizen, several companies controlled by him, registered both in Great Britain and Mauritius, and the African island State[73]. The Claimants, in the request for arbitration submitted to ICSID on 13 September 2016, alleged that the Government of Port Louis had prevented the construction of luxury tourist complexes in the region of Le Morne in violation of the UK-Mauritius Bilateral Agreement on Investment Promotion and Protection of 1986[74]. In

inclusion in these lists». The attention paid to this provision by the Arbitral Tribunal in the *Glamis Gold* case recalls an important Australian case law that, as early as the 1990s, noted the duty of States to identify heritage of outstanding universal value and to protect it, regardless of its inclusion on the World Heritage List. For references to this case law and an analysis of it, see P.J. O'Keefe, *Case Note - Foreign Investment and the World Heritage Convention*, in *International Journal of Cultural Property*, 1994, pp. 259-265. On Article 12 of the 1972 UNESCO Convention see F. Lenzerini, *Article 12 - Protection Not Inscribed on the World Heritage List*, in *The 1972 World Heritage Convention: A Commentary*, edited by F. Francioni, Oxford, 2008, pp. 201-218.

[72] *Thomas Gosling and others v. Republic of Mauritius*, ICSID Case No. ARB/16/32, Award of 18 February 2020. On this controversy see T. Jones, *Mauritius Faces Claim over UNESCO-Influenced Planning Policy*, in *Global Arbitration Review*, 28 September 2016; C. Sanderson, *Mauritius Defeats Treaty Claim over UNESCO Site*, in *Global Arbitration Review*, 19 February 2020; L. Bohmer, *Analysis: In Gosling v. Mauritius, Majority Saw No Treaty Violation, Stressing the Absence of a Right to Build a Real Estate Development on UNESCO World Heritage Site; Stanimir Alexandrov Disagreed*, in *Investment Arbitration Reporter*, 24 February 2020; *Win for Mauritius in World Heritage Development Dispute*, in *Bilaterals.org*, 19 March 2020.

[73] On the factual part of this litigation see *Thomas Gosling and others v. Republic of Mauritius*, ICSID Case No. ARB/16/32, Award, paras. 41-84.

[74] See *Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Mauritius for the Promotion and Protection of Investments*, signed in Port Louis on 20 May 1986 and entered into

2003, in fact, just as the African government was hiring two consultants to obtain Le Morne's inclusion on the Tentative List, initiating the institutional path to inscribe that site on the UNESCO World Heritage List, Gosling began exploring the possibility of investing in Mauritius, without, however, giving due consideration to the restrictions that the conferment of the UNESCO title might imply for the management of the land within the buffer zone of Le Morne, a peninsula of exceptional beauty and profound cultural and historical significance for Mauritian identity – it was there that those who, in past centuries, managed to escape the slave trade took refuge, preferring to throw themselves off the cliff of Le Morne Brabant rather than be recaptured[75]. Thus, the British entrepreneur, in compliance with domestic regulations, acquired and made arrangements with local companies to purchase a property in Le Morne, and then established the necessary contacts with the various public offices to obtain authorisations for the realisation of his tourist property investment.

However, while Gosling presented his project to the government of Mauritius on 7 May 2004, the Parliament of the island Republic adopted the *Le Morne Heritage Trust Fund Act* on 4 May 2004[76]. With this legislation, a trust fund was established to collect

force on 13 October 1986 following the exchange of instruments of ratification, in *United Nations Treaty Series*, 1988, Vol. 1505, p. 63 ss.

[75] In particular, it is sadly well known what happened in 1835: following the abolition of slavery by the United Kingdom with the *Slavery Abolition Act* of 28 August 1833, which came into force on 1 August 1834, a group of British soldiers was sent to Le Morne to announce freedom to the escaped slaves, but the latter did not understand what was happening and, fearing to return to captivity, threw themselves off the promontory of Le Morne. More extensively on these aspects, see the dossier prepared by the Republic of Mauritius to apply for inscription on the UNESCO World Heritage *List*: *The Le Morne Cultural Landscape - Application for Inscription on the World Heritage List*, Republic of Mauritius, 2007, p. 13 ss. (available at *https://whc.unesco.org/uploads/nominations/1259.pdf*).

[76] The Parliament of Mauritius, *An Act to Provide for the Establishment and Management of Le Morne Heritage Trust Fund (Le Morne Heritage Trust Fund Act 2004)*, Act No. 10 of 2004, 28 May 2004, text available at *www.ecolex.org/details/legislation/le-morne-heritage-trust-fund-act-2004-no-10-of-2004-lex-faoc061973/*.

the necessary resources to preserve and promote the Mauritian region, both as a natural heritage and as a symbol of the repudiation of slavery, also observing the prescriptions gradually defined in the interaction between the African Government and the bodies of the UN specialised institution in order to obtain the prestigious UNESCO heritage recognition. Following the rejection, in the period between March and May 2006, of several versions of the dossier prepared by the first group of consultants for the inscription of Le Morne, Mauritius hired two new experts, indicated by UNESCO. In March 2007, the report and the management plan formulated by these experts were deemed satisfactory by the headquarters in Paris, thus paving the way for the proclamation, on 8 July 2008, of Le Morne's cultural landscape as a UNESCO heritage site[77].

The various steps towards the long-standing political objective pursued by the African island State had progressively eroded the possibilities for substantial building development in the buffer zone of the Le Morne site, culminating in the total ban on building any tourist facilities on the very land Gosling invested in, a measure adopted by Mauritius on 8 October 2007.

According to the applicants, the conduct of the African island State violated three provisions of the BIT between the United Kingdom and Mauritius: Article 5 on indirect expropriation[78], Article 2

[77] See the UNESCO presentation of the *Le Morne* site *Le Morne Cultural Landscape*, *https://whc.unesco.org/en/list/1259/*.

[78] «Investments of nationals or companies of either Contracting Party shall not be nationalised, expropriated *or subjected to measures having effect equivalent to nationalisation or expropriation* (hereinafter referred to as 'expropriation') in the territory of the other Contracting Party except for a public purpose related to the internal needs of that Party and against prompt, adequate and effective compensation» (Article 5, para. 1 of the United Kingdom/Mauritius BIT, emphasis added).

on fair and equitable treatment[79], and Article 3 on the principle of non-discrimination[80].

In particular, on 8 October 2007, by adopting the *Revised Planning Policy Guidance-2* ('Revised PPG2'), Port Louis would have substantially deprived the investors of the «contractual development rights» that the applicants claimed to have acquired thanks to the Letter of Intent (LOI) issued on 30 December 2005 by the Mauritian Board of Investments (BOI) and the subsequent letter of 2 June 2006 of the latter, in which the BOI urged investors to submit the documents required in the Letter of Intent in order to issue the investment certificate. However, Gosling and the companies controlled by him, despite the BOI's reminder, had not complied with the six-month deadline set by the LOI to deliver all the necessary attestations, and, as a result, no certificate had ever been issued. Moreover, the tenor of the Letter of Intent did not reveal any grant of contractual development rights. On the contrary, the author of the LOI, the Mauritian Investment Office, emphasised in its text that the submission of all listed documents by no means entailed the automatic issuance of the investment certificate: «after the requested "documents are submitted, the issue of an Investment Certificate under the Integrated Resort Scheme will be considered"»[81]. Even more precisely, the Letter of Intent concluded by clarifying

[79] «Investments of nationals or companies of either Contracting Party shall at all times be accorded *fair and equitable treatment* and shall enjoy full protection and security in the territory of the other Contracting Party» (Article 2, para. 2 of the United Kingdom/Mauritius BIT, emphasis added).

[80] «Neither Contracting Party shall in its territory subject investments or returns of nationals or companies of the other Contracting Party to *treatment less favourable* than that which it accords to investments or returns of its own nationals or companies or to investments or returns of nationals or companies of any third State. Neither Contracting Party shall in its territory subject nationals or companies of the other Contracting Party, as regards their management, use, enjoyment or disposal of their investments, to *treatment less favourable* than that which it accords to its own nationals or companies or to nationals or companies of any third State» (Article 3 of the United Kingdom/Mauritius BIT, emphasis added).

[81] *Thomas Gosling and others v. Republic of Mauritius*, ICSID Case No. ARB/16/32, Award, para. 229.

that it did not create any «contractual relation» between the BOI and the investors, and that the Mauritian Office «will not be liable to any claim for compensation for any expenditure incurred by the company in the event that the project is not implemented as a consequence of the non-obtention of any permits and clearances required in furtherance of the realisation of the project or for any other reason not within the control of the Board of Investment»[82].

Analysing this documentation, the majority of the Arbitral Tribunal observed that this last paragraph alone «should be sufficient to show that the LOI did not confer any development rights to the Claimants»[83]. It then reported that the inscription of Le Morne on the UNESCO World Heritage List was an «overriding policy objective»[84], indeed «the paramount interest»[85] of the Mauritian government. Of this strong political will, the ICSID Tribunal further emphasised, the Claimants were well aware, not least because the Mauritian Prime Minister himself, already at the meeting with the investors on 30 September 2004, had informed them and recorded in the minutes that the Government had decided to present Le Morne's candidature to UNESCO, with the consequence that the proposed investment projects «may not be compatible with this nomination and the recommendations of the UNESCO report»[86]. In such a context

> «[i]t is doubtful that the LOI and the letter of June 2, 2006 by themselves would have been sufficient to generate, in a *prudent* businessman,

[82] *Ibidem*.

[83] *Thomas Gosling and others v. Republic of Mauritius*, ICSID Case No. ARB/16/32, Award, para. 230.

[84] *Thomas Gosling and others v. Republic of Mauritius*, ICSID Case No. ARB/16/32, Award, para. 226.

[85] *Thomas Gosling and others v. Republic of Mauritius*, ICSID Case No. ARB/16/32, Award, para. 238.

[86] *Ibidem*.

> expectations to proceed with an investment such as the Claimants had planned to carry out»[87].

Therefore, the Tribunal concluded, «[t]he reliance of the Claimants seems misplaced»[88] since the Letter of Intent cannot be considered equivalent to obtaining all necessary governmental authorisations. The documentation produced in the arbitration dispute did not hence reveal the existence of any «contractual development right»[89] for the Claimants, with the consequence that the State conduct cannot be qualified as an indirect expropriation, thus as a violation of Article 5 of the Anglo-Mauritian BIT[90].

Gosling and the other investors also attempted to argue that Mauritius's conduct would infringe Article 2 of the BIT dedicated to the fair and equitable treatment. By changing the building parameters of the land near Le Morne to comply with the requirements of the UNESCO experts, the Government of Port Louis would have acted inconsistently and unpredictably, so that the shift of policy in the development prospects for the buffer zone would not have respected the principle of good faith. The Arbitral Tribunal rejected these allegations as well:

> «[t]he Respondent's objective had always been to inscribe Le Morne as a heritage site. The Claimants were aware of this objective ... The Respondent was entitled to change its policy in respect of development in Le Morne and had never given any assurance that it would not change it»[91].

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[87] *Thomas Gosling and others v. Republic of Mauritius*, ICSID Case No. ARB/16/32, Award, para. 236, emphasis added.

[88] *Ibidem*.

[89] *Thomas Gosling and others v. Republic of Mauritius*, ICSID Case No. ARB/16/32, Award, paras 226 and 255.

[90] *Thomas Gosling and others v. Republic of Mauritius*, ICSID Case No. ARB/16/32, Award, para. 242.

[91] *Thomas Gosling and others v. Republic of Mauritius*, ICSID Case No. ARB/16/32, Award, para. 249. It is to be pointed out that even the dissenting arbitrator Alexandrov acknowledged that the inscription of Le Morne on the *World Heritage List* was in the public interest of the State of Mauritius and its population:

In particular, with regard to the argument of the failure to respect good faith in reviewing the buffer zone planning regulations, as the African island State would have been opaque and lacking in its dealings with investors, the Arbitral Tribunal observed, on the contrary, that the local government had always acted transparently, asking one of the experts, chosen on UNESCO's instructions, to organise meetings with investors to inform them and inform himself about each other's projects. Therefore, the standard of fair and equitable treatment set forth in Article 2 of the BIT was also considered to be met[92].

The last argument raised by the Claimants was that of discriminatory treatment in relation to other investors in the Le Morne buffer zone. In fact, other landowners in the buffer zone had accepted compensation from the Mauritian government, compensation that Gosling and his partners considered fair, while that proposed to them was not considered adequate. Again, the Arbitral Tribunal did not accept the grievances of the Claimants, concluding that Mauritius' compensation policy was fair. Indeed, that policy was commensurate with the development opportunities of the various areas of Le Morne that were possible under UNESCO's requirements. The consideration of the absence of discrimination in the quantification of the value of the land is, therefore, anchored to the moment after the adoption of the stricter criteria set forth by the UNESCO experts, who distinguished between buildable and non-build-

«[i]t is undisputed that the inscription of *Le Morne* as a UNESCO World Heritage Site was in the public interest of Mauritius and its people, and that it was a noble goal consistent with the objective of preserving the history of the place, honouring the dignity of the slaves who lived and died there, creating a symbol of freedom and human dignity, and – last but not least – preserving the physical beauty of Le Morne. In sum, [the] Respondent was fully entitled to prohibit any development at *Le Morne*, including in the buffer zone, in the interests of the people of Mauritius – and it did so» (*Thomas Gosling and others v. Republic of Mauritius*, ICSID Case No. ARB/16/32, *Dissenting Opinion of Arbitrator Stanimir Alexandrov*, para. 27).

[92] *Thomas Gosling and others v. Republic of Mauritius*, ICSID Case No. ARB/16/32, Award, para. 250.

able parts of the buffer zone[93]. The applicants were not, therefore, in «like circumstances»[94] compared to other landowners: the prohibition to build on their property «was justified by objective criteria of fauna, flora, and visual integrity *on the basis of the recommendations of the UNESCO's experts*»[95], with the consequent absence of a breach of Article 3 of the BIT between the United Kingdom and Mauritius.

Having dismissed all applicants' claims on the merits, the Tribunal did not award any damages to Gosling and his companies, who, instead, had claimed EUR 18 million in compensation. With regard to court costs, in light of the fact that the Arbitrators rejected most of the objections on jurisdiction raised by the defendant State, as well as the substantive issues raised by the investors, it was deemed appropriate to have each party pay its own legal costs, together with half of the costs of the arbitration proceedings[96].

7. *Conclusions*

The analysis of the arbitral jurisprudence proposed here indicates a clear, constant and growing focus on the protection of world cultural and natural heritage also in international investment litigation.

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[93] *Thomas Gosling and others v. Republic of Mauritius*, ICSID Case No. ARB/16/32, Award, para. 256.

[94] *Thomas Gosling and others v. Republic of Mauritius*, ICSID Case No. ARB/16/32, Award, para. 169.

[95] *Thomas Gosling and others v. Republic of Mauritius*, ICSID Case No. ARB/16/32, Award, para. 254, emphasis added.

[96] The Arbitral Tribunal decided on the allocation of the costs of the proceedings by applying the discretion provided for in Article 61(2) ICSID, according to which «[i]n the case of arbitration proceedings the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award». Cf. *Thomas Gosling et al. v. Mauritius*, ICSID Case No. ARB/16/32, Award, para. 286.

This dynamic reflects and contributes to the affirmation of the consideration of world heritage protection as an important public interest objective and duty on the part of the international community, given also the almost unanimous adhesion of the States to the 1972 Convention. The WHC, in fact, recognised the universal character of the assets that can be qualified as world heritage, placing the duty to contribute to their preservation on all States, and, more generally, on the international community as a whole, thus overcoming the traditional assumption that cultural goods fell only «within the domain of domestic jurisdiction»[97]. The interpretation of the provisions of the investment agreements – which, according to Article 31(3)(c) of the Vienna Convention on the Law of Treaties, must take into account any relevant rule of international law applicable to the relations between the parties[98] – has therefore to be carried out also in the light of the principles of the 1972 Convention, considering as well that «some elements of cultural heritage protection already belong to customary international law»[99].

[97] V. Vadi, *Culture Clash? World Heritage and Investors' Rights in International Investment Law and Arbitration*, cit., at p. 126.

[98] «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 ... There shall be taken into account, together with the context ... (c) any relevant rules of international law applicable in the relations between the parties» (Article 31, *Vienna Convention on the Law of Treaties*, in *United Nations Treaty Series,* vol. 1155, 1980, p. 331). On the systemic interpretation of international agreements see C. McLachlan, *The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention*, in *The International and Comparative Law Quarterly*, 2005, pp. 279-318; D. Kalderimis, C. Tripp, *Systemic Integration and International Investment Law - Some Practical Reflections*, SIEL Working Paper No. 2012/46; P. Merkouris, *Article 31(3)(c) VCLT and the Principle of Systemic Integration - Normative Shadows in Plato's Cave*, Leiden-Boston, 2015; D. Rosentreter, *Article 31(3)(c) of the Vienna Convention on the Law of Treaties and the Principle of Systemic Integration in International Investment Law and Arbitration*, Baden-Baden, 2015.

[99] V. Vadi, *Cultural Heritage in International Investment Law and Arbitration*, cit., p. 268. See also V. Vadi, Jus Cogens *in International Investment Law and Arbitration*, in *Netherlands Yearbook of International Law*, 2015, pp. 357-388; T. Voon, *National Treasures at the Intersection between Cultural Heritage and In-*

Moreover, the awards examined on the relation between investment protection and the 1972 Convention show the contribution of international arbitration jurisprudence to the definition of the duty of due diligence on the part of investors, who, under this obligation, are required to make investments that are 'responsible'. This means that an investor must also carry out a proper analysis of the domestic and international legal framework both before making his investment in the host country and after starting his/her business activity[100]. The lack of due diligence attributable to the investor, in fact, implies the impossibility for the latter to avail himself/herself of the protection of the BITs, or, in any case, of the chapters dedicated to investments in the free trade agreements[101], since the expectations of entrepreneurs, in order to fall under the protection of international investment law, must be legitimate and reasonable[102], a connotation denied by the investor's lack of diligent

ternational Trade Law, in *The Oxford Handbook of International Cultural Heritage Law*, cit., pp. 507-528.

[100] See A. Tanzi, *On Balancing Foreign Investment Interests with Public Interests in Recent Arbitration Case Law in the Public Utilities Sector*, in *The Law and Practice of International Court and Tribunals*, 2012, pp. 65-73; J.E. Viñuales, *Investor Diligence in Investment Arbitration: Sources and Arguments*, in *ICSID Review*, 2017, pp. 346-370; A. Rajput, *Due Diligence in International Investment Law - From the Law of Aliens to Responsible Investment*, in *Diligence in the International Legal Order*, edited by H. Krieger, A. Peters, L. Kreuzer, *Due* Oxford, 2020, pp. 273-287; M.A.J. Levine, *Emerging Practice on Investor Diligence: Jurisdiction, Admissibility, and Merit*, in *Handbook of International Investment Law and Policy*, edited by J. Chaisse, L. Choukroune, S. Jusoh, Heidelberg, 2020, pp. 1-24; M. Burgstaller, G. Risso, *Due Diligence in International Investment Law*, in *Journal of International Arbitration*, 2021, pp. 697-722.

[101] Consider, for example, *Churchill Mining PLC and Planet Mining Pty Ltd v. Republic of Indonesia*, ICSID Case No. ARB/12/14 and 12/40, Award of 6 December 2016, where the Tribunal, *inter alia*, stated: «one would expect an investor aware of the risks of investing in a certain environment to be particularly diligent in investigating the circumstances of its investment. Yet, the Claimants did not engage in proper due diligence in their dealings with their partners ... The inadmissibility applies to all the claims raised in this arbitration ... This is further supported by the Claimants' lack of diligence in carrying out their investment» (paras. 508 and 529).

[102] «The assessment of the reasonableness or legitimacy must take into account all circumstances, including not only the facts surrounding the investment,

factual and legal assessment of the conditions in which his/her investment takes place.

The obligation of due diligence, moreover, is further affirmed and acquires depth thanks to the ever-widening body of international soft law dealing with the conduct of entrepreneurs in the exercise of their economic activity. The *Ruggie Principles,* in fact, call for «[b]usiness enterprises ... [to] respect human rights»[103], taking care to indicate that «[i]n order to identify, prevent, mitigate and account for how they address their adverse human rights impacts, business enterprises should carry out *human rights due diligence*»[104]. More generally, voluntary codes on corporate social responsibility are increasingly referred to in the most recent and innovative international economic law agreements. For example, the CETA Agreement between the European Union and Canada, in the Preamble and in the provisions in which it affirms the commitment of the parties to the promotion of sustainable development, i.e. the dignity of labour (or decent work), the protection of the environment and the optimal use of raw materials, urges them «to pursue best practices in responsible business conduct» and encourage «enterprises operating within their territory or subject to their jurisdiction to respect internationally recognised guidelines and principles

but also the political, socioeconomic, cultural and historical conditions prevailing in the host State». *Duke Energy Electroquil Partners et Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award of 18 August 2008, para. 340. For these aspects see E.T. Laryea, *Legitimate Expectations in Investment Treaty Law: Concept and Scope of Application*, in *Handbook of International Investment Law and Policy*, cit., pp. 1-24.

[103] Article 11 of the *Ruggie Principles*. Cf. UNHRC Res. 17/4, *Guiding Principles on Business and Human Rights*, 16 June 2011.

[104] Article 17 of the *Ruggie Principles*. On the *due diligence* expressed in international law regarding business activity see. L. Chiussi, *General Principles for Business and Human Rights in International Law,* Leiden-Boston, 2020, p. 240 ss.; L. Chiussi, *Corporate Human Rights Due Diligence: from the Process to the Principle*, in M. Buscemi, N. Lazzerini, L. Magi, D. Russo, *Legal Sources in Business and Human Rights*, Leiden-Boston, 2020, pp. 11-30; L. Chiussi, C. Malafosse, *A Public International Law Outlook on Business and Human Rights*, in *International Community Law Review*, 2022, pp. 11-35.

of corporate social responsibility»[105] – including the OECD Guidelines for Multinational Enterprises[106] and the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas[107].

Such a referral certainly has an impact on defining the scope of the diligence that an investor must have when deciding to operate in a third country: this economic operator must adequately inform himself/herself and comply with the national legislation and the international obligations undertaken by the host State on the respect for the environment, fundamental rights, and also for the protection of cultural and natural heritage. Another paradigmatic element of the latest generation of investment agreements and mega-regionals is, in fact, the codification of the entitlement of States to maintain their right to regulate[108] also to protect cultural assets where this may affect the protection of foreign investments, provided that the regulations for the protection of heritage are not arbitrary or unjustifiably discriminatory. Consider, for example, the draft agreement on investment protection between the European Union and Singapore, which in Article 2(3)(d) provides for the possibility for each contracting party to disregard the principle of national treatment of investments if this is «necessary for

[105] Recital 10 of the Preamble and Article 25.4(2)(c) of the CETA Agreement. See also Articles 22.3 and 24.12 of the CETA Agreement. On corporate social responsibility in international investment law see, most recently, L. Dubin, *RSE et droit des investissements, les prémisses d'une rencontre*, in *Revue Générale de Droit International Public*, 2018, pp. 867-891; N. Longo, *La Responsabilità Sociale d'impresa nei trattati internazionali in materia di investimenti: verso obblighi diretti in capo agli investitori*, in *Ordine Internazionale e Diritti Umani*, 2020, pp. 1134-1145.

[106] OECD, *OECD Guidelines for Multinational Enterprises,* Paris, 2011.

[107] *OECD, OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas,* Paris, 2016[3].

[108] On this topic see, *ex multis*, OECD, *L'"expropriation indirecte" et le "droit de réglementer" dans le droit international de l'investissement,* Paris, 2004; A. Titi, *The Right to Regulate in International Investment Law*, Oxford, 2014; L. Wandahl Mouyal, *International Investment Law and the Right to Regulate: A Human Rights Perspective*, London, 2016.

the protection of national treasures of artistic, historic or archaeological value»[109]. Arbitral tribunals called upon to settle disputes on the application of the most modern treaty instruments will thus have clear additional prescriptions set by the State Parties[110] – prescriptions confirming the approach of the awards analysed in this chapter and their positive evolution in favour of the protection of cultural heritage.

It should also not be overlooked that the absence of due diligence can expose investors to counterclaims by defendant States in arbitration disputes. This, for example, happened in the *Urbaser* case, in which the Arbitral Tribunal ruled that Argentina could bring a counterclaim to support the investor's violation of the South American population's fundamental right of access to water[111]. Addition-

[109] Cf. COM(2018) 194 final, *Proposal for a Council Decision on the conclusion of the Investment Protection Agreement between the European Union and its Member States, of the one part, and the Republic of Singapore of the other part*, Brussels, 18.4.2018.

[110] On this point see B. Saverio, *Legal Models of Exception and Integration of Non-Commercial Values: from the Experience of GATT/WTO Law to Foreign Investment Protection Regimes*, in *International Trade Law*, 2013, pp. 405-436; R. Claros, *Striking a Balance between the Protection of Foreign Investment and the Safeguard of Cultural Heritage in International Investment Agreements: Can General Exceptions Make a Difference*? in *Intergenerational Equity - Environmental and Cultural Concerns*, edited by T. Cottier, S. Lalani, C. Siziba, Leiden-Boston, 2019, pp. 192-207; E. Sardinha, *Protecting Cultural Heritage in International Investment Law: Tracing the Evolution and Treatment of Cultural Considerations in Recent FTAs and Investor-State Jurisprudence*, in *Handbook of International Investment Law and Policy*, cit., pp. 1-25.

[111] See *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*, ICSID Case No. ARB/07/26, Award of 8 December 2016, paras 1182-1221. On that case see P. Abel, *Counterclaims Based on International Human Rights Obligations of Investors in International Investment Arbitration - Fallacies and Potentials of the 2016 ICSID Urbaser v. Argentina Award*, in *Brill Open Law*, 2018, pp. 61-90; L. Chiussi, *ICSID Case No. ARB/07/26, Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic, Award of 8 December 2016*, in *Il diritto internazionale come strumento di risoluzione delle controversie*, edited by E. Baroncini, Bologna, 2018, pp. 212-223; N. Longo, *Considerazioni a margine del caso ICSID Urbaser: tra responsabilità sociale d'impresa ed "International Corporate Human Rights Obligations"?*, in *Diritto comunitario e degli scambi internazionali*, 2018, pp. 117-227.

ally, in the panorama of the regulation of the economy, significant projects are emerging to articulate the obligation of due diligence, and in this context it is relevant the debate within the European Union to provide itself with a binding discipline on the due diligence of companies[112].

An investor, therefore, in order to show to be prudent[113] and act in due diligence, must also verify the impact that his/her investment is likely to have on the place chosen for his/her activity from the point of view of the respect for the world heritage protected and valorised by the 1972 UNESCO Convention, rightly considered «the jewel of UNESCO treaties»[114]. Only in this way can his/her investment be considered diligent and responsible, and therefore fully preserved by international investment law.

More generally, on the topic of the relationship between international investment law and human rights see A. Tanzi, *Reducing the Gap Between International Investment Law and Human Rights Law in International Investment Arbitration*? in *Latin American Journal of International Trade Law*, 2013, pp. 299-311; with specific reference to the right to water see A. Tanzi, *Bridging the Gap between International Investment Law and the Right of Access to Water*, in *Bridging the Gap between International Investment Law and the Environment*, edited by Y. Levashova, T. Lamboy, I. Dekker, The Hague, 2016, pp. 187-214.

[112] Cf. COM(2022)71 final, *Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937*, Brussels, 23.2.2022, and European Parliament Research Service, *Towards A Mandatory EU System of Due Diligence for Supply Chains*, 2020.

[113] See paragraph 6 above, in correspondence with footnote 87, where the ICSID Tribunal requires the presence of the status of 'prudent investor' before recognising that the regulatory interventions of the host State violated the protection of the foreign economic operator. Cf. *Thomas Gosling and others v. Republic of Mauritius*, ICSID Case No. ARB/16/32, Award, para. 236.

[114] S. von Schorlemer, *Compliance with the UNESCO World Heritage Convention: Reflections on the Elbe Valley and the Dresden Waldschliisschen Bridge*, in *German Yearbook of International Law*, 2008, pp. 321-390, at p. 322.

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Elisa Baroncini, Bert Demarsin, Ana Gemma López Martín, Raquel Regueiro Dubra, Ruxandra-Iulia Stoica

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