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Cultural Heritage Law and Investment Treaty Law: A Balancing Act?

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Investor-state disputes often involve an interplay of different bodies of international law. In addition to investment law, disputes may invoke issues involving public international law, international human rights law, and international environmental law – and tribunals are faced with the challenges of trying to reconcile the sometimes conflicting rights created under these different bodies of law. International cultural heritage law is one of the areas of law that can sometimes be relied on in the context of investment treaty disputes, particularly where an investment touches upon an area that has been granted international recognition and protection either by the competent authorities of the host State, and/or by the United Nations Educational, Scientific and Cultural Organization ("**UNESCO**"). Relevantly, the 1972 Convention Concerning the Protection of the World Cultural and Natural Heritage ("**1972 World Heritage Convention**") creates obligations on States to protect and conserve sites that are inscribed on the UNESCO World Heritage List (article 5), and UNESCO publishes Operational Guidelines requiring States to take legislative and regulatory measures to protect listed sites.

The recent designation of the land at the center of the 4.4 billion USD dispute in *Gabriel Resources Ltd. and Gabriel v Romania* (ICSID Case No. ARB/15/31) ("***Gabriel Resources v. Romania***") as a UNESCO World Heritage site brings to the fore the conceptual challenges that may arise where an investment dispute concerns a site of international cultural significance. In this case, the inscription of Ro?ia Montan? as a World Heritage site came after the tribunal had heard oral arguments and received post-hearing briefs. Accordingly its significance may be limited for the decision. However, the case provides a useful opportunity to reflect on past developments in investment treaty disputes involving culturally or environmentally significant sites, and how tribunals might approach these two different bodies of law.

Gabriel Resources v Romania

In 2015, Gabriel Resources Ltd. and Gabriel Resources (Jersey) Ltd. ("**Claimants**") initiated a claim against Romania under the Romania-Canada BIT and the Romania-United Kingdom BIT. The claim alleged that the government had breached its treaty obligations by failing to approve the Claimants' environmental impact assessment and issue an environmental permit to allow exploration at the Ro?ia Montan? gold mining project.

The Claimants' project was planned for Ro?ia Montan?, which is located in the Apuseni Mountains in the western region of Romania. The site was used extensively for gold mining during the Roman Empire, and evidence of the infrastructure and mining techniques used during these times is preserved to this day. The Ro?ia Montan? site is now renowned as the most "significant, extensive and technically diverse underground Roman gold mining complex".

In 2017, Romania applied to UNESCO to have the Ro?ia Montan? site listed on the World Heritage List. In 2018 however, Romania suspended this process, reportedly pending ICSID's determination in the ongoing proceedings. In February 2020, the Romanian government resumed its application to include Ro?ia Montan? on the World Heritage List. In July 2021, at the 44th Session of the World Heritage Committee, the Ro?ia Montan? site was inscribed on the UNESCO World Heritage List. Relevantly, UNESCO noted that "the current mining proposal means that the integrity of the property is highly vulnerable." UNESCO also indicated the need for the Romanian government to take adequate controls to prevent active mining licenses on the site from being extended.

As noted above, the tribunal in *Gabriel Resources v Romania* has already heard oral argument, and received post-hearing briefs. It is unclear accordingly what effect, if any, the UNESCO inscription will have on the dispute.

Previous Investment Treaty Cases Involving UNESCO Listed Sites

While the UNESCO listing of the Ro?ia Montan? site came after the hearing in *Gabriel Resources v. Romania*, there have been a number of earlier cases where tribunals have had to consider the relevance of this cultural designation in determining an investor's rights.

This issue featured significantly in the proceedings in *Thomas Gosling and other v. Republic of Mauritius* (ICSID Case No. ARB/16/32), determined in February 2020. In that case, the claimants alleged that Mauritius had infringed the UK-Mauritius BIT by not granting them the right to build a luxury tourism development in Le Morne, an area in southwest Mauritius that was used as shelter for runaway slaves in the 18th and 19th centuries. The State had initially provided the claimants with a letter of intent to issue a tourism development certificate. At the same time however, the State was pursuing UNESCO listing for Le Morne. After having the application for UNESCO listing twice rejected, the State submitted a further application for listing to UNESCO that stated that development at the site would not be permitted. Following that statement, the site was approved by UNESCO. The claimants argued, *inter alia*, that the revised UNESCO application, which excluded the possibility of future development at Le Morne, constituted an expropriation of their contractual rights. The majority dismissed the claim. However, this was not due to the UNESCO listing, but rather on the basis that the State had not yet granted the claimants any development rights nor provided them with any assurances that could give rise to a treaty violation.

Other tribunals have also had to grapple with the relevance of a UNESCO World Heritage Listing for an investment dispute, with varying results. For example:

- In *Compañia del Desarrollo de Santa Elena SA v. Republic of Costa Rica* (ICSID Case No. ARB/96/1), Costa Rica reclaimed property owned by American investors in order to expand the Santa Rosa National Park in the Guanacaste Conservation Area. The investors brought

proceedings claiming that the State had expropriated their investment without providing compensation. While the proceedings were pending, Costa Rica applied for and received UNESCO World Heritage Listing for the Guanacaste Conservation Area. The tribunal accepted that the property had been expropriated and ordered the State to pay the investors fair market value. The tribunal noted that while takings for environmental reasons may constitute takings for a public purpose, this does not affect the State's obligation to pay compensation (Award, February 17, 2000, para 71).

- In *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt* (ICSID Case No. ARB/84/3), the Investors had commenced excavation and construction works to build a tourism complex at the pyramids of Giza, when they uncovered artefacts of archaeological importance. The Egyptian Government then declared the land surrounding the pyramids to be "public property" , and withdrew approval for the project. Two years later, the Pyramid Fields became a World Heritage Listed site. The Investors later instigated proceedings claiming that the State had expropriated its investment. Similar to the Tribunal in *Saint Elena v. Costa Rica*, the Tribunal in this case found that there had been expropriation, but that the taking was in the public interest as it was for the purpose of protecting the State's antiquities (Award, May 20, 1991, paras 158). Interestingly however, the Tribunal limited the award of damages to lost profits accrued up to the date that the site was listed as a World Heritage site. Its rationale for doing so was that the sale of land on a heritage listed site is illegal under Egyptian and international law, and that "any profits that might have resulted from such activities are consequently non-compensable" (Award, May 20, 1992, paras 190-191).
- In *Parkerings-Compagniet AS v Republic of Lithuania* (ICSID Case No. ARB/05/8), the Municipality of Vilnius in Lithuania granted the Investor the right to construct parking facilities in the historic city center of Vilnius, a World Heritage Listed site. However, the Municipality later terminated the agreement, due to both technical difficulties and concerns regarding the effects that the project would have on the city's archaeological heritage. The Municipality then signed an agreement with a Dutch company for construction of the parking lot. Relevantly, the Dutch company's construction plans did not involve excavating under the historic city centre. The Investor brought proceedings, claiming that Lithuania had breached the 1992 Lithuania-Norway Bilateral Investment Treaty. The Tribunal however found that the State had not breached its obligations under the treaty, and "historical and archaeological preservation and environmental protection could be and in this case were a justification for the refusal of the [Claimant's] project" (Award, September 11, 2007, para 392).

Takeaways for Investment Law and Cultural Heritage Law

This brief survey of investment law cases involving UNESCO World Heritage Listed sites shows the difficult task that tribunals face in seeking to balance what can be two competing areas of international law. This challenge is not unique to international cultural heritage law, as tribunals are often required to undertake similar tasks in disputes involving, for example, international human rights law, or international environmental law.

It is clear from this brief survey that tribunals do recognize the legitimacy and, indeed, the value in States taking steps to protect their cultural and natural property. However, while such actions may be necessary, this does not necessarily relieve States of their obligations under investment law – with these tribunals holding that investors must be compensated for any rights that are transgressed in the process of the State attempting to protect its cultural property. However, the measure of

compensation may vary depending on when the site is listed by UNESCO and whether the tribunal takes this cultural designation into account in determining the investors' loss.

It remains to be seen whether the designation of Ro?ia Montan? on the World Heritage List at such an advanced stage of proceedings in *Gabriel Resources v Romania* will be considered by the tribunal in that case. However, with the number of natural and cultural sites inscribed on UNESCO World Heritage Listing continuing to increase, the issue of how investor's rights will be balanced against the State's obligations under the 1972 World Heritage Convention will inevitably come up again, and it will be interesting to see how tribunals continue to balance cultural heritage against an investor's rights under international law.

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This entry was posted on Sunday, October 10th, 2021 at 8:45 am and is filed under Cultural heritage, ICSID, Investment Arbitration, Investment Disputes
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