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Arbitrating Culture: Cultural Heritage, the EU's Energy Trilemma, and Investor–State Dispute Settlement

The Values of Participatory Democracy and Transparency in Shaping EU Trade and External Energy policies

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Outline

- **The EU's Energy Trilemma**
  - Ensuring security of supply
  - Maintaining affordability and competitiveness through trade liberalization
  - Meeting sustainability commitments under the Lisbon Treaty
  - Treaty-based Competence Framework
- **ISDS and cultural heritage**
  - Tension between cultural heritage and EU energy policy
  - The rise of ISDS cases involving cultural heritage and natural resources
    - *Parkerings v. Lithuania* (ICSID, 2007)
    - *Cortec Mining v. Kenya* (ICSID, 2018)
    - *Cosigo Resources v. Colombia* (UNCITRAL, 2015)
    - *South American Silver v. Bolivia* (PCA, 2018)
    - *Southern Pacific Properties v. Egypt* (ICSID, 1992)
- **Conclusions and recommendations**
  - Integration of cultural heritage protection into investment protection regime
  - Strengthening transparency and participation in ISDS

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The Energy Trilemma

The Energy Trilemma refers to the contradictory forces of energy security, energy equity and environmental sustainability.

- **Energy security** “reflects a nation’s capacity to meet current and future energy demand reliably, withstand and bounce back swiftly from system shocks with minimal disruption to supplies”.
- **Energy equity** “assesses a country’s ability to provide universal access to affordable, fairly priced and abundant energy for domestic and commercial use”,
- **Environmental sustainability** “represents the transition of a country’s energy system towards mitigating and avoiding potential environmental harm and climate change impacts”.

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The Energy Trilemma in the TFEU

Article 194(1) TFEU:

In the context of the establishment and functioning of the internal market and with regard for the need to preserve and improve the environment, Union policy on energy shall aim, in a spirit of solidarity between Member States, to:

(a) ensure the functioning of the energy market;

(b) ensure security of energy supply in the Union;

(c) promote energy efficiency and energy saving and the development of new and renewable forms of energy; and

(d) promote the interconnection of energy networks.

Thus, these competing objectives are goals which the EU is legally mandated to pursue in its energy policymaking.

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Treaty-based Competence Framework

- Treaty on European Union (TEU) Article 3(5): Peace, human rights, sustainable development.
- TEU Article 21: Rule of law, United Nations Charter compliance.
- Treaty on the Functioning of the European Union (TFEU) Article 6 and Article 167: Culture as a supporting competence.
- TFEU Article 167(4): Cultural mainstreaming clause – integration of culture (and cultural heritage) goals into other EU policies, including for external action.
- Culture remains a supporting competence under TFEU Articles 6 and 167.
- TFEU Article 194 legally codifies the Energy Trilemma - Energy Security, Energy Equity and Environmental Sustainability.

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Underlying tension between EU obligations

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Tension between the protection of cultural heritage and EU energy policy

- The EU **seeks to secure stable access to energy, transition minerals and critical raw materials,** it is increasingly engaging with jurisdictions where **resource extraction might overlap with areas of deep cultural and environmental significance.**

- **Example**: the EU's energy policy aims to promote energy security, energy equity and energy sustainability. An EU investor invests in an extractive industry in a third country. There is a need to reconcile the EU's interests in ensuring energy security, on one side, and ensuring the protection of cultural heritage worldwide, on the other side.

- **Extractive projects** that proceed without adequate community participation or without sensitivity to cultural heritage have frequently generated social conflict, political instability and high-profile arbitration claims. These disputes have demonstrated that **transparency and participatory governance** are not only **normative values but essential conditions** for achieving sustainable and legitimate energy partnerships.

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The rise of ISDS cases involving cultural heritage and natural resources

- ISDS directly affects public interest, creating demand for participation, transparency, and accountability.
- The rise of ISDS **disputes involving extractive projects in culturally sensitive regions**, often **affecting Indigenous peoples and their heritage**, has highlighted the tension between investment protection and state responsibilities to safeguard cultural heritage, community rights and the environment.
- Could ISDS operate as a mechanism for enforcing international cultural heritage law and for challenging inconsistent domestic cultural-heritage regulation (Vadi, 2023)?

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ISDS cases and cultural heritage

Parkerings v Lithuania

Parkerings-Compagniet AS v Republic of Lithuania, ICSID Case No. ARB/05/8, Award, 11 September 2007

- The Norwegian investor Parkerings-Compagniet sought approval to construct and operate a parking facility in the protected area of Vilnius Old Town. The arbitral tribunal ruled in favour of Lithuania on the basis that the heritage-protection restrictions were legitimate, non-discriminatory regulatory measures consistent with the fair and equitable treatment standard.
- Based on the Lithuania-Norway BIT, under which Article 2 accorded investors “fair and equitable treatment” (FET) and Article 3 guaranteed “full protection and security” and that investments shall not be expropriated without compensation.
- Reference to the World Heritage Convention.

Cortec Mining v Kenya

Cortec Mining Kenya Limited, Cortec (Pty) Ltd and Stirling Capital Ltd v Republic of Kenya,
ICSID Case No. ARB/15/29,
Award, 22 October 2018

- An ICSID tribunal heard claims by Cortec Mining Kenya Ltd, Cortec (Pty) Ltd, and Stirling Capital Ltd, who wished to mine niobium and rare earth elements at the culturally significant Mrima Hill.
- It was brought under the United Kingdom–Kenya BIT (1999), which includes Article 4 on expropriation, Article 3 on fair and equitable treatment, and Article 2 on definition of investment and investor protection.
- The tribunal dismissed the claim because the mining licence was invalid under Kenyan law (failure to obtain the required EIA because the site was designated both as a National Monument and a sacred landscape), and thus did not constitute a protected investment under the BIT.

Cosigo Resources v Colombia

Cosigo Resources, Ltd., Cosigo Resources Sucursal Colombia, Tobie Mining and Energy, Inc. v. Republic of Colombia, UNCITRAL

- An UNCITRAL tribunal was seized of claims by Cosigo Resources Ltd, Cosigo Resources Sucursal Colombia, and Tobie Mining and Energy Inc., all seeking to exploit a gold deposit inside what became the Yaigojé Apaporis National Park. The Claimants are companies based in the US and Canada. Colombia prevailed on the basis that the concession was granted unlawfully and that the state was entitled to protect Indigenous sacred sites and the cultural-environmental integrity of the national park.

South American Silver v Bolivia

South American Silver Limited (Bermuda) v The Plurinational State of Bolivia, PCA Case No. 2013-15, Award, 22 November 2018

A Permanent Court of Arbitration tribunal examined the claims of South American Silver Limited, which sought to develop the Malku Khota polymetallic silver-indium-gallium project. It was brought under the UK–Bolivia BIT (1988) which in Article 5(1) provides that "investments shall not be nationalised or otherwise expropriated except for a public purpose" and in Article 2(2) requires fair and equitable treatment (FET).

The dispute arises out of the reversion of mining concessions, due to escalating conflicts against local Indigenous communities over environmental concerns related to mining activities and significant acts of violence. The arbitral tribunal found that the investor failed properly to engage with local impacted communities before applying for a mining concession and found no breach of Article 2(2) FET.

The tribunal found that an expropriation took place. However, this case in interesting with regard to the standard of compensation, as the tribunal only awarded sunk costs, not market value, and not a discounted cash flow.

Southern Pacific Properties v Egypt

Southern Pacific Properties (Middle East) Limited v Arab Republic of Egypt, ICSID Case No ARB/84/3, Award on the Merits, 20 May 1992

- The investor SPP (Hong Kong) sought to develop a major tourist resort adjacent to the Giza Pyramids, bringing the claim under the Egypt–UK BIT, including Article 2(2) on fair and equitable treatment and Article 5 on expropriation.
- The ICSID tribunal found Egypt responsible for breaches of Article 2(2) and Article 5 because the cancellation of the project and the government's inconsistent treatment constituted an unlawful expropriation and denied the investor fair and equitable treatment, even though Egypt justified its actions on cultural-heritage and planning-law grounds. The Tribunal granted compensation but reduced it by limiting recovery to actual damage, explaining that lost profits could not be awarded because only profits that would have been lawful under international cultural heritage law, including restrictions arising from the World Heritage Convention, were eligible for compensation. It further held that the project's location in an area where the claimants should have anticipated the likelihood of discovering antiquities was appropriately reflected in the valuation method adopted, demonstrating the Tribunal's sensitivity to World Heritage Convention considerations in determining the quantum of damages.

Conclusions on ISDS cases on cultural heritage

- The site was part of the **World Heritage List**; reference to the World Heritage Convention (***Parkerings v Lithuania***).
- Invalidity of the mining concession as the site was an **indigenous sacred site**. Reference to the **Constitution of Colombia**: Article 72 of about the protection of cultural heritage, Article 79 about the protection of natural heritage, and Article 63 about the use of communal spaces for ethnic groups and archeological heritage (***Cosigo Resources v Colombia***).
- Invalidity of the mining licence under Kenyan law due to the **failure to obtain the required EIA** because the site was designated both as a National Monument and a sacred landscape (***Cortec Mining v Kenya***).
- Invalidity of the mining concession for **failure to properly engage with the indigenous communities** affected by the project (***South American Silver v Bolivia***).
- Invalidity of part of the concession to build a tourist complex because it was in a site listed in the **World Heritage List**. Sunk costs awarded for the expropriation of the part of the project that was not located within a site listed in the World Heritage List (***Southern Pacific Properties v Egypt***).

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Conclusions and recommendations: Integration of cultural heritage protection into investment protection regime

- **Codifying cultural-heritage and Indigenous-rights principles in investment treaties** reduces regulatory friction, lowers dispute risk and increases legal certainty.
- A **right-to-regulate clause** recognising cultural heritage protection as a legitimate policy objective; **GATT-style general exceptions** for safeguarding tangible, intangible, and underwater heritage; mandatory **heritage impact assessments** and Free Prior Informed Consent (FPIC) procedures as preconditions for investor protection.
- **External energy policy** must navigate the Article 194 TFEU trilemma (security, affordability, sustainability), reflecting Indigenous and heritage realities in resource regions.
- The principle of self-determination of peoples is already regarded as jus cogens. Arbitral tribunals are encouraged to interpret soft law instruments such as the United Nations Declaration on the Rights of Indigenous Peoples as part of **customary international law**.

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Conclusions and recommendations: Strengthening transparency and participation in ISDS

- These disputes have demonstrated that **transparency and participatory governance** are not only **normative values but essential conditions** for achieving sustainable and legitimate energy partnerships.
- The EU can **embed transparency, cultural awareness and community participation into dispute-settlement architecture**.
- Replacing ad hoc Investor–State arbitration with the **Investment Court System** and the proposed Multilateral Investment Court enables open hearings, third-party submissions and procedural clarity. These reforms protect cultural and Indigenous rights while improving predictability for investors in energy and mineral extraction.
- Participatory democracy in external action requires early engagement through **cultural-heritage impact assessments, Indigenous consultation** and free, prior and informed consent.
- This approach **reinforces treaty-based legitimacy**, supports partner-state reform and builds cooperative, stable investment environments.

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Thank you

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