

ESCAPING FROM FREEDOM? THE DILEMMA OF AN IMPROVED ISDS MECHANISM

Sophie Nappert
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ABSTRACT

“What is Europe's role in this changed world? Does Europe not, now that it is finally unified, have a leading role to play in a new world order, that of a power able both to play a stabilising role worldwide and to point the way ahead for many countries and peoples? Europe as the continent of humane values, the Magna Carta, the Bill of Rights, the French Revolution and the fall of the Berlin Wall; the continent of liberty, solidarity and above all diversity. meaning respect for others' languages, cultures and traditions.”

This is a welcome opportunity to reflect on whether it can be said that there is natural compatibility between, on the one hand, freedom and peaceful stability as core values of the European Union as expressed above in the 2001 Laeken Declaration on the Future of the European Union and, on the other hand, freedom as the epicentre of international arbitration as a means of peaceful dispute settlement worldwide, and notably in the resolution of disputes between foreign investors and the Union or its Member States under the CETA and the proposed TTIP.

Our enquiry must not begin and end with an assertion of the importance of freedom on purely historical, or indeed hortatory, bases. Rather, in this changing landscape, the relevant questions should be forward-looking – in the context of investor-to-State dispute resolution, does freedom still matter as a value, and are its exacting consequences too high a price to pay? Or are current circumstances so unsettling that we will want to escape from freedom towards a more prescriptive, apparently comforting, environment? Do the freedom and flexibility of international arbitration still have a place in the new-generation IIAs?

My purpose is not to make the apology of ISDS in its current form, or to sing its eulogy. Rather than clinging to a model that is showing cracks, I am far more interested in the challenging proposition of making investor-to-State, and most relevantly investor-to-EU, dispute resolution in the 21st century legitimate and authoritative at this fascinating intersection between EU law and international law, whilst remaining loyal to core values common to both the EU and international dispute settlement.

Walking away from international arbitration as a means of “reforming” ISDS for reasons of rushed political appeasement, as appears to be the case, carries consequences. It would mean walking away from a tried and tested culture of freedom and flexibility, trusted by States and business alike. It would also mean walking away from the 1958 New York Convention. Before that path is chosen as the way forward, we must be able to answer quite lucidly the basic questions why we are improving ISDS, and what precisely needs improvement.