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# Escaping from Freedom? The Dilemma of an Improved ISDS Mechanism

*Sophie Nappert*<sup>a</sup>

## Abstract

This article is based on the EFILA's 'Inaugural' Annual Lecture 2015. ISDS in its current international arbitration format has attracted criticism. In response, the EU proposal for ISDS in the TTIP consists of a two-tiered court system, comprising an appeal mechanism empowered to review first-instance decisions on both factual and legal grounds and, the EU says, paving the way for a "multilateral investment court". The Lecture expressed surprise at the EU proposal of a court mechanism given the CJEU's unambiguous, historical unease with other similar, parallel international court systems. The Lecture proposed a third way, aimed at addressing these concerns, whereby a Committee – stroke – Interpretive Body, informed by the intentions of the TTIP Parties, would take over the development of TTIP jurisprudence in a more linear and consistent manner, with a longer-term view, whilst ad hoc arbitration tribunals in their current form would focus on the settlement of the discrete factual dispute. Since the Lecture was delivered, the ICS was adopted in both the EU–Vietnam FTA and (in part) the EU–Canada CETA. This contribution ponders how the ICS might work in practice, sit alongside current ISDS tribunals, and contribute to development and jurisprudence in the field.

La valeur la plus calomniée aujourd'hui est certainement la valeur de liberté.

De bons esprits (...) mettent en doctrine qu'elle n'est rien qu'un obstacle sur le chemin du vrai progrès. Mais des sottises aussi solennelles ont pu être proférées parce que pendant cent ans la société marchande a fait de la liberté un usage exclusif et unilatéral, l'a considérée comme un droit plutôt que comme un devoir et n'a pas craint de placer aussi

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a This article is an updated and revised version of the 2015 Inaugural EFILA Annual Lecture delivered in London on 26 November 2015, taking account of developments as at 15 May 2016. The Lecture was awarded the 2016 Global Arbitration Review Award for "Best Speech or Lecture" on 2 March 2016.

souvent qu'elle l'a pu une liberté de principe au service d'une oppression de fait.

ALBERT CAMUS, *Discours de Suède, 14 décembre 1957*.

## 1 Freedom as a Core Value in EU Policy

In times where refugees fleeing a “foul and bloody” civil war<sup>1</sup> are crossing the borders into Western Europe in numbers unseen since civilians took to the roads during the Second World War, the value and meaning of freedom, and what it means to be free, stare us in the face.

The fact that we have the luxury of taking freedom for granted is probably the greatest achievement of what has become the European Union, since the Second World War ravaged its territory. This is because the Union was conceived with freedom and liberty as part of its defining values.<sup>2</sup>

This Lecture was delivered a few days after the Paris attacks of November 2015, and this contribution is being written as Brussels reels from more acts of terrorism. It may be no coincidence that a shocked and embattled Europe is rethinking the openness that it had championed in the Laeken Declaration, which set in motion the process that culminated in the adoption of the Lisbon Treaty:<sup>3</sup>

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* (emphasis added), meaning respect for others' languages, cultures and traditions.<sup>4</sup>

1 'Refugees in Europe – Exodus', *The Economist*, 12 September 2015, <<http://www.economist.com/node/21664136/print>>, visited on 12 June 2016.

2 As reiterated by the Court of Justice in its Opinion 2/13 on the draft accession agreement to the ECHR, para. 72.

3 M. Evans and P. Koutrakos (eds.), *Beyond The Established Legal Orders: Policy Interconnections between the EU and the Rest of the World*, (Hart Publishing, 2011).

4 Laeken Declaration, <<http://www.consilium.europa.eu/en/european-council/conclusions/pdf-1993-2003/european-council-meeting-in-laeken--presidency-conclusions-14-15-december-2001/>>, visited on 12 June 2016.

It has pithily been said that those values may be presented both as characteristic of the Union's identity, and as the key to achieving specific Union objectives – such as “playing a stabilising role worldwide and pointing the way ahead for many countries and peoples”.<sup>5</sup>

This contribution asks whether current times warrant a rethinking of freedom as a core factor of the EU's policy on ISDS, bearing in mind that the defining values of the Union were chosen because their enduring quality transcends punctual political vagaries. It reflects on the natural compatibility of, on the one hand, freedom and peaceful conflict resolution as core values that the European Union wishes to project externally with, on the other hand, freedom as the epicentre of international arbitration as a means of peaceful dispute settlement worldwide.

It wishes to step away from the shrill chorus of criticism that has been deafening the TTIP negotiations and to speak quietly from the trenches about what it means to the Union's continuing objective of peaceful, democratic and economic stability to have within its territory, amongst its Member States, a mechanism of international dispute settlement that partakes in the Union's foundational values, that has stood the test of time and is trusted by European and global business and States alike to provide stable outcomes in conflict resolution and to uphold the rule of law. It also ponders whether the EU's current proposal to replace Investor-State dispute settlement (ISDS) with a two-tiered investment court system (the ICS) is, as the Union now claims, an improvement and a workable and viable way forward.

Whilst it is helpful to recall freedom as an historical component of both the EU and the international arbitral process, in these reflexions we must remain acutely aware of the fact that the international legal order – and more particularly within it the development of what has now come to be referred to as international investment law – has undergone profound change in the last fifteen years or so, and even in the few years since the EU enshrined those fateful three words, “foreign direct investment”, into its exclusive competence in the Lisbon Treaty. In that very short space of time the international legal order, it has been said perceptively, “acquired both greater focus and penetration, whilst also being asked to shoulder a greater burden in terms of value-bearing than had been the case in recent times”.<sup>6</sup>

Consequently, 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.

5 M. Cremona, *Values in EU Foreign policy*, *supra* note 3.

6 M. Evans and P. Koutrakos, *supra* note 3.

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, but immediately comforting, environment and despite potentially dramatic long-term consequences? Do the freedom and flexibility of international arbitration still have a place in the new generation of IIAS?

The EU's answer to these questions has followed a winding course in the space of only a few months. In 2014, the EU concluded its first investment treaty *qua* EU, the Comprehensive Economic and Trade Agreement (the CETA), with Canada. The text initially signed by the Contracting Parties provided for a modern, transparent form of ISDS. Thereafter the "legal scrubbing" process (and a change of government in Canada) yielded the inclusion of the ICS,<sup>7</sup> albeit in a modified form from that proposed by the EU to the United States in the context of the TTIP negotiations. Notably CETA's current Article 8.30 on Ethics sets out its own standards, not adopting the EU's proposal of a Code of Conduct for the TTIP, which is open to criticism in its lack of practical thought. Nevertheless the CETA, in its Article 8.29, adopts the EU proposal of pursuing with other trading partners "the establishment of a multilateral investment tribunal and appellate mechanism for the resolution of investment disputes".<sup>8</sup>

What this contribution does not seek to do is make the apology of ISDS in its current form, or sing its eulogy. At the same time, it must be acknowledged that we are bereft of ready-made solutions to what may be the most tectonic shift besetting international arbitration since the adoption of the 1958 New York Convention. Our challenge is therefore to be innovative, yet retain legitimacy and stability. Rather than clinging to a model that is showing cracks, or getting on a high horse about the desirability or otherwise of a multilateral investment court, our interest and endeavour are more contained, but no less challenging for all that. We are interested in the exercise 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 faithful to core values common to both the EU and international dispute settlement.

7 Press release, 29 February 2016: "*CETA: EU and Canada agree on new approach on investment in trade agreement*", <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1468>, visited 12 June 2016.

8 As at the date of writing, the latest round of negotiations as leaked is to the effect that "Other provisions such as the Tribunal of First Instance and the Appeal Tribunal were not broached in this round", <<https://www.ttip-leaks.org/>>, visited on 12 June 2016.

## 2 Freedom in International Arbitration

The international arbitral process is by nature a freer process than other forms of litigation, not only before State courts but also before other international courts or tribunals, with its flexibility of procedure, openness to providing a level conflict resolution forum with equal regard to the private law or public law nature both of the parties and the issues at stake, and resting on the ability given to the parties of choosing their decision-makers if they so wish.

In addition, possibly the greatest instrument of freedom for arbitration is the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, to which over 150 States are parties. Enshrining as it does a strong pro-enforcement policy, subject to a handful of procedural and substantive grounds for objecting to enforcement that are intended to be limited in scope, the New York Convention has given to international arbitration its *lettres de noblesse*. No other international agreement for the recognition of court judgments comes close to having the New York Convention's reach and depth – a reality recognised by the EU in its decision to leave arbitration outside the scope of the Judgments Regulation recast.

Walking away from international arbitration as a means of Investor-to-EU dispute resolution would mean walking away from this tried and tested culture of freedom and flexibility. It would also mean walking away from the New York Convention. If that is the way forward, if this is what is considered improvement of the ISDS process, then we must be able to answer quite lucidly the basic questions why we are improving, and what precisely needs improvement.

## 3 ISDS in the Proposed TTIP – The EU Proposal of 12 November 2015

After canvassing the views of civil society on the TTIP, the EU was beset by a chorus of virulent criticism aimed largely, albeit not solely, at ISDS. That chorus resonated strongly with some Member States' governments and the EU's political bodies. The EU's response was to forward a proposed two-tiered court system ('the ICS'), first on 16 September 2015 for discussion with the Member States, then tabled to the US before being publicly released on 12 November 2015.<sup>9</sup> The ICS has since been adopted in the EU–Vietnam FTA and (in part) the EU–Canada CETA, the latter in a last-minute about-face following the 'legal scrubbing' process.

<sup>9</sup> European Union's Proposal, "*Transatlantic Trade and Investment Partnership*", <[http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc\\_153955.pdf](http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc_153955.pdf)>, visited 12 June 2016.



The EU proposes for the TTIP a dispute settlement mechanism that is composed of a first instance court called the Tribunal of First Instance (Section 3, Article 9). The TFI would hear ISDS claims (not, it is to be noted, State to State claims) under the rules of either the ICSID; the ICSID Additional Facility; UNCITRAL; or “any other rules agreed by the disputing parties at the request of the claimant” (Article 6(2)). Those rules in turn do not have precedence. They are subject “to the rules set out in this Chapter, as supplemented by any rules adopted by the (...) Committee, by the Tribunal or by the Appeal Tribunal.” (Article 6(3)). Thus it would appear that the intention is to have a pick-and-choose application of the ICSID and UNCITRAL Rules, excluding notably the possibility for the parties to select their decision makers, and introducing full blown appeal on both appreciation of facts and law. The proposal for the selection of decision makers provides as follows.

Crucially, the TFI draws its decision-makers from a pool of fifteen pre-determined Judges (Article 9(2)). The possibility is expressly provided that at least some of these Judges may serve full-time (Article 9(15)). The composition of TFI panels is three Judges, and it is stipulated that they shall be put together “on a rotation basis, ensuring that the composition of the divisions is random and unpredictable” (Article 9(7)). If one adopts the criteria set out by the Advisory Committee of Jurists in the context of the establishment of the Permanent Court of International Justice as characteristics of an arbitral tribunal,<sup>10</sup> this is where the EU proposal first walks away from arbitration.

The task of the TFI is essentially twofold: (i) to determine whether the treatment the subject of the claim is inconsistent with the protection afforded by the Investment Chapter, applying the provisions of the TTIP and other rules of international law applicable between the Parties; and (ii) to interpret the Agreement in accordance with customary rules of interpretation of public international law, as codified in the Vienna Convention on the Law of Treaties (Article 13(1) and (2)).

10 According to the Advisory Committee of Jurists, which was set up to prepare the draft Statute of the Permanent Court, arbitration is distinguished from adjudication by three criteria: “*the nomination of the arbitrators by the parties concerned, the selection by these parties of the principles on which the tribunal should base its findings, and finally its character of voluntary jurisdiction*” in Advisory Committee of Jurists, Documents presented to the Committee relating to existing plans for the establishment of a Permanent Court of International Justice (1920), <<http://www.icj-cij.org/pcij/other-documents.php?p1=9&p2=8>>, visited 12 June 2016.

In addition, and in a further departure from the arbitral process, the EU proposes an Appeal Tribunal of six pre-ordained Members, likewise put together in panels of three “on a rotation basis, ensuring that the composition of the divisions is random and unpredictable” (Article 10(9)) to hear appeals by either party on the following very broad grounds:

- (a) that the Tribunal has erred in the interpretation or application of the applicable law;
- (b) that the Tribunal has manifestly erred in the appreciation of the facts, including the appreciation of relevant domestic law; or,
- (c) those provided for in Article 52 of the ICSID Convention, in so far as they are not covered by (a) and (b) (Article 29).

Essentially, the proposal places one panel of three decision-makers atop another, which has the effect of multiplying cost and delay implications, especially in circumstances where the Appeal Tribunal is empowered with limitless powers of review and can decide to remand a dispute to the First Instance Tribunal. ISDS critics bemoaning the time taken to reach decisions and the legal fees incurred are unlikely to find comfort in these aspects of the proposal.

Article 11 of the proposal deals with the ethical rules to which the Judges and the Members must adhere. A Code of Conduct is annexed to the proposal (Annex 11). The Code of Conduct provides for obligations of arbitrator independence and impartiality as follows:

1. Members must be independent and impartial and avoid creating an appearance of bias or impropriety and shall not be influenced by self-interest, outside pressure, political considerations, public clamour, loyalty to a Party or disputing party or fear of criticism.
2. Members shall not, directly or indirectly, incur any obligation or accept any benefit that would in any way interfere or appear to interfere, with the proper performance of their duties.
3. Members may not use their position to advance any personal or private interests and shall avoid actions that may create the impression that they are in a position to be influenced by others.
4. Members may not allow financial, business, professional, family or social relationships or responsibilities to influence their conduct or judgment.
5. Members must avoid entering into any relationship or acquiring any financial interest that is likely to affect their impartiality or that might reasonably create an appearance of impropriety or bias.

Members are prohibited under Article 11.1 from “acting as counsel in any pending or new investment protection dispute under this or any other agreement or domestic law”. Members further could not be affiliated with any government nor take instructions from any government or organization with regard to matters related to the dispute.<sup>11</sup> Members will not be able to “participate in the consideration of any disputes” that would create “a direct or indirect conflict of interest.”

Articles 9.4 and 10.7 provide that Members must “possess the qualifications required in their respective countries for appointment to judicial office or be jurists of recognised competence.” “Appointment to judicial office” in many civil law countries is a qualification that applies to graduates from – to use France as an example – the *École Nationale de la Magistrature*, who would be the equivalent of freshly qualified attorneys in the common law system. It has been pointed out that,

depending on interpretation of the phrase “qualification required for appointment to [the highest] judicial office[s],” the EU proposal may also exclude many knowledgeable private and public sector lawyers in civil law countries who have not followed the separate qualifications track for a potential judicial career.<sup>12</sup>

In the same vein it is noted that

the important terms “appearance” of “impropriety” and “bias” in the following are not defined, nor are the differences between any of those concepts and the more common concepts of “justifiable doubts” as to “impartiality” and “independence” identified. Other important phrases (...) are also not explained, with possible implications for so-called “issue conflicts” and personal or financial relationships for academics, retired practitioners, retired government officers, retired judges and other possible Court appointees.<sup>13</sup>

Clearly insufficient thought or practical input has been given to the feasibility and application in real life of the independence and impartiality prerequisites

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11 But note under CETA Article 8.30(1) the footnote that “For greater certainty, the fact that a person received remuneration from a government does not in itself make that person ineligible.”

12 Mark Kantor, OGEMID post, 19 April 2016 (with permission).

13 *Ibid.*

listed in the Code of Conduct. More refined and informed reflexion is needed. This is undoubtedly the clearest instance of rushed political appeasement of the entire proposal, and in that context one cannot resist pointing out the delightful irony of requiring from Judges and Members of the Appeals Tribunal that they are to discharge their duties without being influenced by “outside pressure, political considerations, public clamour, or fear of criticism” (Code of Conduct, Article 5(1)) – when in fact the originators of the proposal themselves were very much influenced by precisely these factors, chief amongst them “public clamour”.

The following is one illustration of the lack of practical thought given to this aspect of the proposal. It is striking, for a document that seeks to get away from ISDS as currently practiced, that it imports probably one of ISDS’ most problematic practices in the ICSID context, and that is to have a Judge or Member, the President of the TFI or the Appeal Tribunal, decide on ethical challenges to fellow Judges or Members (Article 11 (2)–(4)) in instances where the challenged individual refuses to resign. Surely that aspect alone falls foul of the Code of Conduct. No possibility of an appeal or review of this decision is provided.

The proposal provides for the enforcement of Final Awards issued by the Tribunals within the EU and US. Enforcement elsewhere remains an open question. A valid argument can be made that, as the process as currently contemplated is not arbitration, the decisions rendered by the Tribunal are not arbitration awards – no matter what label is put on them – and therefore not covered by the New York Convention.

Even if one disagrees with this argument, the ICS proposal very likely creates a double-track enforcement of ICS decisions: one track in the contracting States’ courts giving deference to the fiction that these decisions are arbitral awards pursuant to the New York Convention; the other in foreign States’ courts on the basis of judicial comity, thus recognizing that these decisions are not New York Convention awards resulting from an arbitral process.

On any view, this phenomenon will weaken or fragment the import and influence of the New York Convention as we know it.

#### 4 The CJEU and International Courts

It is not clear how the Commission envisages – if it needs to be envisaged – that the establishment of the ICS will sit alongside the CJEU’s jurisdiction. Historically the ECJ (as it was) has displayed an interventionist – some say activist – stance in relation to the definition of the scope of EU external

competence and its implications for Member States; and a ‘gatekeeper’ – some say defensive – role in relation to the status of international law within the EU legal system.<sup>14</sup>

The Court of Justice has reacted with what has been politely described as “diffidence” to initiatives taken by the EU’s political institutions or by Member States governments to engage with new or existing international dispute settlement mechanisms. In that regard, scholars have noted that,

[t]he Treaty itself establishes a potential tension between the jurisdiction given to the Court of Justice as the ultimate authority to interpret and determine the validity of Union law (including the provisions of international agreements binding the EU, which become part of Union law), and the explicit task of the Union to promote the development of international law – and thus to promote effective compliance and dispute settlement mechanisms. The Court’s desire to protect its own jurisdiction and the autonomy of the Union legal order has (...) resulted in the separation rather than the engagement of the Union in international dispute settlement.<sup>15</sup>

In its Opinion 2/13 of 18 December 2014 the Court, in even sterner language than in its Opinion 1/09, explained why the draft Accession Agreement to the European Convention on Human Rights had several areas of tension that it considered incompatible with EU law. In a nutshell, and most prominently, the Court reiterated once again its understanding of the principle of autonomy to signify that although the EU may be a construction of international law, in its internal order its own rules displace the principles and mechanisms of international law. The Court also noted, not for the first time, that the EU and its organs can submit themselves via an international agreement to a binding interpretation of that international agreement by an external judicial organ (¶182), provided that that interpretation steers clear of the competences of the EU in their essential character. In particular, ECHR organs must not be able to bind the EU to a particular interpretation of rules of EU law.<sup>16</sup>

14 M. Cremona, ‘A Reticent Court?’ in M. Cremona and A. Thies, *The European Court of Justice and International Relations Law – Constitutional Challenges*, (Hart Publishing 2013).

15 Cremona and Thies, Introduction, in *The ECJ and International Relations Law*, *supra*.

16 In the context of this talk it is worth noting the Court’s unambiguous affirmation of freedom as a core principle of the EU: “The pursuit of the EU’s objectives, as set out in Article 3 TEU, is entrusted to a series of fundamental provisions, such as those providing for the

It is worth noting that the Court of Justice's diffidence has been repeatedly expressed in the past vis-à-vis judicial organs that were court-like in their nature, meaning that unlike arbitration tribunals they were permanent institutions staffed with at least some full-time judges: the Fund Tribunal (Opinion 1/76); the EEA Court (Opinion 1/91); the European and Community Patents Court (Opinion 1/09) and now the European Court of Human Rights (Opinions 2/94 and 2/13).

In light of that history and the CJEU's unambiguous message, one has to look with considerable surprise at the EU proposal of a two-tiered court system for the TTIP, and the Commission's claim in its Communication of 14 October 2015<sup>17</sup> that this will "begin the transformation of the old investor-state dispute settlement into a public Investment Court System", and beyond this, "engage with partners to build consensus for a fully-fledged, permanent multilateral investment court".

Until one sees greater openness in the stance taken so far by the CJEU and greater comfort and security displayed in the CJEU's own place and sphere alongside international adjudicatory bodies, important questions must be asked about the place of the ICS alongside ISDS in future, and how the CJEU's nervousness about international courts will accommodate itself of this plurality of dispute resolution mechanisms in the field of foreign direct investment. Overall it matters, when considering the CJEU's attitude to international courts, not to lose a broader sense of perspective, as follows. Although the EU is unique as a regional legal model, the challenges that it faces in its interaction with international law are similar to those faced in other domestic legal orders, or regional, but non universal, legal orders. For domestic courts, the pluralism of the international legal order poses the problem of the limits that domestic law sets for the reception of international decisions within the domestic legal order. The challenge remains that of the interpretation on the one hand, and application on the other, of international law in spite of the legal and social

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free movement of goods, services, capital and persons, citizenship of the Union, the area of freedom, security and justice, and competition policy. Those provisions, which are part of the framework of a system that is specific to the EU, are structured in such a way as to contribute – each within its specific field and with its own particular characteristics – to the implementation of the process of integration that is the *raison d'être* of the EU itself.", para. 172.

- 17 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, "*Trade for All – Towards a more responsible trade and investment policy*", <[http://ec.europa.eu/europe2020/pdf/europe2020stocktaking\\_en.pdf](http://ec.europa.eu/europe2020/pdf/europe2020stocktaking_en.pdf)>, visited 12 June 2016.

fragmentation of the contemporary legal order.<sup>18</sup> That is a challenge for the CJEU to tackle, and thus far it has done so with a defensiveness that is starting to be viewed as a handicap. But it is a challenge that extends more broadly than ISDS, and sacrificing ISDS at the altar of that challenge bears a cost in uncertainty and unpredictability. Therefore it is important not to “improve” ISDS in a way that will feed the CJEU’s defensiveness, as the current TTIP proposal has the potential of doing.

## 5 Paths to Improvement

It is important to acknowledge, separately, that the ISDS that has been practiced up to now can yield, and has yielded, some troubling outcomes. Every teenager learns the hard lesson that with freedom comes responsibility. ISDS, as dispute resolution systems go, is in its teenage years, and as teenagers do it unnerves many who find its immaturity exacerbating at times.

There have been some instances of errors and abuse in the growing-up process of ISDS, which have fed the criticism very publicly expressed. It is arrogant, and dangerous, to dismiss these instances as rogue incidents, unrelated to more systemic weaknesses. The chorus of criticism also masks the reality that, with legal systems as with human beings, maturity takes time, and that some zigzagging is inevitable.

For the purposes of hopefully advancing our reflexion on the future of ISDS, and the path for potential “reform”, let us consider two recent examples showcasing weaknesses in the ISDS mechanism, and use these to test whether the proposed reforms of a tiered court system composed of judges, and a Code of Conduct, address the problem.

### 5.1 *Hulley Enterprises et al., v The Russian Federation*

Our first example is the *Yukos Awards* in the arbitration proceedings between the Yukos shareholders and the Russian Federation.<sup>19</sup> Criticism has been expressed elsewhere about the several aspects of the Awards that beggar

18 See on this topic A. Paulus, ‘*International Adjudication*’, in S. Besson and J. Tasioulas, eds, *The Philosophy of International Law*, (Oxford University Press 2010), p. 207.

19 On 20 April 2016, the Hague District Court allowed Russia’s challenge of the Awards on the ground that the Yukos Tribunal lacked jurisdiction. The Court disagreed with the Tribunal’s interpretation of Article 45 of the Energy Charter Treaty and considered that Russia was not provisionally applying the Treaty and thus had not consented to arbitration under its terms. The decision is being appealed. An unofficial English translation of the

belief.<sup>20</sup> For the purposes of this illustration the following bear noting: (i) the stark and unexplained *res ipsa loquitur* approach to the burden of proof applied to several of the Claimants' claims; (ii) the lax interpretation of the expropriation provision at Article 13 of the ECT; (iii) the rewriting of the taxation provision at Article 21 ECT; and (iv) the treatment of damages in unannounced departure from the case advanced by each party.

Proponents of an appeal mechanism will tell us that it is precisely such matters that this mechanism would aim to address. Let us look at what issues the EU proposal of an Appeal Tribunal would face in a case such as *Yukos*.

What scope of deference, if any, would the Tribunal of First Instance be given on its findings of fact? In its consideration of an appeal based on "manifest error in the appreciation of the facts" (Article 29(1)(b)), would the proposed Appeal Tribunal be allowed to appreciate the facts *de novo*, to reopen the record in whole or in part, so as to "modify or reverse the legal findings and conclusions in the provisional award in whole or in part" (Article 29(2)), thereby substituting its own appreciation to the TFI?

What guarantee that the Appeal Tribunal gets it right, and what recourse against possible errors on its part, especially on the facts?

Recall that these were, to use the *Yukos* Tribunal's own words, "mammoth arbitrations" that lasted some ten years with close to 9,000 exhibits. Even the less exorbitant investor-to-State disputes are by no means small affairs in terms of size of the record, and one wonders how a Tribunal of part-time Judges on a retainer fee of EUR 2,000 a month might cope with the caseload.

Recall also that an appellate system is not without its own risks. The appeal court may arrive at a conclusion that is at complete odds with that of the court of first instance not because the appreciation of the court of first instance was necessarily wrong *per se*, but because the appeal court sees things differently – much like different investment tribunals interpret the same or similar wording differently. A recent illustration in the field of arbitration is provided by the French case of *Banque Delubac*,<sup>21</sup> in which the *Paris Cour d'Appel* rendered its

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judgment can be found at <http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2016:4230>, visited 12 June 2016.

20 See S. Nappert, 'The *Yukos* Awards – A Comment', 2 *Journal of Damages in International Arbitration* 2 (2015) and S. Nappert, 'Square Pegs and Round Holes: The Taxation Provision of the Energy Charter Treaty and the *Yukos* Awards', 1 *Paris Journal of International Arbitration/Les Cahiers de l'Arbitrage* 7 (2015).

21 M. Henry, 'La responsabilité de l'arbitre pour reddition de sentence tardive', 2 *Paris Journal of International Arbitration/Les Cahiers de l'Arbitrage* (2015), p. 313.



judgment on 31 March 2015 regarding the liability of arbitrators for issuing an Award outside the time period provided in the ICC rules.

The Tribunal de Grande Instance at first level had dismissed the claim made for the return by the arbitrators of the fees paid to them, finding that (1) the Award had been rendered in a timely fashion; (2) there was no indication or evidence of gross or even simple negligence on the part of the arbitrators; and (3) in any event the immunity provision of the ICC Rules applied to cover cases of Awards rendered outside the delay.

The *Cour d'Appel* held that (1) the Award was rendered 3 months outside the legal period of 6 months; (2) the arbitrators were at fault; and (3) the immunity provision did not cover late awards. The arbitrators were ordered to reimburse some €1,166,000 in damages, being the total of their fees.

In a developing field of law like investment treaty law, such a result would not contribute to the legitimacy and predictability of the two-tiered court process any more than a series of zigzagging decisions from different ad hoc tribunals do at present.

## 5.2 *Croatia v. Slovenia*

Another spectacular instance of serious concern is the matter of *Croatia v. Slovenia*<sup>22</sup> currently pending before the PCA – a State-to-State matter. There, unofficial transcripts and audio recordings of conversations between one of the five arbitrators in the arbitration regarding the territorial and maritime dispute between Croatia and Slovenia, and Ms. Simona Drenik, one of the Slovenian representatives in the proceedings, were made public. These conversations took place during the proceedings and encompassed discussions on the tribunal's deliberations, the probable outcome of the case and development of further strategies to ensure that Slovenia prevailed, including the possibility of lobbying other arbitrators.

This, incidentally, was another case where “(t)he Parties included with these pleadings nearly 1,500 documentary exhibits and legal authorities, as well as over 250 figures and maps”, as the case had been going on for some three years when the scandal erupted.

What “improvement” might be needed in a case such as this? And to police what target? Such incidents are not unheard of, albeit most are not as dramatic or as public. Arguably, the targets to police go beyond the rogue arbitrator him- or herself.

22 Arbitration Between the Republic of Croatia and the Republic of Slovenia, PCA 2012–04, <<https://www.pcacases.com/web/view/3>>, visited 12 June 2006.

As regards the arbitrator, the EU's proposed Code of Conduct – as is often the case with ethical prescriptions – does not spell out what sanctions apply in case of a breach (returning fees, e.g.), aside from removal from the case. What about that arbitrator's continuing duties in other cases under the same treaty (since the EU is contemplated a restricted list of prescribed arbitrators it may not be easy to replace the rogue arbitrator)?

Does the balance of the Tribunal have any obligation of information to the parties or the integrity of the process if they become aware of impropriety? Should it? The proposal is silent.

Arguably the arbitral institution itself also has a responsibility to shoulder for confirming that arbitrator, then remaining silent. What "improvement" is needed in that respect?

The question can also validly be asked whether this phenomenon is arbitration-specific, and the wisdom queried of placing important power in the hands of two individuals (the President of the Appeal Tribunal and that of the TFI), including that of deciding challenges against fellow judges.

Thus it is far from clear that the Code of Conduct proposed to appease public clamour cures the very real ills encountered in practice.

## 6 Escaping from Freedom

Speaking of constitutionalism, agendas, and opportunity, it is worth saying a brief word about the theme of this talk, "Escaping from Freedom". This is a nod to the title of a book published in the United States in 1941 by the Frankfurt-born psychologist and social theorist Erich Fromm.<sup>23</sup> In the book, Fromm explores humanity's shifting relationship with freedom, with particular regard to the personal consequences of its absence. Given the era in which he was writing, his focus was notably the psychosocial conditions that facilitated the rise of Nazism.

Fromm's theory is that freedom breeds headiness, but also anxiety, in mankind – a very ingrained reaction, rooted in such profoundly anchored stories as that of God's expulsion of Adam and Eve from the Garden of Eden, for Christianity the root of Man's ensuing and continuing restlessness, the cause of which was of course an act of freedom on the part of Eve, that of eating the forbidden fruit, breaking away from God's prescription.

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23 E. Fromm, "Escape from Freedom", (Farrar & Rinehart 1941).

Fromm explains that in wanting to rid himself of these anxious feelings brought about by freedom, Man will feel the need to rush to conformity, to what the greater number sees as common sense, to replace the old order with another order of different appearance but identical function. One can immediately see the potential for a vicious circle in which freedom remains a longed-for ideal, but a reality that is never assumed, the responsibility of which forever escaped, and the benefits of which never obtained.

The image strikes as a powerful one in the debate about the future of ISDS – a mechanism premised on substantial freedom as explained above – within the EU, itself a political and legal construct with liberty as one of its tenets.

The temptation is great, for political purposes, to rush to appeal mechanisms and familiar-looking court structures to appease those who may be uncomfortable with that freedom. A system (in our case ISDS) is not given a chance to improve, to get out of teenage hood, to show its promise, to become a fully mature adult, if we rush to something more familiar and comforting in the short term because its excesses, such as they are, cause friction. In many ways, there is a valid case for applying a denial of justice standard to ISDS – before rushing to declare that it is futile or deficient, it must be given a chance to perform – especially since, unlike political trends, a treaty is a long-term affair, and what it enshrines must stand the test of time.

Our role therefore must be to identify the excesses of freedom within ISDS and address them properly, before deciding if the rush to conformity is warranted, and that the price of conformity is worth paying in the long term.

## 7 Avenues

My proposal at the time of delivering the Lecture, and as stated in the following section, was to retain ISDS in its current form, whilst entrusting the Committee with the harmonious interpretation of the TTIP. Since then, the ICS has been enshrined in the EU–Vietnam FTA and (in a modified version) the EU–Canada CETA, making the ICS no longer a proposed construct, but a reality. The challenge going forward will therefore be to manage the ways in which the ICS coexists alongside existing ISDS ad hoc tribunals.

This will entail finding cogent answers to the following questions: the hierarchy, if any, of the ICS vis-à-vis those tribunals; its authority, if any; and the precedential value of its rulings, if any. The uncertainty bred by these questions will be present for a considerable time until the ICS finds its footing and develops its jurisprudence. During that time the ICS will be no more than yet another ISDS forum, further fragmenting the field, and as stated above, weakening the status and authority of the New York Convention.

For the purposes of this article, I am leaving intact the original proposal below.

## 8 Refocusing the Purpose of ISDS: Settling Disputes, Rather than Developing the Law

As any litigator knows, legal questions are only part (sometimes a very small part) of a dispute. The history of State-to-State adjudication has shown that settling legal questions has not always been accompanied by the settlement of the dispute.<sup>24</sup>

On the more recent ISDS front, the *Yukos* Awards are a stark example of precisely that phenomenon.

We may have reached a stage where ISDS displays an acute and self-destructive symptom of *overreaching*, for lack of a better word. What has been feeding the criticism of arbitration and emotional rhetoric displayed of late seems to be this: the system, premised on party autonomy and ad hoc tribunals, is tasked – or has tasked itself – with what has become too heavy a mandate.

The focus of the criticism aimed at ISDS so far has been placed on the perceived evils of the ad hoc nature of ISDS tribunals and the party selection of arbitrators. It is true that these are easy targets. In fact and in practice the difficulty may well lie elsewhere – it is that ad hoc tribunals, conscious of the enormous stakes involved, are being tasked with the following, manifold, mandate: to uphold the rule of law; to create jurisprudence in a novel legal field; to interpret myriad treaties in a consistent linear fashion; to dispense justice in what is an eminently political field; all this plus factual disputes of often bedevilled complexity. This is, as has been perceptively observed, a consequence of the modern reality that international law now encompasses community interests as well as State interests, “(t)he multi-purposive task of international law creates problems for its coherent application.”<sup>25</sup> It is little wonder that amidst all of this, the settlement of the factual dispute before tribunals may sometimes have been held hostage to the grander policy considerations of a nascent legal field.

Rather than giving up on the model altogether, there may be value in taking a bite-sized approach to the future development of ISDS to which the EU is a party, carefully retaining what has a track record of providing value, whilst rethinking those aspects that have the potential of turning into rotten apples.

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24 V. Tumanis, “Adjudication Fallacies: The Role of International Courts in Interstate Dispute Settlement” 31 *Wisconsin International Law Journal* 1 (2014), p. 34.

25 Paulus, *supra* note 18, p. 212.

As a starting point for further reflexion, and with a view to reforming ISDS whilst retaining arbitration's free character and the assistance of the NY Convention, it might make sense to provide comfort to parties, arbitral tribunals and civil society alike by creating a steering Joint Committee- stroke-interpretive body on hand to assist ad hoc tribunals with the meta- elements associated with the ISDS function, thereby dissociating the settlement of the discrete factual dispute from the interpretive, jurisprudential function so the facts do not colour the treatment of the law, as happened in *Yukos*, and the treatment of the law remain more linear and consistent; to leave factual appreciation to arbitration tribunals in their current form, and to create a parallel permanent interpretive body for the interpretation of the underlying TTIP in a coherent, authoritative, evolutive fashion, that would be mindful of the intentions of the State parties, including the EU, and one that might have easier reach for a dialogue with the CJEU, if that were needed, than would an ad hoc tribunal or a court of appeal. Such a body would sidestep several of the pitfalls of appeal – procedural heaviness, time, delay, and the very real risk of inconsistent decisions between the first instance court and the appeal court.

This would not be inconsistent with the EU proposal of 12 November 2015, building as it does on Article 13(5). The proposal as it stands provides for an as-yet-unnamed Committee (“the ... Committee”) that could take on the role of an interpretive body and ethical police. If this avenue is pursued, the staffing of that Committee would need to reflect the importance and high level aspects of its role, give a voice to State parties and not include arbitrators or counsel currently active in the field.

In *Yukos*, such a body would have been welcome in informing the Tribunal on the proper interpretation of the Expropriation and Taxation provisions of the ECT in line with the intention of the Member States.

As regards ethical considerations, the Committee might be well placed to give teeth to the Code of Conduct – once it is reworded in a practical realistic manner – and to create precedent there as well. In any event it would be much better placed, and much more credible, than Judges deciding on the ethical conduct of a peer.

This is not a new idea, or a revolutionary one. Bodies tasked with advising tribunals on the intention of the State parties have been set up under other treaties, notably the NAFTA and the CETA. The TPP, in its current Chapter 27, provides the establishment of a TPP Commission, meeting at the level of Ministers or senior officials (Article 27.1), whose functions include the establishment of Model Rules of Procedure for Arbitral Tribunals (Article 27.2 (e)); the consideration of any matter relating to the implementation of the TPP Article 27.1 (a));

and the resolution of any differences or disputes arising regarding the interpretation or application of the TPP, and provide directions, as needed, to the office providing administrative assistance to arbitral tribunals (Article 27.6).

What I have in mind is something along the same lines, working in parallel with arbitral tribunals, but more focused on the legal interpretive and ethical sides of the TTIP ISDS mechanism – those areas that have been the focus of criticism and political unease. This body could become the historical repository of TTIP jurisprudence, allowing a more harmonious, authoritative and linear development of TTIP interpretation and law, whilst at the same time smoothing out the knee-jerk, zig-zagging process associated historically with legal development in the ISDS mechanism.

The consequences and practical application of such a proposal – continuity, liaison, dialogue, staffing – are in themselves probably the topic for another Lecture.

As the EU moves forward with its ICS proposal, it may be worth considering tailoring the role of the Appeals Tribunal to that which I contemplated above for the Committee, rather than the present one of wholesale appeal on fact and law, which appears disproportionate and duplicative of the work of the First Instance Tribunals, whilst itself being subject to no review mechanism.

## 9 Sidebar: International Commercial Arbitration and Its Economic Value in the EU

In closing, it is worth considering the following point, tangentially related to our topic but important enough to deserve mention.

It is crucial not to underestimate the fact that the scepticism (to use a neutral word) directed at ISDS inevitably casts aspersion on international arbitration more broadly in the commercial arena, given that ISDS initially derived procedurally and structurally from international commercial arbitration and given that they tend to share the same players – and as such are naturally conflated by observers of the process. That, as a result of the current furore, commercial arbitration should be tainted with the same brush as that brandished by the critics of ISDS should be a source of serious concern for the EU. This is notably because of the not inconsiderable, and measurable, economic benefit that befalls arbitration-friendly jurisdictions, which is the case for several Member States of the EU.

In the run-up to the review of the Judgments Regulation in 2010 (now known as Brussels recast), the European Commission issued a Staff Working Paper,

entitled 'Impact Assessment'. In it the Commission set out the background to its consultation of interested parties, the information that came out of the consultation, policy options and the reasons for the resulting outcome.<sup>26</sup>

The Working Paper set out the general objectives underpinning the revision of Brussels, one of these was to help create 'the necessary legal environment for the European economy to recover.'<sup>27</sup>

Surveys show that about 63% of large European companies prefer arbitration over litigation to resolve their business disputes (...). Where they have a choice, European companies prefer to arbitrate within the EU... In 2009, European arbitration centres administered 4,453 international arbitration cases with a total value of over €50 billion; the tendency is growing. (...) The total value of the arbitration industry in the European Union can be estimated at €4 billion.<sup>28</sup>

The arbitration industry in the EU, and the EU's image as a modern, enlightened and arbitration-friendly space, are therefore factors of importance and value for economic stability, another core value of the EU's. If, as appears to be the case, current proposals for "improving" or "reforming" ISDS have an underpinning of rushed political appeasement, then it would send the wrong signal were these reforms or improvements to step away altogether from the arbitral nature and origins of the ISDS process.

## 10 Conclusion

My only conclusion is that I cannot end a lecture themed on freedom without dedicating it to the victims of terrorism everywhere – and by victims I mean of course the fallen, but also all of us who remain standing, and looking for solutions.

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26 Commission Staff Working Paper, *Impact Assessment - Accompanying document to the Proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters*, <<https://www.justice.gov.uk/downloads/consultations/brussels-i-commission-staff-working-paper-full-ia.pdf>>, visited 12 June 2016.

27 *Idem.* p. 8.

28 *Idem.* p. 36.