

THE 2015 EFILA INAUGURAL LECTURE

ESCAPING FROM FREEDOM? THE DILEMMA OF AN IMPROVED ISDS MECHANISM

SOPHIE NAPPERT

delivered on 26 November 2015 in London

FOREWORD

The European Federation for Investment Law and Arbitration (EFILA) has been established in Brussels as a non-profit, non-governmental organization, with the aim of creating a platform for an open and balanced discussion on European investment law and arbitration issues.

EFILA aims at providing high-profile, in-depth analysis and discussion for the benefit of the relevant policy makers, stakeholders, media and the public at large.

In January 2015 EFILA kicked off with its 1st Annual Conference, which was held in London and attracted 150 attendees with a wide variety of backgrounds.

On 5 February 2016 the 2nd Annual Conference will take place in Paris, entitled "Investment Arbitration 2.0?". The conference organizers have secured a very impressive list of high profile speakers, which promises to be another very successful event. The (draft) programme and registration form are available at our website: http://efila.org/events/annual_conference_2016/.

In September 2015 EFILA also launched its EFILAblog (www.efilablog.org), which provides another direct platform for the exchange of views and in-depth discussion.

The EFILA Annual Lecture series is the newest initiative, which aims at pushing the debate to another level by inviting distinguished experts to present their views to a broad audience.

EFILA is honoured that Sophie Nappert has accepted the invitation to deliver the very first EFILA Annual Lecture on a topic of her choice, which - it is hoped - will mark the start of a long series of ground-breaking lectures by eminent experts in the field of investment law and arbitration.

This booklet contains the Executive Summary of the Lecture as well as the full text as it was delivered on 26 November 2015 in London.

The views and opinions expressed in this Lecture are of Sophie Nappert alone and do not necessarily reflect the position of EFILA.

EFILA is very grateful to Allen & Overy, London offices, which hosted the Lecture and all the sponsors of the event.

Dr. Nikos Lavranos, LLM (Secretary General of EFILA)

EXECUTIVE SUMMARY

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 EU proposal envisages that the courts of first instance and appeal be composed of pre-ordained, semi-permanent judges randomly assigned to cases and subject to compliance with a Code of Conduct worded in general terms.

As it stands the EU proposal walks away from the international arbitration format, and consequently the application of the New York Convention.

The Lecture expresses surprise at the EU proposal of a court mechanism given the CJEU’s unambiguous, historical unease with other similar, parallel international court systems, as most recently expressed in its Opinion 2/13 of 18 December 2014 on the draft Accession Agreement to the European Convention on Human Rights.

The Lecture examines whether, and how, the EU proposal might provide solutions to critical issues presented in two recent cases taken as illustrations – the Awards in the cases of the Yukos shareholders against the Russian Federation, as well as the case of *Croatia v Slovenia* currently pending in the PCA.

The Lecture remarks that appeal mechanisms are not free from difficulty, not least of which the real risk of inconsistent decisions between the first and appeal instances, due to different, equally valid approaches to a developing area of international law.

The Lecture also notes that the proposed Code of Conduct provides no practical sanctions to deal with instances of arbitrator misconduct such as that featured in the *Croatia v Slovenia* matter, and expresses surprise that ethical challenges are to be decided by fellow Judges – probably one of the most problematic features of the current ICSID system.

The Lecture proposes 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.

Dissociating the settlement of the factual dispute from the broader interpretive exercise would create a repository of the TTIP jurisprudential function, allowing for a more harmonious and authoritative development of TTIP interpretation and law and alleviating the phenomenon of “over-reaching” currently burdening ad hoc tribunals – arguably the real source of the criticism aimed at ISDS.

The Committee/Interpretive Body could also more credibly act as decision-maker in ethical challenges than would fellow Judges, provided the Code of Conduct is reviewed to allow for realistic standards and practical sanctions.

This proposed “third way” retains the arbitration features necessary for the application of the New York Convention, and is not inconsistent with the EU’s own proposal, building as it does on Article 13(5) which contemplates an overseeing Committee that would be well-placed to take over the above role.

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“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 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.

Esteemed colleagues
Ladies and Gentlemen

We live in heart-wrenching times, where refugees fleeing a “foul and bloody” civil war¹ 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. And since I wrote these words, the attacks on Paris and Beyrouth have come as an unwelcome reminder of the fact that

there are, on this planet, fellow human beings who will stop at nothing to annihilate a freedom and way of life that we take largely for granted.

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. And this is because the Union has placed freedom at its core, liberty at its foundation, in short has made it one of its defining values.²

¹ *The Economist*, ‘Exodus’, 12 September 2015.

² As reiterated again by the Court of Justice in its Opinion 2/13 on the draft accession agreement to the ECHR, ¶172.

I will therefore start this talk by saying a few words about freedom as a core value of the EU, before turning to freedom as a tenet of international arbitration.

I will look at the EU proposal of 12 November 2015 for dispute resolution in the TTIP, and test it by way of illustration against issues that arose in recent cases, to see whether the proposal cures the ills present in practice.

I will then look at the CJEU and its stance up to now as regards other international adjudicatory bodies.

Finally I will put to you for discussion some ideas for a way forward.

ture all its own. In doing so it has become a model in the literal sense of the word, a template and source of inspiration for stabilisation, peaceful conflict resolution, democracy and respect for the rule of law. It is the EU's duty, given its importance, to own up to its stature and to have the courage of these core values – in short, to practice what it preaches.

The Union recognised the need for it to provide leadership, authority, and a vision aligned with its values in the Laeken Declaration (The Future of the European Union, 15 December 2001), which set in motion the process that culminated in the adoption of the Lisbon Treaty.³

I. What freedom and why it matters

Freedom as a core value of the EU

The EU is unique in its supra national nature, as it is unique in its organisational structure. Having evolved from being a key organ of regional economic and political organisation to a full participant on the world stage, it has come to take its place on the geo-political map as a global civil power with a personality and a cul-

“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

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

the Berlin Wall; **the continent of liberty, solidarity and above all diversity**, meaning respect for others' languages, cultures and traditions.”

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”.⁴

I am grateful for this opportunity to reflect with you on the natural compatibility of, on the one hand, freedom and peaceful conflict resolution as core values of the European Union that it wishes to project externally with, on the other hand, freedom as the epicentre of international arbitration as a means of peaceful dispute settlement worldwide.

I am grateful for the privilege of being here today because it allows me to step away from the shrill chorus of criticism that has been deafening the TTIP negotiations, as well as step away from other emotion-laden discussions even in informed circles, in order to speak quietly

⁴ M. Cremona, ‘Values in EU Foreign policy’, in Evans and Koutrakos, eds, *supra* note 3.

from the trenches, as it were, on what it means to the Union’s continuing objective of peaceful, democratic and economic stability – and indeed whether it means anything going forward - 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.

Whilst it is helpful to recall freedom as an historical component of both the EU and the international arbitral process, in these reflections 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 15 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”.⁵

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, I put to you that 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, 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?

In putting these queries to you for comment and thought, I want to make clear the following. I am not here to make the apology of ISDS in its current form, or to sing its eulogy. At the same time I am unaware of ready-made solutions to what I perceive to be the most tectonic shift currently 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 Global Investment Court, my interest and endeavour are more contained, but no less challenging for all that. I am 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.

Having spoken about freedom as a core value of the EU, I now turn to freedom as a tenet of international arbitration.

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

⁵ Evans and Koutrakos, *supra* note 3.

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.

II. ISDS in the proposed TTIP

The EU Proposal of 12 November 2015⁶

After canvassing the views of civil society on the TTIP, including ISDS, the EU put forward a proposed dispute resolution mechanism, first on 16 September 2015 for discussion with the Member States, then tabled to the US before being publicly released on 12 November 2015.

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*

⁶ http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc_153955.pdf

set out in this Chapter, as supplemented by any rules adopted by the [...] [an unnamed and undefined] 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.

Let us look then at the proposal for the selection of decision makers.

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)). This, in accordance with the criteria set out by the Advisory Committee of Jurists in the context of the establishment of the Permanent

Court of International Justice,⁷ 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)).

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

⁷ 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.” ADVISORY COMMITTEE OF JURISTS, DOCUMENTS PRESENTED TO THE COMMITTEE RELATING TO EXISTING PLANS FOR THE ESTABLISHMENT OF A PERMANENT COURT OF INTERNATIONAL JUSTICE 113 (1920).

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).*

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 II).

I will not waste your time picking the Code apart, as clearly insufficient thought has been given to the feasibility and practical application in real life of what are listed as independence and impartiality prerequisites. More refined and informed reflection is needed. This is undoubtedly the clearest instance of rushed political appeasement of the entire proposal, and in that context I cannot resist pointing out the delightful irony of requiring from Judges and Members of the Appeals Tri-

bunal 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”.

As one illustration of the lack of practical thought given to this aspect of the proposal, let me note the following. It is striking, for a document that claims to bend over backwards to get away from ISDS as we know it, 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. Note that no possibility of an appeal from, 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 ques-

tion. 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.

Article 30(1) of the proposal tries bravely to pull the wool over our eyes, first by entitling itself “Enforcement of Awards”, and second by stating that “*Final Awards issued pursuant to this Section by the Tribunal shall be binding between the disputing parties and shall not be subject to appeal, review, set aside, annulment or any other remedy*” – As if the contemplated process was not precisely that of a full appeal of the TFI Award on both fact and law. The proposed appeal mechanism is not consonant with arbitration as contemplated by the NYC, and Article 30 cannot unilaterally change that fact.

Similarly, it is not clear how the Commission envisages – if it needs to be envisaged - that the establishment of these Investment Tribunals will sit alongside the CJEU’s jurisdiction.

A word on the CJEU and international courts

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.⁸

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, “*The 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*

⁸ M. Cremona, ‘A Reticent Court?’ in: M. Cremona and A. Thies, *The European Court of Justice and International Relations Law – Constitutional Challenges*, (2013) Hart Publishing.

*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."*⁹

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

⁹ Cremona and Thies, Introduction, in *The ECJ and International Relations Law*, supra note 8.

bind the EU to a particular interpretation of rules of EU law (¶¶183-4).¹⁰

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

¹⁰ 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 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.**"* (¶172)

Communication of 14 October 2015¹¹ 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*”. (A cynic might venture that the Commission is creating a system that it knows the CJEU will sideline, but I am no cynic.)

For the more immediate purposes of our reflexion on the future of ISDS, and on the basis that we want to work towards a dispute resolution system that will have credibility and not be sidelined, and 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, the prudent view must be in favour of retaining the known quantity that is international arbitration as a means of investor to State dispute settlement, whilst factoring in modifications aimed at preventing, and dealing with, instances of abuse.

¹¹ 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” COM (2015) 497.

In addition, it is important, when considering the CJEU’s attitude to international courts, not to lose a broader sense of perspective, and by this I mean the following.

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 fragmentation of the contemporary legal order.¹² Here I am consciously separating interpretation from application, and you will see why shortly.

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

¹² See on this topic A. Paulus, ‘International Adjudication’, in S. Besson and J. Tasioulas, eds, *The Philosophy of International Law*, (2010) OUP, 207.

extends more broadly than ISDS, and sacrificing ISDS at the altar of that challenge will almost certainly work to the EU's detriment in the medium- to long-term. 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.

It is important to acknowledge, separately, that the ISDS that has been practiced up to now can yield, and has yielded, some troubling outcomes, and I will now turn to these.

III. Paths to improvement

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 le-

gal systems as with human beings, maturity takes time, and that in that time some zigzagging is inevitable.

For the purposes of hopefully advancing our reflection 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.

Hulley Enterprises et al v The Russian Federation

Our first example is the *Yukos Awards*. I have written elsewhere in rather critical tones about the several aspects of the Awards in the matters of the Yukos shareholders versus the Russian Federation that beggar belief.¹³ For the purposes of this illustration I will only mention the following: (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

¹³ See S. Nappert, 'The Yukos Awards – A Comment' (2015) *Journal of Damages in International Arbitration*, Vol.2, No.2; and S. Nappert, 'Square Pegs and Round Holes: The Taxation Provision of the Energy Charter Treaty and the Yukos Awards' (2015) *Paris Journal of International Arbitration/Les Cahiers de l'Arbitrage*, Vol. 1, 7.

the expropriation provision at Article 13 of the ECT; (iii) the rewriting of the taxation provision at Article 21 ECT; (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 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*” (29(2)), thereby substituting its own appreciation to the TFI?

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. And 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 Euros 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*,¹⁴ in which the Paris Cour d’Appel rendered its 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

¹⁴ *Banque Delubac & Cie c/ X.*, Paris, pôle 1, Ch. 1, 31 March 2015, no 14-05436. See M. Henry, “La responsabilité de l’arbitre pour reddition de sentence tardive” (2015) *Paris Journal of International Arbitration/Les Cahiers de l’Arbitrage* Vol.2, 313.

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 Euros 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.

Croatia v Slovenia

Another spectacular instance of serious concern is the matter of *Croatia v Slovenia* 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 with 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.

Let us look at the targets that might have to be policed.

As regards the arbitrator himself, 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 treaties (since the EU is contemplating 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? 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 there?

And is this phenomenon arbitration-specific? Certainly it is not ISDS-specific, since this is a State-to-State dispute.

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

A wider question is, does improvement necessarily mean constitutionalism? The question has appositely been asked, “*For those who see the need for greater ‘order’ in the ‘international order’, the impulse towards constitutionalism offers both an agenda and an opportunity. But whose agenda, and whose opportunity?*”¹⁵

IV. Escaping from freedom

Speaking of constitutionalism, agendas, and opportunity, I will say a brief word about the theme of this talk, “Escaping from Freedom”.

As many of you will have spotted, 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. In the book, Fromm ex-

¹⁵ Evans and Koutrakos, *supra* note 3.

plores 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 – it is 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.

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 struck me as a powerful one in the debate about the future of ISDS – a mechanism premised on substantial freedom as I 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, we must apply a denial of justice standard to ISDS – before we rush 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.

V. Avenues

I do not have the temerity or arrogance to come here proposing ready-made solutions to the current state of affairs. Rather I make a plea to us all to pause for a time and consider if we can come up with a solution that is creative and practically workable, without reinventing the wheel. So that if we decide to walk away from freedom and go for conformity, it will be because we have thought about, and discarded, the alternatives.

It may make sense to consider the following.

*Refocusing the purpose of ISDS: Settling disputes, rather than developing the law*¹⁶

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.

¹⁶ V. Tumonis, “Adjudication Fallacies: The Role of International Courts in Interstate Dispute Settlement” (2014) *Wisconsin International L.J.* vol. 31, Issue 1, 34.

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 bedeviled complexity. This is, as has been perceptively observed, a conse-

quence 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.”¹⁷ 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.

As a starting point for further reflection, and with a view to reforming ISDS whilst retaining arbitration’s free character and the assistance of the NY Convention, I wonder whether it makes 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. To thereby dissociate

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. 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. And that 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, 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

¹⁷ Paulus, *supra* note 12, at 212.

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. Much better placed, and much more credible in any event 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 (27.2 (e)); the consideration of any matter relat-

ing to the implementation of the TPP (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 (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.

VI. Sidebar: International commercial arbitration and its economic value in the EU

In closing, there is one side comment that I wish to make, tangentially related to our topic but important enough to deserve mention.

It is crucial not to underestimate the fact that the current skepticism (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 is, or certainly 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.¹⁸ The Working Paper set out the general objectives underpinning the revision of Brussels 1. One of these was to help create ‘the necessary legal environment for the European economy to recover.’¹⁹

“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.” Page 36: *“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 Europe-***

¹⁸ 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, COM (2010) 748, SEC (2010) 1548, 14 December 2010, at page 35.

¹⁹ *Ibid.*, page 8.

an Union can be estimated at €4 billion.”

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.²⁰ 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.

VII. Conclusion

My only conclusion, before we embark on discussion as I very much hope we will, is that I cannot end a lecture themed on freedom without dedicating it to the victims of the Paris and Beyrouth attacks, and indeed 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.

London, 26 November 2015

²⁰ Commission’s Communication, *supra* note 11.