Politicising Law or Legalising Politics?
Justiciability and the 'Political Question' Doctrine in International Justice

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I. Introduction

At the 2019 St. Petersburg International Legal Forum, a discussion was held on, inter alia, the *Justiciability and the 'political question' doctrine in national and international justice*.[1] Although it is not a common concept in European countries, the concept of justiciability encompasses a number of long existing questions in the realm of national law: how far should the judicial power extend? Where should the demarcation between the legal and the political be drawn? How 'prudent' should the judiciary be in the judicial review of the legislature's regulatory acts and the executive's foreign policy steps?

The speakers at the Forum session, including former presidents of the highest Russian and Dutch courts, an English barrister, a former judge of an international court, a lawyer of a transnational corporation and an international law expert,[2] reached several conclusions.

– First, judges of both national courts and international tribunals are often involved in matters of a clearly political tone (e.g. environmental protection, public health, tax policies, actions of armed forces, etc.);

– second, many judges readily accept such cases, and it is hard to convince them not to do so;

– third, in procedural law, there are tools that allow courts to avoid 'inconvenient' processes (e.g. the well-established procedural concept of dismissal of claim);

– fourth and finally, no political considerations should limit the right of access to court or deprive the courts of the opportunity to rise to the challenges of time in the administration of justice.

The problems discussed in St. Petersburg and taken up in this article cover both international courts and arbitral tribunals to the same extent. Suggestions that international arbitration differs greatly from international judicial dispute settlement cannot be upheld.[3] Practice shows that the same cases, where one of the parties tries to use 'political' arguments, may pass through the national judiciary, international courts and arbitral tribunals.

1. The Yukos case before the European Court of Human Rights[4]

The factual background of this well-known case is here germane and merits review as an example of the possible and actual import of the subject of this article. The Russian oil company *OAO Neftyanaya Kompaniya Yukos* underwent tax and enforcement proceedings brought in 2004 which eventually led to its liquidation in 2007. The ECtHR found that the Russian Federation did *not* misuse legal proceedings to destroy *Yukos* and seize its assets (no violation of 'political'[5] Article 18 ECHR in conjunction with Article 1 Protocol 1 to the Convention) but nevertheless violated the Convention in some aspects. The ECtHR found in its *judgment on the merits of 20 September 2011:* a ● violation of the right to a fair trial (Article 6 §§ 1 and 3 lit. b ECHR) concerning the 2000 tax assessment proceedings against Yukos because it had insufficient time to prepare its case before the lower courts; a violation of the right to property (Article 1 Protocol 1 to the Convention) concerning the 2000-2001 tax assessments, regarding the imposition and calculation of penalties and regarding the enforcement proceedings; but ● found **no** violation of the Convention regarding the right to property concerning the rest of the 2000-2003 tax assessments and no violation of the prohibition of discrimination (Article 14 ECHR in conjunction with the right to property).

In the ECtHR judgment on just satisfaction (Article 41 ECHR) of 24 June 2014 the Court found that *Yukos* had sustained pecuniary damage as a result of the violations of the right to property and decided that overall pecuniary damage is to be paid in the amount of 1.8 billion EUR (exactly 1,866,104,634 EUR) to the shareholders of Yukos as they had stood at the time of the company's liquidation and, if applicable, to their legal successors and heirs.

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[1] St. Petersburg Legal Forum held from 14 to 18 May 2019 under the auspices of the President of the Russian Federation. Speakers: the former presidents of the highest Russian and Dutch courts, Anton Ivanov, Chairman of the Supreme Commercial [Arbitrazh] Court of the Russian Federation (2005-2014) and Gerardus Josephus Maria Corstens, former President of the Supreme Court of the Netherlands (2008-2014); an English barrister, Sophie Lamb, QC, specialized in international arbitration practice, Partner in the London Office, Latham & Watkins LLP; an international law expert, Anatoliy Kovler, Head of the Centre of Foreign Legislation and Comparative Law at the Institute of Legislation and Comparative Law, Government of the Russian Federation, former Judge at the European Court of Human Rights (1999-2012). *See also* https://spblegalforum.ru/ru/news/20190517_justiciability; video recording of the session: https://spblegalforum.ru/ru/2019_Video (session 4.7).

[2] *See supra* note 1.

[3] *See* Manuel Indlekofer, *International Arbitration and the Permanent Court of Arbitration, International Arbitration Law Library,* Vol. 27, Kluwer Law International 2013, pp. 133-134.

[4] ECtHR, *OAO Neftyanaya Kompaniya Yukos*, application No. 14902/04. Regarding the proceedings before the ECtHR as well as – largely simultaneously – before international arbitration tribunals, *see also* Matti Pellonpää, 36 HRLJ 353 (2016) at pp. 361-366 (Lessons to be Learned from the Yukos Saga?).

[5] It is said that 'a violation of Article 18 ECHR occurs when the executive branch of government *male fide* tries to erode the social, political and economic *contre-pouvoirs* within a State and when the institutional *contre-pouvoirs*, namely the judicial and the legislative branch of government, fail to avert this erosion'. *See* Aikaterini Tsampi, "The new doctrine on misuse of power under Article 18 ECHR: Is it about the system of contre-pouvoirs within the State after all?", *Netherlands Quarterly of Human Rights,* Vol. 38 issue 2, 2020, p. 134. https://journals.sagepub.com/doi/full/10.1177/0924051920923606

2. The cases of three major shareholders of Yukos Oil Company in investment arbitration under the auspices of the Permanent Court of Arbitration in The Hague

Three decisions (each more than 600 pages in length) were rendered the same day, on 18 July 2014, regarding final awards in: *Hulley Enterprises Ltd. (Cyprus) v. Russian Federation* (PCA Case No. AA 226), Russia ordered to pay damages in the amount of USD 40 billion (exactly 39,971,834,360 USD); *Veteran Petroleum Ltd. (Cyprus) v. Russian Federation* (PCA Case No. AA 228), damages awarded in the amount of 8.2 billion USD (exactly 8,203,032,751 USD); and *Yukos Universal Ltd. (Isle of Man) v. Russian Federation* (PCA Case No. AA 227), Russia ordered to pay damages in the amount of 1.8 billion USD (exactly 1,846,000,687 USD).

II. Justiciability and the 'Political Question' in American Law

The concept of justiciability originated in common law countries. In the USA, the concept was used in 1803 in *Marbury v. Madison*,[6] a famous U.S. Supreme Court case in which Chief Justice Marshall distinguished between individual rights that depend upon the performance by the executive branch of its *legal duties* and political matters that are entirely within the President's *discretion*. If the first matters are justiciable, the second are not. He explained that the US Constitution entrusted a scope of discretion in some areas to the executive departments alone. Despite more than two centuries of history, the concepts of justiciability and the political question still have no clear terms and boundaries of application. At the same time, in US judicial practice and doctrine, these concepts are perceived as categories that allow courts, for the purpose of stable state administration, to exercise 'oversight' in invalidating executive acts, guarantee the operation of the principle of separation of powers, preserve the legitimacy of an unelected judicial branch, whilst simultaneously enabling a dialogue with the other branches and the public.[7]

Traditionally, a question of whether a case represents a 'political question' (in addition to cases related to the executive branch's implementation of foreign and military policy) has been considered by the US courts in partisan gerrymandering claims. In the recent *Rucho et al. v. Common Cause et al.*[8] in 2019, the U.S. Supreme Court ruled that while partisan gerrymandering may be 'incompatible with democratic principles', the courts *cannot* review such claims, as they present *nonjusticiable political questions outside the remit of these courts*. In US jurisprudence, another concept exists (*police power*) where the federal courts are not competent to review state laws enacted within their territory for the betterment of public health, safety and morals.[9]

According to Rachel E. Barkow, professor at NYU School of Law, the concept of a 'political question' in its classical sense is necessary from two points of view. First, it allows each branch of government to be in its own constitutional 'field', and, second, it prevents a situation where the Supreme Court is effectively left alone to police the boundaries of its power and thus is allowed to act self-interestedly. The concept of a political question allows the court to take a more modest, functional view of its own powers and capabilities. Otherwise, 'a constitutional conversation among three coordinate branches would turn into a monologue by the Supreme Court'.[10]

While the relationship between law and policy is perceived as a social and philosophical question, in the context of international dispute resolution it acquires not only applied relevance for determining the competence (jurisdiction) of the tribunal, but is essential for the credibility of international courts and the very future of international justice.

III. International Policy and International Justice

Almost any high-profile international process could be considered to be political. The session of the St. Petersburg International Legal Forum recalled the international investment arbitration claims of Philip Morris against Uruguay and Australia in relation to national anti-tobacco regulations,[11] *Georgia v. Russia*[12] and *Ukraine v. Russia*[13] inter-State cases in the European Court of Human Rights (ECtHR), and the abovementioned *Yukos* case.[14] One can also recall the Transnistrian disputes in the ECtHR, where the international court artificially expanded the scope of Article 1 of the European Convention on Human Rights and assumed the burden of determining the

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[6] 5 U.S. 137 (1803).

[7] *See* Jared P. Cole, *The Political Question Doctrine: Justiciability and the Separation of Powers. Congressional Research Service Report,* December 23, 2014 with reference at pp. 11 ff. to the recent Supreme Court judgment of 26 March 2012, *Zivotofsky v. Clinton* [published in 32 HRLJ 188 (2012)] which appears to have narrowed the scope of the political question doctrine.

[8] 588 U.S. (2019). https://www.supremecourt.gov/opinions/18pdf/18-422_9ol1.pdf

[9] Application of this concept in *Plessy v. Ferguson* in 1896 allowed the U.S. Supreme Court to uphold the reasonableness and constitutionality of racial segregation in the Southern States, *see* 163 U.S. 537 (1896). https://supreme.justia.com/cases/federal/us/163/537. The illegality of this statement is now beyond doubt; *see* in the context of segregation of white and colored children in public schools, U.S. Supreme Court judgment of 17 May 1954 in *Brown et al. v. Board of Education*, 347 U.S. 483 (1954), esp. at p. 495: "We conclude that in the field of public education the doctrine of 'separate but equal' has no place." Regarding 'race' having been taken into account in affirmative action programs, *see* also USSC judgment of 28 June 1978 in *Bakke*, 438 U.S. 265 (1978), *Regents of the Univ. of California v. Bakke*.

[10] R. Barkow, "The Rise and Fall of the Political Question Doctrine", in: N. Mourtada-Sabbah, B. Caine (eds.), *The Political Question Doctrine and the Supreme Court of the United States,* 2007, pp. 44-45.

[11] *See* for example: https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/421/philip-morris-v-australia; https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/368/philip-morris-v-uruguay

[12] In total, since 2007, there have been four cases brought by Georgia v. Russia:
- *GEO v. RUS (I),* no. 13255/07, judgment of 3 July 2014 (merits); judgment of 31 January 2019 (just satisfaction);
- *GEO v. RUS (II),* no. 38263/08, lodged on 11 August 2008, declared admissible on 13 December 2011, still pending before the Grand Chamber;
- *GEO v. RUS (III),* no. 61186/09, on 10 March 2010 a Chamber of the Court decided to strike the application out of the list of cases (*see* Article 37 § 1 (a) ECHR);
- *GEO v. RUS (IV),* no. 39611/18, lodged on 22 August 2018, still pending, not yet declared admissible.

[13] In total, since 2014, there have been eight cases brought by Ukraine v. Russia:
- *already struck out of the list of cases:* no. 49537/14
- *pending Ukraine v. Russia*
  - *re Crimea (2 cases):* no. 20958/14 of 13 March 2014; no. 42410/15 of 27 August 2015 (*see* GC decision on admissibility of 16 December 2020);
  - *re Eastern Ukraine (3 cases):* no. 8019/16 of 13 March 2014; no. 43800/14 of 13 July 2014; no. 70856/16 of 27 August 2015 (application number allocated on 25 November 2016);
  - *re Detention and Prosecution of Ukrainian Nationals on Various Criminal Charges (1 case):* no. 38334/18 of 11 August 2018 (Press Release ECHR 277(2018) of 27 August 2018);
  - *re Sea of Azov (1 case):* no. 55855/18 of 29 November 2018 (Press Release ECHR 412(2018) of 30 November 2018).

[14] *See* above at p. 29 (under I.); *see also* Supreme Court of The Netherlands case No. 20/01595, *The Russian Federation v. Veteran Petroleum Limited, Yukos Universal Limited and Hulley Enterprises Limited*.

degree of political influence of one state on the territory of another.[15]

Only over the last year, two inter-State cases, namely *Liechtenstein v. the Czech Republic* (in connection with the confiscation by Czechoslovakia of certain property of German nationals in 1945)[16] and *Netherlands v. Russia* (in connection with the crash of the Malaysian Boeing in Ukraine in 2014),[17] were added to the portfolio of high-profile 'political' cases in the European Court of Human Rights. As a rule, such cases are brought to push international courts to voice their position on issues that are usually decided by way of diplomatic negotiations, at summits of heads of state, or in the UN Security Council and are in the sovereign discretion of national governments and parliaments. The justiciability doctrine may prevent these collisions by legal means. Hersch Lauterpacht, one of the founders of modern international law and Judge of the International Court of Justice, wrote in 1928: '"Justiciable" or "Justiciability" are not terms with which the average lawyer is conversant... he would be inclined to regard a "justiciable" dispute as one over which a competent court has jurisdiction, and he would argue that in a civilised country all disputes are justiciable', but 'in relations between states... the doctrine of non-judiciable disputes connotes that by the very nature of international conflicts certain disputes between states are removed from the competence of international courts'.[18] This is true for not only purely inter-State disputes, but for other cases, which affect a state's sovereignty.

IV. Vertical and Horizontal Dimensions of Justiciability: The May 2020 judgment of the German Federal Constitutional Court (re: *ultra vires* acts)

In May 2020, the Federal Constitutional Court of Germany (*Bundesverfassungsgericht – in the following:* BVerfG) declared as unconstitutional the European Central Bank's (ECB) measures aimed at boosting the economy of the Euro area (the Public Sector Purchase Programme, PSPP), despite the judgment of the Court of Justice of the European Union (CJEU) to the contrary.[19] This decision of the BVerfG is noteworthy as it considers justiciability issues (although the court does not use this term) both from the point of view of the court's assessment of the measures taken *in the horizontal dimension* (the court's assessment of the *Bundesbank*'s actions to participate within its competence in the formulation and implementation of the monetary measures) and in relation to national and supranational jurisdictions, including the judicial one (the BVerfG, the Federal Government of Germany, the *Bundestag* and the *Bundesbank*, on the one hand, and the bodies of the European Union, the ECB and the CJEU on the other hand) – i.e. in *the vertical dimension*. The BVerfG conducted not only a legal, but also a thorough economic analysis of the relevant measures to determine the competence of the EU bodies and tried to distinguish between the economic policy and the monetary policy. Let us cite here several key arguments from the ruling.

In paragraph 101 of the ruling, the court states that the German Basic Law 'does not authorise German state organs to transfer sovereign powers to the European Union in such a manner that the European Union becomes authorised, in the independent exercise of its powers, to create new competences for itself. The manner and scope of the transfer of sovereign powers must satisfy democratic principles. The substantive leeway to design afforded the *Bundestag* – especially in the form of its budgetary powers – must be preserved.'

'In any case, dynamic [international] treaty provisions must be subject to suitable safeguards that enable the German constitutional organs to effectively exercise their responsibility with regard to European integration' (para. 102). 'Thus, a transfer of sovereign powers [in favour of the ECB as a monetary policy maker in the Euro area] violates the principle of democracy at least in cases where the type and level of public spending are, to a significant extent, determined at the supranational level, depriving the *Bundestag* of its decision-making prerogative' (para. 104).

'If any Member State could readily invoke the authority to decide, through its own courts, on the validity of EU acts, this could undermine the precedence of application accorded to EU law and jeopardise its uniform application. Yet, if the Member States were to completely refrain from conducting any kind of *ultra vires* review, they would grant EU organs exclusive authority over the Treaties even in cases where the EU adopts a legal interpretation that would essentially be tantamount to a treaty amendment or an expansion of its [EU] competences' (para. 111).

'Where an *ultra vires* review or an identity review raises questions regarding the validity or interpretation of a measure taken by institutions, bodies, offices and agencies of the European Union, the Federal Constitutional Court, in principle, bases its review on the understanding and the assessment of such a measure as put forward by the CJEU. However, this no longer applies where the interpretation of the Treaties is simply not comprehensible and thus objectively arbitrary' (para. 118).

'Relevant economic policy effects of the PSPP furthermore include the risk of creating real estate and stock market bubbles as well as the economic and social impact on virtually all citizens, who are at least indirectly affected inter alia as shareholders, tenants, real estate owners, savers or insurance policy holders' (para. 173). 'Based on their responsibility with regard to European integration *(Integrationsverantwortung)*, constitutional

[15] The position set out in the brilliant dissenting opinion of Judge Kovler in the case *Ilaşcu and others v. Moldova and the Russian Federation* (application No. 48787/99 = 25 HRLJ 332 (2004)) continues to be a "guiding star" in opposing attempts to explicitly politicize the concept of human rights in ECtHR practice.

[16] ECtHR, *Liechtenstein v. Czech Republic,* no. 35738/20 of 19 August 2020, pending. *See also* the Grand Chamber judgment of 12 July 2001, ECtHR, no. 42527/98, *Prince Hans-Adam II of Liechtenstein v. Germany,* with comments by Andreas Paulus, "The European Convention on Human Rights as a Mirror of German History", 39 HRLJ 11 at p. 12 with notes 12-16 (2019). *See also* https://www.ejiltalk.org/liechtenstein-v-czech-republic-before-the-european-court-of-human-rights/

[17] The case of *The Netherlands v. Russia,* no. 28525/20, was lodged on 10 July 2020; *see* Press Release ECHR 354 (2020) of 4 December 2020 indicating that the Grand Chamber decided on 27 November 2020 to join the new inter-State application – described as: "shooting down on 17 July 2014 of Malaysia Airlines flight MH17 over Eastern Ukraine" – to the already pending application no. 8019/16 (*supra* note 13 re Eastern Ukraine); the joined case will be referred to as *Ukraine and the Netherlands v. Russia* (nos. 8019/16, 43800/14 and 28525/20). *See also* https://www.government.nl/latest/news/2020/07/10/the-netherlands-brings-mh17-case-against-russia-before-european-court-of-human-rights

[18] H. Lauterpacht, "The Doctrine of Non-Justiciable Disputes in International Law", *Economica*, no. 24, 1928, p. 277. JSTOR, www.jstor.org/stable/2548052. Accessed 29 Oct. 2020.

[19] The underlying judgment of the CJEU (C-493/17 of 11 December 2018 – case of Weiss) was rendered after a request for a preliminary ruling according to Article 267 TFEU); BVerfG, Judgment of the Second Senate of 5 May 2020, 2 BvR 859/15 – PSPP judgment – the following quotes are taken from the Court's unofficial English translation available at: https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2020/05/rs20200505_2bvr085915en.html

organs have a duty to take active steps against the PSPP given that it constitutes an *ultra vires* act' (para. 229). 'As a result, the *ultra vires* act is not to be applied in Germany and has no binding effect in relation to German constitutional organs, administrative authorities and courts. These organs, courts and authorities may participate neither in the development nor the implementation, execution or operationalisation of *ultra vires* acts' (para. 234).

V. Separation of Powers and International Law

These positions show that supranational bodies cannot ignore anymore the system of separation of powers in relevant states and their power to resolve matters of a political nature not only in the fulfilment of international legal obligations, but also in expressing their consent to be bound by such obligations. In this connection, the increasing application in international and national constitutional practice of Article 46 of the 1969 Vienna Convention on the Law of Treaties (VCLT) could be expected. Article 46 VCLT on the one hand deprives states of the right to invoke the fact that its consent to be bound by a treaty was expressed in violation of a provision of its internal law, and, on the other hand, directly provides such an opportunity if that violation was manifest and concerned a rule of its internal law of *fundamental importance*. Obviously, the reference here is made first of all to the provisions that set the fundamental principles of the constitutional order. The latter includes not only rules that can be designated as 'substantive', providing for specific types of legal rights (as, for example, the electoral rights of prisoners in the ECtHR *Anchugov and Gladkov* case[20] and the right of male military personnel to parental leave in the *Markin* case[21]), but also 'procedural' rules: setting the right of access to court, implementing the principle of separation of powers (including the division of competence between the president, the government and the parliament in the implementation of foreign policy), the mechanism of judicial and legislative control over the executive, etc.

The BVerfG, in the above-cited judgment, recognised that it is impossible to implement the decisions of supranational bodies, as such decisions were adopted without taking account of the powers of the *Bundestag* as a representative and legislative body of Germany, and noted that the transfer of sovereign powers must satisfy democratic principles. Making a political decision requires a sufficient level of legitimacy for the decision-making organ. In the event that such a decision has been made not only in the form of a law approved by an elected parliament, but by a national vote, it is obvious that any acts (including international ones) directly contrary to that decision are not to be applied in the territory of that state. For example, in the Russian legal system, the highest level of legitimacy is required for the adoption and amendment of the provisions contained in Chapters 1 'Basics of the Constitutional Order' and 2 'Human Rights and Freedoms' of the Constitution, which by virtue of its Article 125 cannot be revised by the parliament and may be changed only by adopting a new Constitution approved on the basis of the results of a national vote. Similarly, the BVerfG pointed that the prerogative of the German parliament to take all essential decisions on revenue and expenditure forms part of the core of Art. 20(1) and (2) of the German Basic Law, which is '*beyond the reach of constitutional amendment*' (para. 104), i.e. a power that is crucial for the *constitutional order* and forms part of the Basic Law's *constitutional identity* (para. 101).

The above statements can in no way question the unconditional obligations of states to comply with and respect international law. Moreover (as noted by the BVerfG), the responsibility for the development of international law and achievement of objectives of international treaties lies with national constitutional organs, including the highest courts. The said organ *must respond* to violations of the fundamental principles and rules of international law, the provisions of international treaties, especially if such violations result in *ultra vires* acts, arbitrary application and interpretation of the treaties not so much in contradiction with the principles of national law of the Member States, but in violation of the objectives of the treaty itself. In its judgment, the BVerfG repeatedly mentions the responsibility of the Federal Government and the *Bundestag* with regard to 'European integration', and in fact advocates such integration, and not only for the national sovereignty, stating that the international organs exceeded their competences.

VI. Limits of Investment Arbitration Competence

In some specific sense, the position of the BVerfG resonates with the arguments of the respondent in the *Yukos* case. Let us recall that in accordance with an arbitration award of 2014 Russia had to pay more than USD 50 billion in compensation for damages to former majority shareholders in connection with sanctions imposed on the company for large-scale violation of Russian tax law in the early 2000s.[22] At the same time, investment arbitration, and then the Dutch Court of Appeal, both confirmed the validity of the arbitration award, recognised that the competence of arbitration could also be based on the provisions of *a not ratified* treaty (the Energy Charter Treaty was signed but not ratified; the signature of the Russian Federation was withdrawn in 2009).

Without refining the limits of the provisional application of a treaty, we note that it is exactly in this case where not just 'simple' provisions of national law or 'ordinary' rules of the Constitution, but the fundamentals of the constitutional order of the country, including the right of access to court and the principle of separation of powers, have been affected.[23] Following the logic of the arbitration, one may conclude that the executive branch (in the case of *Yukos*, the Russian government in 1994), without the approval of the parliament can freely consent to the exclusion of the competence of national courts (including the Constitutional Court) with regard to the legal review of its actions in the implementation of economic, investment and tax *policies* and transfer such powers to private persons (arbitrators in international arbitration). In this sense, the provisional application (without ratification) of a treaty providing for the relinquishment of jurisdiction over a state-involving dispute would be equivalent to a violation of the fundamental *right to the lawful court*[24] – i.e. the need to establish jurisdiction exclusively by law adopted by the parliament and not by government order. The right of access to a competent court is widely used in ECtHR case-law, which in particular has repeatedly affirmed that even in arbitration, if it is compulsory for the parties, such

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[20] ECtHR, *Anchugov and Gladkov v. Russia* (application No. 11157/04 et al., 4 July 2013 = 33 HRLJ 119 (2013)).

[21] ECtHR, *Konstantin Markin v. Russia* (application No. 30078/06, Grand Chamber judgment of 22 March 2012).

[22] *See* the Introduction above at p. 29 f. under I.1. and I.2. All case files are available on the website http://yukoscase.com/

[23] As confirmed by the Russian Constitutional Court in the Ruling No. 2867-O-P of 24 December 2020 with regard to the impossibility of the provisional application of arbitration agreements in unratified international treaties.

[24] *See* the overview of this right in various European constitutions in the European Commission for Democracy through Law (Venice Commission) Comments on European Standards as Regards the Independence of the Judicial System: Judges (by Angelika Nussberger). 2008. pp. 2-3 // https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-JD(2008)006-e

arbitration is subject to the universal requirements of Article 6 (1) ECHR, under which the right to a fair trial shall be implemented by an independent and impartial tribunal *established by law*.[25]

It is noteworthy that The Netherlands (whose Supreme Court is considering the application for setting aside the *Yukos* award[26]) has recently become a respondent in investment arbitration cases initiated inter alia by German energy companies based on the mentioned Energy Charter Treaty, which companies are seeking compensation for The Netherlands passing a law prohibiting the use of coal.[27] Such cases (similar claims based on the Energy Charter Treaty were filed against Germany – in connection with the restrictions on nuclear power imposed after the Fukushima accident[28]) prompted the general public and the political class in Europe to question the feasibility of the treaty, originally designed to secure Western investments in former Soviet countries, but subsequently turned into a 'truly anti-democratic tool in the hands of private arbitrators (representing the highly secretive parallel justice system)', under the threat of huge financial sanctions, forcing states to change their policies, including with regard to the protection of the right to a healthy environment.[29]

Some believe that nothing prevents international arbitration from reviewing the constitutionality of national laws applicable in the case.[30] We cannot agree with such a thesis, since it is not based on international law. Indirect and direct judicial control[31] remains in the jurisdiction of national courts. International arbitral tribunals should apply national law in the very same meaning as interpreted by national constitutional and supreme courts. If we assume that arbitrators can interpret the rules of national law autonomously, it is necessary to agree that, for example, Russian, German or Polish law would then have both 'for domestic use' and 'export' versions. The 'export' version in its turn may have multiple variations, depending on which of the international tribunals[32] has interpreted it.

The last word in the development and interpretation of the rules of national law always remains with the national courts of the relevant country. As the Lord Chief Justice of England and Wales said in 2016: 'it is the [national] courts that develop the [national] law; courts articulate and explain rights, including definitive rulings on the scope and interpretation of contractual clauses, financial instruments and so on. Arbitration does not. Open court proceedings enable people to watch, debate, develop, contest, and materialize the exercise of both public and private power. Arbitration does not'.[33]

Even those authors who salute the modern system of investment arbitration because they view it as the hallmark of an emerging unique 'Global Administrative Law'[34] which is autonomous from national law and order and is able to 'discipline' the states, admit the following. Firstly, international arbitrators are commercially interested in their future appointments to cases, are not free from other political and professional activities incompatible with their impartiality and therefore tend to interpret the competence of investment arbitrations more extensively.[35] Secondly, in investment arbitration there are issues of the state's activities in the exercise of public power (unlike international commercial arbitration), regulatory relations between the sovereign and the individual. Thirdly – and most importantly – the consent of the state to transfer to *investment* arbitration the powers to resolve disputes is fundamentally different from that of commercial arbitration or an investment arbitration based on *an agreement* between a state and a *particular* private investor.

In the first case, when consenting to arbitration the state is not acting in a private capacity in accordance with the principle of party autonomy; its consent is general and extends to an indefinite number of persons (investors) whose identities are unknown at the time of passing the jurisdiction from domestic courts of the host state to arbitration. The general consent transforms investment arbitration from a sub-category of commercial arbitration, based on a reciprocal legal relationship between private parties, into an adjudicative mechanism to *control* (emphasis added) the exercise of public authority.[36]

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[25] *See* for example the ECtHR judgment of 28 January 2020 in the case of *Ali Riza and Others v. Turkey* (applications No. 30226/10 and 4 others) where the Court decided that Turkey must reform its system for settling footbal disputes; the Court held: 'a distinction must be drawn between voluntary arbitration and compulsory arbitration. If arbitration is compulsory, in the sense of being required by law, the parties have no option but to refer their dispute to an arbitral tribunal, which must afford the safeguards secured by Article 6 § 1 of the Convention' (para. 174).

[26] *Russia v. Veteran Petroleum – Yukos Universal – Hulley Enterprises,* Dutch Supreme Court Case No 20/01595, ECLI:NL: PHR:2021:425, pending.

[27] *RWE AG (German) and RWE Eemshaven Holding II BV (Dutch) v. Kingdom of the Netherlands,* ICSID Case No. ARB/21/4 and *Uniper SE (German), Uniper Benelux Holding B.V.(Dutch) and Uniper Benelux N.V. (Dutch) v. Kingdom of the Netherlands,* ICSID Case No. ARB/21/22, both pending.

[28] *Vattenfall AB and others v. Federal Republic of Germany*, ICSID Case No. ARB/12/12, pending.

[29] https://www.equaltimes.org/how-the-little-known-energy?lang=en#.X2NoGOtuzb1

[30] *See,* e.g.: Andrzej Olas, "May International Arbitral Tribunals Declare Laws Unconstitutional? An International and a Polish Perspective on the Issue of Dealing with Unlawful Laws"*, Journal of International Arbitration,* 2017, Vol. 34, Issue 2, pp. 169-206. The article is based on the positions of Jan Paulsson (Prof. em., University of Miami School of Law, appointed arbitrator in some 250 cases). Olas' reference to the 1958 New York Convention made to support the above thesis seems irrelevant. The said convention, be it in spirit or letter, does not address the relevant issues.

[31] When exercising *indirect* regulatory judicial control in civil proceedings, the court reviews the legality of government actions if such action (act) represents a legal fact underlying the grounds of a civil claim. If the court finds an act (action) illegal when exercising indirect regulatory control (unlike *direct* regulatory control in administrative or constitutional proceedings), it does not recognise the act invalid (illegal) itself, but just does not apply the illegal act in the case.

[32] Or foreign courts when considering the recognition and enforcement of, or setting aside, an arbitral award.

[33] Lord Chief Justice of England and Wales Lord Thomas of Cwmgiedd (Bailli Lecture 2016). https://www.judiciary.uk/wp-content/uploads/2016/03/lcj-speech-bailli-lecture-20160309.pdf

[34] Global Administrative Law (GAL) is defined as the principles, procedures, and review mechanisms emerging to govern international organizations, intergovernmental networks, distributed administration, and both hybrid public/private and private transnational regimes decision making and rulemaking, largely leaving aside the substantive content of rules and considering GAL's sources more broadly than classical sources of public international law, *see*: Benedict Kingsbury, Nico Krisch, Richard B. Stewart, "The Emergence of Global Administrative Law", *Revue internationale de droit économique*, 2013/1 (Vol. XXVII), pp. 37-58. DOI: 10.3917/ride.259.0037. URL: https://www.cairn-int.info/journal-revue-internationale-de-droit-economique-2013-1-page-37.htm.

[35] As noted, 'it is all too often that arbitrators are only happy to decide that they have jurisdiction' (author's translation), s*ee* Opinion of Advocate General before the Dutch Supreme Court, 28 March 2014, ECLI NL: PHR:2014:1774. The Advocate General stated in para. 11.10 of the Opinion that the doctrine adopts the presumption that arbitrators, being financially interested, face the temptation to 'prioritise the rights of investors' (author's translation), *ibid.,* https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:PHR:2014:1774.

[36] Gus Van Harten, Martin Loughlin, "Investment Treaty Arbitration as a Species of Global Administrative Law"*, The European Journal of International Law* (2006), Vol. 17 No. 1, pp. 121-150.

According to other scholars, the irony is that investment arbitration that was originally understood to provide a neutral non-political forum for the resolution of disputes has been heading down a trajectory of re-politicisation.[37]

VII. Concluding remarks

What is next? How to find a balance between the political and the legal in international justice?

In an attempt to answer this question, let's again recall the words of Hersch Lauterpacht: 'While it is not difficult to establish the proposition that all disputes between States are of a political nature, inasmuch as they involve more or less important interests of States, it is equally easy to show that all international disputes are, irrespective of their gravity, disputes of a legal character in the sense that, so long as the rule of law is recognized, they are capable of an answer by the application of legal rules'.[38]

In order to begin to solve the problem, it is necessary to honestly admit its existence. International tribunals are increasingly expanding their own competence to cover issues traditionally reserved for national authorities and/or lying exclusively in the diplomatic realm. The 'evolutive' interpretation of rules of international law adapted by international tribunals (and other international organs) contradicts their literal meaning as originally intended by the states and is becoming a persistent trend. This entails a natural reaction of national legal systems represented by higher courts: on the one hand, they avoid direct confrontation through maintaining the classical paradigm of respect to international law, and, on the other hand, draw 'border lines' designed to limit the jurisdiction of international courts and arbitration tribunals. As a rule, such border lines are established to secure the most important political issues, which cannot be resolved without constitutional mechanisms, including those that contemplate the expression of the will of the people or their elected representatives in democratic procedures.

Such actions have no resemblance of a comprehensive dialogue. Rather, they resemble a series of unilateral reactions, 'sounding out' each other's positions and the limits of prudence. At the same time, no peaceful resolution of the conflict of jurisdictions is possible without understanding the problem in the legal plane, without joint determination of the question which cases are *justiciable* in the international process, and which questions should be considered 'political'.

The politicisation of international arbitration is a question that should not be embarrassingly swept under the carpet or considered marginal. Otherwise, there is a risk that it would finally destroy the international dispute resolution system and, as a consequence, undermine the mechanisms of international law. We have already witnessed some harsh attempts by certain states, including the USA, not just to unilaterally reject the jurisdiction of international courts in an 'inconvenient' case (the International Court of Justice),[39] but threatening officers of the court with prosecution (the International Criminal Court).[40]

Assuming that the concepts of justiciability and 'political questions' can be applied in the field of international dispute resolution, it is necessary to determine what we mean by the latter in *the legal sense*, in relation *to international justice*. If we go further than just listing the relevant categories of cases, and find a common generic feature of such cases, a political question can be understood as a question arising in the consideration of an international dispute that allows *a formally lawful* decision *in favour of either party to the dispute* and, as a consequence, *allowing the court to make a decision based on the interests of a political group*, supporting the position of one of the parties, and *having the greater influence on the judges*. The described situation should be distinguished from *deliberately wrongful* decisions based on a conscious misrepresentation of facts and law in favour of opportunistic interests, as well as from the situation when the tribunal acts apparently outside its remit (*ultra vires* act).

If a tribunal is to decide a case that represents a 'political question', in addition to a *primary test* to find whether the case meets the above described criteria, it must also conduct a *secondary test* which should help the judges or arbitrators answer the question of whether they are ready to and whether they should consider the case *on the merits* (and not to recognise it inadmissible on procedural grounds), i.e. to make a judicial intervention, rather than to show 'prudence'[41] or even judicial 'modesty'.[42]

Such *a secondary test* can include three aspects considered altogether.

First, the *reputational aspect*. It is necessary to determine what will be the level of legitimacy of the future decision. Will it be perceived as just and fair, and will the court's reputation be strengthened in the long run? Is there certainty that the decision will actually be enforced?

Second, the *axiological (value) aspect*. Will the court's decision on the matter actually achieve the objectives for which the rule, relied upon by the court, was established? Will the decision help achieve international peace and security and increase the level of mutual understanding between the subjects of international law as well as a constructive resolution of the 'political' question?

Third, the *institutional aspect*. Are the procedures of a particular tribunal suitable for the most complete and objective examination of the question raised? Do the judges have knowledge and expertise in these matters? Is the court confident that the decision will be based on proven and reliable facts? Is there a more convenient judicial or *extrajudicial* forum for this question?

Finally, neutrality remains the key asset for any international tribunal.[43] If a referee wants to see his name in the newspapers next to the names of goal-scoring forwards, and for this purpose appears on the field not to judge, but to play alongside the teams, he is no longer a referee, but one of the football players. That said, any game needs clear rules and impartial referees to oversee their enforcement. Otherwise, such a game has no future.

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[37] Catharine Titi, "Are Investment Tribunals Adjudicating Political Disputes?: Some Reflections on the Repoliticization of Investment Disputes and (New) Forms of Diplomatic Protection", *Journal of International Arbitration*, 2015, Vol. 32, Issue 3, pp. 261-288.

[38] H. Lauterpacht, *The Function of Law in the International Community (first published in 1933),* republished by Oxford University Press, 2011, at pp. 165 f.

[39] https://www.haaretz.com/us-news/u-s-pulls-out-of-vienna-treaty-following-palestinian-complaint-1.6529650

[40] The ICC is currently investigating whether US forces committed war crimes in Afghanistan, *see* https://www.bbc.com/news/world-us-canada-54003527 which refers to senior officials in the ICC, including chief prosecutor Ms Fatou Bensouda and Phakiso Mochochoko, head of the ICC Jurisdiction, Complementarity and Cooperation Division.

[41] *See* Mark V. Tushnet, "Law and Prudence in the Law of Justiciability: The Transformation and Disappearance of the Political Question Doctrine". 80 *N.C. L.* Rev. 1203-1235 (2002), https://scholarship.law.georgetown.edu/facpub/254/

[42] *See* Jared P. Cole, *The Political Question Doctrine: Justiciability and the Separation of Powers. Congressional Research Service Report.* December 23, 2014, p. 19.

[43] Geert Corstens, Former President of the Supreme Court of The Netherlands, closed his speech at the Forum session (*supra* note 1) described in the foreword with the following words: 'if a judge starts to take an active interest in politics, then it's time for him to resign.'

Editors' note: *See also* the Opinion of the Venice Commission on the March 2020 draft amendments to the Russian Constitution, 40 HRLJ 468-477 (2020), in the present issue.