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Editorial

Guest Editorial: Ten Years of ESIL – Reflections; European Hypocrisy: TTIP and ISDS; Masthead Changes; Roll of Honour; In this Issue; Christmas Reading? Christmas Gifts? Some Suggestions from the Editor-in-Chief

From time to time, we are asked about the relationship between *EJIL* and the European Society of International Law (ESIL). That relationship is simple: the Journal and the Society are two separate, but mutually supportive and complementary entities. Indeed, past and present *EJIL* Editors can boast, with parental pride, of having been present at the conception, as well as the birth, of the Society! From its inception, membership in ESIL has included automatic online and print subscriptions to *EJIL* – including very soon a tablet version.The relationship has only strengthened in recent years, with ESIL Presidents and Presidents-elect serving ex officio on the *EJIL* Board. It is in the spirit of that growing bond that we wholeheartedly share in ESIL's 10-year celebrations, and have invited the following Guest Editorial from its leadership.

Guest Editorial: Ten Years of ESIL – Reflections

Ten years ago, the European Society of International Law (ESIL) organized its Inaugural Conference in Florence. Some papers were later published in the Baltic Yearbook of International Law but, other than that, most presentations at the event have long been forgotten. Yet that event was one of those moments where the participants still proudly recall that they were there: yes, I was there in Florence when ESIL started, I was there when the seed was planted.

Ten years later, although ESIL has matured rapidly with the development of a wide array of activities, the Society is still in its formative stage. There is a real sense that ESIL is beginning to realize its enormous potential for understanding and influencing international law in Europe and throughout the world. But this is not a self-propelling process. On a day-to-day basis, critical choices have to be made on the directions in which the Society can and should evolve.

As the Society continues to develop, it is important to remain mindful of the origins of ESIL. Looking back on what motivated the founders of ESIL, there is one theme that dominated: ESIL was established out of the perceived need to create a European forum for European-wide discussions, against a background of a rich European tradition, of international legal issues of concern to Europe. Until ESIL was founded, there had

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been no forum in which to pursue those goals on a Europe-wide basis and to meet the need for the exchange of ideas and, where possible, the cultivation of shared positions within Europe. There was a sense that European international lawyers should have their own identity and should position themselves as Europeans in global debates. The rapidly developing powers of the EU, the aftermath of the fall of the Berlin Wall and, at a scholarly level, an increasing self-awareness of the tradition and potential of European international legal scholarship were drivers to this end.

Much has been done to fulfil the promise of 2004. ESIL has become a European forum in the widest sense: whereas there were participants from 29 states at that inaugural meeting in Florence, ESIL now has members from more than 60 states. It hosts events in many countries and its conferences, which are held each year in a different location, provide a forum for discussion throughout Europe, most recently with the 10th anniversary conference in Vienna, and with future conferences to be held in Oslo, Riga and Naples.

However, there is still a lot to be done. The mission of ESIL remains as urgent as in 2004. The Society can become more relevant by increasing membership and by enlarging the participation of practitioners in the Society. While the need to create a European forum induced the establishment of the Society, the global nature of many problems requires that the Society moves beyond its European focus. Also for this reason, we are further developing the fruitful relationships with societies of international law in other regions.

The relationship between the Society and the *European Journal of International Law* is critical for strengthening the quality and impact of international law scholarship in Europe. Leading up to the 2004 inaugural conference in Florence, *EJIL* editors played a key role in setting up the Society. While it may appear that *EJIL* and ESIL have mostly led separate lives since Florence, the relationship between the two is in fact a close one and the mutual links have recently come into sharper focus. This is a very positive development as the Society and the Journal are largely complementary. In terms of substance, both are part of and build on the European tradition, explore European perspectives on grand challenges, and provide fundamental perspectives on European problems. Between them, ESIL and *EJIL* provide a rich palette of materials for international lawyers: the Journal, ESIL conference publications, ESIL Reflections, EJIL: Talk!, the ESIL Lectures Series, and EJIL: Live!. Some members of the ESIL Board are also members of the *EJIL* Editorial Board and Scientific Advisory Board, and vice versa, further strengthening the relationship and exchanges between the two. Moreover, both are based in Florence at the European University Institute, a symbolic independent base in Europe. This proximity is to be further developed through partnership initiatives for the benefit of both members of ESIL and readers of *EJIL*.

As the Society enters its second decade, ESIL needs to move beyond planting seeds. As in 2004, there is a critical need to reflect on and contribute to the respect for the rule of international law in Europe and throughout the world. With the support of its increasing membership, ESIL has the potential to further contribute to this ongoing debate and become a key actor on the European and international scene.

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European Hypocrisy: TTIP and ISDS

I

For some, the Transatlantic Trade and Investment Partnership (TTIP) in and of itself has become, in many European (and American) circles, the enemy: another manifestation of unchecked globalization, the march of Capital trumping social, environmental and other rights, an unhealthy embrace of the Americans from whose clutches we have painfully managed to extricate ourselves, et cetera. Yes, there is some sarcasm or irony in the above, but visit the blogs and you will see where it comes from. My sarcasm should not be taken as a dismissal of all or any of these concerns. TTIP is far from Snow White. The concerns are not entirely fanciful. It is the final objective I oppose: a no-holds-barred attack on TTIP with the objective of tanking the whole agreement. If this is your view, do not waste your time here and skip to another item.

A wholesale defeat of TTIP, if achieved, will, I believe, be a big time Pyrrhic victory – a hugely missed opportunity for the polities and the peoples of these polities.

I support the TTIP for two obvious and banal reasons. First, there is every reason to believe that on aggregate it will contribute significantly to an increase in welfare in both polities, enhance growth, contribute to stability and constitute another tool, in an embarrassingly empty toolkit, to combat future transatlantic-generated economic shocks. A large and often unspoken asset of TTIP rests not with the content of the various substantive disciplines but in establishing a culture of joint conversation, regulation and management. It will counter the litigious and confrontational culture of the WTO, where the EU and the USA find themselves typically as rivals and antagonists. Constructivist theory actually has something to say here as do the insights of Global Administrative Law scholarship.

To be sure, and let us state this for the nth time: the notable wealth creation effect of an agreement such as TTIP will not accrue evenly. The rich, Capital, will get a lot richer than the rest. But, and let us state this too for the nth time: how to distribute the bag of cookies produced by trade and investment treaties is the responsibility of the various partner countries, primarily with their fiscal and other forms of redistributive mechanisms. There is huge variation here and many countries have effective redistributive policies in place. Let us not alibi our non-progressive and ineffective wealth distribution mechanisms by scapegoating the mechanisms which create more wealth to redistribute if we are so minded.

Second, I support TTIP for a far deeper reason. I do think that the current circumstance – the post-Cold War era (though a new chill is about us), with a variety of growing threats to European and global security (do I really need to list the altogether new and menacing sources of danger?) in an era in which the *Pax Americana* has effectively come to an end – has produced a new set of daunting challenges to our objective of assuring security and prosperity to our peoples. Similar threats challenge not only European prosperity in fields as diverse as energy, supply routes or outlets for European food production but also deep values which underpin our political culture and political institutions. Ukraine, and our relative impotence in its regard, is emblematic for all of the above.

The TTIP, way beyond its immediate potential economic benefits, represents an important strategic asset (not the only one to be sure) in the forging of a relationship

between Europe and the United States where, unlike the military area, Europe has an equal weight, equal leverage, and equal influence, including on American internal policies – a Partnership of Equals with a spillover to fields way beyond the specific obligations of TTIP. TTIP, as a strategic asset, is of an importance to Europe (and to Europe and the United States together) that cannot be measured with the predictions of euros or dollars and cents. Some things are priceless – for the rest there is …

One of the most common, frustrating and at times laughable aspects of the globalization debate is the notion that the institutions against which we throw stones 'promote globalization'. I have always seen it the other way round: those institutions, such as the WTO, (inadequately, at times) regulate it. And if stones need to be thrown it is to egg them on to do more, not less. Trade, for example, is so much better regulated than capital. A multilateral investment regime, given the composition of the stakeholders, would balance far better the interests of capital-exporting and capital-importing countries and would so much better balance and address the shameful exploitations and arbitral biases that are now part of the thousands (!) of bilateral investment treaties (BITs) which are for the most part offered on a take-it-or-leave-it basis between bilateral unequal partners. You do not need to be Machiavelli to guess the stakes and special interests which have thwarted progress in this area.

II

Of all the roadblocks to a successful negotiation of the TTIP, the provisions of Investor-State Dispute Settlement (ISDS) loom largest. The tone is shrill and it comes in large part from the political classes and, at times, even from the highest echelons of government. The litany of complaints and objections is well known and articulated at different levels of generalization: ISDS constitutes an assault on sovereign institutions; a circumvention of the normal national judicial procedures; a privileging of private investor interests (American to boot) over European societal interests; an arbitral system which is elected by the parties, answerable to no one and for which there are but limited appeal possibilities. Much of this is correct and well founded.

The Economist, which I mention by name because, like the *Financial Times*, it enjoys an importance that oft wildly transcends the intrinsic quality of some of the things they publish (this notwithstanding my addiction to both), acknowledges the problem but suggests a seemingly simple remedy: keep the substantive provision of investment, but move away from the investment treaty model of investor-state dispute settlement and 'WTOize' it by confining investment disputes to a WTO-style state-to-state regime – a counsel of Athitofel, as I shall presently explain. But the prevailing mood, and sadly this might be where the wind is blowing, would be to have the entire investment or ISDS dropped – a step, in my view, which throws the water out with the baby.

First, then, my claim of hypocrisy. The ISDS chapter in the TTIP is essentially modelled (for good and for bad) on similar regimes in thousands (!) of BITs in force all over the world. Almost all European Member States, among them the shrillest objectors to the ISDS in the TTIP, are not only signatories to such agreements but are heavy users thereof. In bilateral investment arbitration, European investors own the Champion's Cup. All these agreements, with literally a handful of exceptions, are as flawed or worse

than the proposals on the TTIP negotiating table – they are investor interest-skewed in their substantive provisions, and worse; the Bar that adjudicates them is of a limited range (as effectively illustrated in a recent article in *EJIL* vol. 25, no. 2), and dominated by arbitrators from private practice rather than public interest backgrounds (which is not to say that I call into doubt either the good faith or professionalism of that Bar – I have been part of it myself, albeit from a different background, and have come to admire the professionalism of many of its practitioners); and most damning of all, the substantive provisions of the investment treaties, when it comes to protecting societal interests, are woefully defective and inferior when compared with similar public interest provisions in trade agreements such as the WTO itself.

NAFTA is a poster-boy example: you find, in the very same Treaty itself, in its trade provisions, an altogether better and arguably adequate balance between the interest of free trade on the one hand, and public morality, public health, the environment, crime fighting and the like on the other hand, as compared to an altogether skewed and inadequate set of similar provisions in the Investment chapter. The dispute settlement provisions show a similar bias.

The European hue and cry at the ISDS of TTIP is ugly and self-serving when one considers that they themselves have imposed the very same provisions they find so otiose when applied to Europe (in the context of North American investment) in their bilateral investment relations with developing and other countries (where the fear of reciprocal action is negligible) and happily use them, extensively, when the boot is on their foot. These horrible provisions are, it appears, altogether Kosher when applied to others, but oh, so unacceptable when threatening us. It's the NIMBY of international economic law: fine so long as it is not in my back yard.

The Gospel of Matthew says it all:

> *Thou hypocrite, first cast out the beam out of thine own eye; and then shalt thou see clearly to cast out the mote out of thy brother's eye. (Matt. 7:5)*

The Economist's idea of correcting the situation by replacing investor-state arbitration with state-state arbitration is a medicine that is worse than the illness, and this for three reasons. First, anyone close to the WTO or Regional Trade Agreement (RTA) State-to-State Dispute Settlement knows that in many cases the private investment interest just goes underground – they lobby the government, in transparent and oft times less than transparent ways (not all states have the legally controlled procedures of the EU and the USA), they depend on government discretion whether or not to take up their cause and initiate a state-to-state procedure introducing an arbitrary and skewed access-to-justice procedure for aggrieved investors. The bigger the economic stake, the more powerful the multinational, the more likely they are to get the ear of a government which will espouse their case. Just think, say, for more than five minutes of that celebrated case of *Antigua v. the USA* in the matter of internet gambling and you will get the picture: *Res Ipsa Loquitur*! Or consider the current tobacco packaging cases.

In addition, the remedy offered in WTO or NAFTA or RTA style government-to-government dispute settlement is almost always prospective, designed to bring a violation to an end, but offering cold relief, meaning no relief at all, to the individuals for past abuse and heavy loss suffered at any time. (In passing, raising in a WTO policy forum the notion that WTO dispute settlement should deal with past losses is equivalent to crying 'fire' in a crowded cinema.)

There is a third and final flaw to WTOizing ISDS in the context of the Investment chapter. One of the rationales for the creation of, say, the International Centre for Settlement of Investment Disputes (ICSID) and moving towards the regime of BITs, was to de-politicize at a state-to-state level disputes regarding alleged and real maltreatment of investors in foreign countries. Under the old regime (pre-ICSID, BITs and all the rest) any dispute involved the need on the part of one state to bring a claim against another, with at least two inimical results: governments and states, for their own reasons, which had nothing to do with the rights or wrongs of the actual investment dispute, were often reluctant to espouse even palpably just claims; governments espousing a claim and, by definition, creating a state-to-state dispute, increased the stakes involving national honour in winning or losing an international claim – inimical to pacific and functional international relations. Partially 'privatizing' ISDS removed in large measure these inimical results. As a political matter, do we really wish to make run-of-the-mill disputes between investors a matter of inter-state and inter-governmental dispute?

III

What, then, in my view is a rational and sober manner with which to deal with these not simple issues? I think solutions are at hand and not only for the TTIP, Investment and ISDS but also as a model for a whole rethinking of the pathologies of BITs and perhaps as a micro-example for what may later be regarded as a 'best practice' for BIT reform and even, in the longer run, a model for a multilateral investment agreement. There would be poetic justice if the two greatest trading blocs, instead of walking away from the problem, charted an agreed functional way ahead.

Here are some tentative bullet points – a basis for discussion:

- One has to acknowledge that in current investment agreements on which the TTIP is largely based, the substantive protections of public interests range from the defective to the slim to the non-existent. A TTIP Investment chapter should have at least as robust a protection of societal state interests as do equivalent trade agreements – and at times even more robust. The substantive provisions must achieve and be seen to be achieving a better balance between private interests and the collective societal good.
- One should retain the option of direct Investor-State Dispute Settlement and not intergovernmentalize all such dispute settlement for reasons given above. One can consider tightening standing rules and justiciability rules but not to the extent that individual remedies become illusory. Access to justice is one of the solid gains of our understanding of contemporary justice – empty remedies serve neither individuals nor justice.
- No less important a change, in my view, should be in the bodies which entertain and decide investor state complaints and arbitration. The current patchwork of privately appointed panels (even if from state suggested rosters) is inimical both to certainty, the emergence of a coherent body of law as a guide for future panels and, above all, for future investments and contracts between investors and states. Hugely

> important would be the composition of the dispute settlement panels – there are plenty of mechanisms to ensure a different demography to the existing ones, both better representing and sensitive to the competing interests in investment disputes, and seen to be so sensitive. The degree of permanence or semi-permanence of such panels is a matter of negotiations with interesting trade-offs. Likewise, the desirability of having an Instance of substantive (not just residual as is the case now) Appeal (maybe piggy backing on the Appellate Body of the WTO – is that sacrilege?).

Deal with the substantive justice issues in the investment regime and with the composition and permanence of the dispute settlement bodies and you have de-natured the real problem, at the same time providing a model to the entire world of bilateral investment regimes.

I hesitate to say that all this could be negotiated and agreed in a matter of months, but it should be, if there is a will to bring this to closure. The alternative, to tank the entire Investment chapter and ISDS, will not only remove one of the most promising aspects of the TTIP in terms of enhanced mutual investment and wealth creation but risks killing off the entire agreement – whilst leaving intact the highly problematic (with certain shameful aspects) BIT world scene with its thousands of agreements.

Masthead Changes

The growth and development of any organization, even a journal, depends on the strength of its foundations. In the case of *EJIL*, those foundations are represented by its Board of Editors and its Scientific Advisory Board. To maintain their strength, the *EJIL* Boards benefit from change and renewal. Thus, I would like to sincerely thank Anne Peters, who has stepped down from the Board of Editors, for her dedicated commitment and service to the Journal. Anne has now assumed a leadership role in the newly established *Journal of the History of International Law*. We wish the new journal (and Anne) every success. Thanks also go to Francesco Francioni and Hélène Ruiz Fabri who have come to the end of their term on the Board of Editors, but will continue their valuable contribution to the Journal in the Scientific Advisory Board. Dapo Akande, Anthea Roberts and the newly-elected ESIL President, André Nollkaemper, have joined the Board of Editors. Finally, we welcome Jean d'Aspremont, Jan Klabbers, Sarah Nouwen and Anne van Aaken to the Scientific Advisory Board.

Roll of Honour

EJIL relies on the good will of colleagues in the international law community who generously devote their time and energy to act as peer reviewers for the large number of submissions we receive. Without their efforts our Journal would not be able to maintain the excellent standards to which we strive. A lion's share of the burden is borne by members of our Boards, but of course we also turn to many colleagues in the broader community. We thank the following colleagues for their contribution to *EJIL*'s peer review process in 2014:

Tilmann Altwicker, Dia Anagnostou, Stelios Andreadakis, Asli Bâli, Arnulf Becker Lorca, Catherine Brölmann, Gian Luca Burci, Damian Chalmers, Ioana Cismas, Cai Congyan, Kristina Daugirdas, Richard Gardiner, Lech Garlicki, Matthias Goldmann, Hans Morten Haugen, Laurence Helfer, Ian Johnstone, Alexandra Kemmerer, Jan Komárek, Dino Kritsiotis, Jürgen Kurtz, Ulf Linderfalk, David Malone, Petros Mavroidis, Frédéric Mégret, Carrie Menkel-Meadow, Joanna Mossop, Jens Ohlin, Martins Paparinskis, Jacqueline Peel, Cecily Rose, Arie Rosen, Nicole Roughan, Martin Scheinin, Thomas Schultz, Iain Scobbie, Ingo Venzke, Guglielmo Verdirame, Steven Wheatley, Nigel White.

In this Issue

This issue opens with a short, reflective article by Jochen von Bernstorff on the proper role of international legal scholarship. Recapitulating themes and concerns sounded in other articles published earlier in this volume – see, especially, Anne Orford's 'Keynote' and the article by Tilmann Altwicker and Oliver Diggelmann, both in issue 2 – von Bernstorff points to the problematic legacies of positivist 19th-century legal thought and argues that scholarship has the potential to act as a 'cooling medium' for international law and politics. In the next article in the issue, Kristina Daugirdas makes a not-dissimilar case for the importance of the Draft Articles on the Responsibility of International Organizations. Taking the 2010 cholera outbreak in Haiti as a case study, Daugirdas argues that the Articles may turn out to provide a useful focal point for 'transnational discourse' among states and non-state actors about the compliance of international organizations with international law, thereby ultimately accruing to their legitimacy and effectiveness.

Our third article, by Richard Bellamy, continues with the theme of the legitimacy of international organizations. Bellamy takes on political constitutionalist objections that international human rights courts, such as the European Court of Human Rights, lack democratic legitimacy. Rather than reject the premises of those objections he shows how an argument consistent with those premises may be constructed in favour of the European Court of Human Rights. The fourth article in this issue also relates political philosophy to international law. In his article, Oisin Suttle bridges the gap between global justice theory and international economic law, developing a typology of international coercion that promises to illuminate a variety of problems and positions in the regulation of international trade. Look out for the EJIL: Live! interview with Oisin Suttle in which we discuss some of the issues raised by this stimulating article.

Under our regular *EJIL: Debate!* rubric, Lorand Bartels brings us back to the legal obligations of international organizations. Bartels' article considers the human rights obligations imposed on the European Union under EU law, in particular in relation to the extraterritorial effects of EU policy measures; and Enzo Cannizzaro provides a thoughtful Reply. The debate will continue on *EJIL: Talk!* with a Rejoinder by Lorand Bartels to Enzo Cannizzaro. Readers are invited to join the discussion there.

In *Roaming Charges*, we feature a photograph entitled Places of Permanence and Transition: On the Mekong River. When visiting the Mekong, one may shut one's eyes and be transported to the 1930s or 40s or 60s or 90s, or indeed to 2014.

This issue offers two 'bonus' articles under our occasional series, *The European Tradition in International Law*. Helmut Aust examines the contribution of André Mandelstam to the development of international human rights law. Reut Paz

uncovers the largely forgotten career of Helen Silving-Ryu, a student of Hans Kelsen who became the first woman professor of international law in the United States. Both articles approach their subjects with sensitivity to both history and theory. Both make a worthy contribution to the series.

Our occasional series, *Critical Review of International Governance*, presents yet another example of the flourishing 'empirical turn' in international legal scholarship. Drawing on an extensive, original dataset, Thomas Schultz and Cédric Dupont test three commonly-held views about the principal function of investment arbitration. No doubt the debate on this topic will continue, and we welcome readers' responses on *EJIL: Talk!*

The Last Page in this issue presents a poem entitled 'A Pronunciation Lesson' by Jonathan Shaw.

Christmas Reading? Christmas Gifts? Some Suggestions from the Editor-in-Chief

The following is not a '10 Best Books Published in 2014'. Looking back at the books (excluding novels) I read (and in some cases re-read) this year I have picked those which created that 'everyone should read this book' urge that we all experience from time to time. The selection is of course entirely subjective, but rigorous in one sense: knowing how precious reading time is, involving serious opportunity costs, I put on the list only those titles where I felt that I would not run the risk that someone would write to me and say: you wasted my time.

The order of books on the list is arbitrary.

Moshe Halbertal, *Maimonides: Life and Thought*. Princeton: Princeton University Press, 2013

Of Maimonides it has been said endlessly that from [the great Biblical] Moses to Moses [Maimonides] no one has arisen as Moses. (Trust me, it sounds a lot better in pithy Hebrew – *Momoshe ad Moshe Lo Kam KeMoshe*). A son of Cordoba (1138) he spent the central part of his life in Cairo where he died in 1204 and was then buried in Tiberius. Renaissance Man (long before the Renaissance) he was and remains one of the greatest Jewish teachers, scholars, legal decisors, philosophers (in the Aristotelian tradition) and physicians. His codification of Jewish Law has remained normative till this day and his *Guide to the Perplexed* is part of the canon of medieval philosophy and is hugely rewarding to anyone today (all too few, alas) interested in virtue theory. The story of his life, an exile from Caliphate Andalusia and ending as physician to the Crown of Egypt, is not only riveting but offers a window to a world of, inter alia, Islamic glory, which is not often known beyond a small circle of scholars.

Enter another Moses, Moshe Halbertal, the author, inter alia, of a recent study of Maimonides. I read the Hebrew original some years ago but reread the English translation this year. It is a crowded corner and a difficult choice, but with no hesitation I would crown him the most significant and interesting Jewish scholar and intellectual of our times. He, too, is a renaissance man – philosopher, historian, profound jurisprude whose range is vast, making regular forays into the public space with

thought-provoking, mind-shifting essays on contemporary issues. Google, pick out any, and hold your breath.

The great virtue of his book on Maimonides is that both specialist and novice will be drawn into the text to their respective profit, enlightenment and edification. To go from the sublime to the ridiculous, you get two-for-one: an insight into the profound worlds of Moses Maimonides and Moses Halbertal.

Robert Howse, *Leo Strauss, Man of Peace*. Cambridge: Cambridge University Press, 2014

If you have not heard of Leo Strauss (himself a subtle interpreter of Maimonides), move on to the next book. If Strauss is on your radar, you are most likely to fall into one of four groups: a profound admirer (with or without some normative misgivings), a passionate critic (I have not come across non-passionate critics) with strong normative misgivings, an occasional peeping Tom, not a real Straussian but one who enjoys the considerable and never-ending fracas, or, finally, an innocent bystander who may have read a piece or two and does not quite get what all the fuss is about. Robert Howse, one of those prodigies who can write with equal authority and insight on the product-process distinction in international trade as on Alexandre Kojeve (indeed, he is probably today the most authoritative interpreter of Kojeve) has recently published a book on Leo Strauss. The subtitle is *Man of Peace* – a provocation to many protagonists in the Strauss debate. I found the book compelling for several reasons: it is characteristic of Howse scholarship – ideas are backed by careful textual analysis and enviable erudition. He takes a strong position – he is incorrigibly normative. And finally, there is a lucidity and clarity to his text – you never struggle or waste energy in trying to understand what he, in turn, is trying to say, you can instantly engage with his thought. Like Halbertal on Maimonides, Howse on Strauss will certainly engage the experts but can serve, in the best possible way, as a primer for anyone who has kind of heard of Strauss and, indeed, wants to know what all the fuss is about. Howse takes a side in the debate but is scrupulous in alerting the readers to the positions with which he engages. And a final virtue: not too long. You can sit down on a Saturday morning and get up in the evening a wiser and more learned person.

Norman Davies and Roger Moorhouse, *Microcosm. A Portrait of a Central European City*. London: Pimlico; New Ed edition, 2003

Gregor Thum, *Uprooted: How Breslau became Wroclaw during the Century of Expulsions*. Princeton: Princeton University Press, 2011

There are the great cities of Europe: Paris, Rome, London, St. Petersburg, Berlin – add to your heart's content. But there are, too, the magic cities of Europe. I am not talking about anyone's favourite little jewel here or there – with a special hidden treasure, or beauty, or the place where you once fell in love, but those that are on the one hand truly important in understanding Europe, perhaps with an historical patina that gives gravitas, and in addition are beautiful and rich – in culture, in architecture or scenic beauty and, not least, in their humanity. Some candidates? In Spain? Seville

rather than Madrid or Barcelona (which would be candidates for the Great City list). In Greece? Thessaloniki rather than Athens – I wait impatiently for a next May visit. Some I dream of – Odessa, for example.

One such magic city is Wroclaw, for some time Breslau. Its ancient and recent history is a quintessential European story, not to say saga. It belongs to those episodes in European history where European habitual amnesia, political correctness and discomfort with the discomfiting brings out the broom, the carpet is lifted and sweep, sweep. As part of the World War II resolution arrangements, Poland, which lost historical lands in the East to the then Soviet Union, gained Breslau, a major German, among other things, intellectual centre, with a great university (several Nobel laureates, a few Nazis, a few Jews among them – how more European do you get?). In its history the names Bohemia, Poland, Silesia, Habsburg, Germany are all part of the musical chairs. The recent shift from Breslau to Wroclaw was dramatic in its abruptness. I have heard, from local residents, of parents who moved into German homes where coats were still hanging on coat hangers in the cupboards of their new homes. Hold your horses – there are no quick and easy moral judgments to be made here.

The city, on the Oder, is handsome, parts of it stunningly beautiful. There are Starbucks but also plenty a café where you will be stepping into an older world that feels authentic, not kitched up. I experienced a vibrancy, ironic optimism (very Polish) and students and colleagues second to none. It's unlikely that you will have the patience to read both books: Thum weighs in at circa 500 pages, Davies and Moorhouse are even a bit longer. They are both wonderfully written, they draw you in. So how to choose? Davies and Moorhouse are 'magisterial' but in the modern sense: the big picture is constantly woven with details; kings and paupers feature in almost equal measure. The context, European and Polish, is ever present in the presentation of the particular. The time horizon is centuries. Gregor Thum's remarkable achievement is different. He too gives context and horizon, but the focus is on that extraordinary period in which the German population was expelled and the Poles (many of whom were expelled from the East) moved in. If you wish, the Thum volume is a microcosm of the Davies/Moorhouse *Microcosm*. One of Thum's greatest achievements is his ability to deal with the huge human turmoil and tragedy – of all parties – fraught with the most difficult moral issues, with a tone and serenity which do not eschew the issues but make discussion and understanding of them possible. He has one of the great virtues of a social historian – the power of empathy. Davies/Moorhouse is rigorous history and historiography but also a clear work of love for the city, its people and its nation. If you read either book, you will not resist a visit to the city. If you visit the city, you will not resist reading one of the books. Either way you will be doubly rewarded.

Klemen Jaklic, *Constitutional Pluralism in the EU*. Oxford: Oxford University Press, 2014

I have never thought of myself as a Constitutionalist Pluralist in the famous way that the unforgettable and acutely missed Neil MacCormick and his many followers, disciples and fellow travellers have used the term. Beyond any intrinsic intellectual value,

the term is usually seductive – the combined seduction of constitutionalism and pluralism. It's almost like human rights – bring anything into the conceptual orbit of human rights and you have bestowed importance upon it (even if inadvertently you debase the currency). Constitutionalism which is not pluralist seems to have been consigned to the box of all evil isms.

I have come to consider myself as a conscientious objector to such. I feel at times that it is a fad that will fade away in our lifetime and represents a misunderstanding or misreading of the noble dimension of classical hierarchical constitutionalism. But I accept that mine is a somewhat iconoclastic view, not to say troglodyte. I also know that one's self-definition and self-understanding is often-times self-serving – sigh, the human condition – and I will not remonstrate that in Klemen Jaklic's book, I find myself described, thankfully in mostly favourable terms, as one of that band. Having made this disclosure I think this is an important and tremendously useful book. Constitutional Pluralism has become a little bit like Global Administrative Law – a tag which is so often used that the concept risks losing the coherent specificity that renders it useful as an analytical and cartographical tool. You are not quite sure what you are about to get, these days, when something is tagged as being CP or GAL. Jaklic's book does two things: it maps, it puts order, it classifies – not a mean achievement; but, in addition, it develops the author's own take, his own voice in the debate which, being informed by the various strands, constitutes a coherent defence of the entire 'movement'. The book enables you to step back and, perhaps, to take a positon.

Nick Barber, *The Constitutional State*. Oxford: Oxford University Press, 2012

My secretary once told me that my library grows, even in the age of the internet and digital publishing, at the rate of one foot (circa 30 cm) a week, counting only books I receive as gifts from authors, publishers and the like. Add the books I buy (I deserve a bonus from Amazon) and it is no surprise that space has become a major challenge. Being a bibliophile of the old school we try to acknowledge all, and I take a peek at all – you know, preface, intro, conclusions, etc. Some, then, just go to the library, others are put on a special shelf (or, better, shelves) to be read later. It can take time, even, sigh, years. And so it was with Nick Barber's *The Constitutional State*, published in 2010. So this year, finally, the book got its turn to be read seriously.

Boy, if there ever were a book that would have merited the 'fast track' this would be it. What would you expect from a book with this title? Tantalizing: Is it a law book? A book about the law? (More the latter in this case but not exclusively so). But after that you kind of expect a variation on the usual themes which range between organization of the state and its institutions, courts, human rights (more human rights) et cetera. What Barber does so successfully and so importantly and so refreshingly is to focus, first and foremost, on society, on the social, on sociality – on the human context in which and on which constitutionalism takes it grip. There is not an assumption of society that is to be found in many *Staatslehre* books; it is not an abstract; It is not the 'Brechtian' move of imagining the genial constitutional order and then expecting society to adapt. It presents as a result a much more interesting interplay between *is* and *ought* in thinking of constitutionalism and the state. It is also important in that in

so much constitutional writing the leap is from the state to the individual – not here. The individual is of course central but as part of the social. The book is not exactly slim, but it is far from a 'tome'. It is a book to be read, from beginning to end, not to be 'consulted' as is our habit. The book serves another very useful function. It reminds me of a book by an Italian colleague, Roberto Bin, *Lo stato di diritto* (and several other titles). Both now are top of my list when I want to recommend a work on constitutionalism to a non-public law lawyer or even a non-lawyer. This is high praise in my eyes.

Wistawa Szymborska: *Here*. Boston: Mariner Books, 2012; *Poems New and Collected*. Boston: Mariner Books, 2000 (or any other collection of her poems)

Among its several quirks, the *European Journal of International Law* publishes in each quarterly issue a photograph under the rubric of Roaming Charges and a poem as its Last Page. I get a fair amount of comment on the photographs but hardly any at all on the poems, even though we have published some truly fine pieces, not least by our colleague Greg Shaffer.

Poetry is not everyone's cup of tea and for many it evokes some nasty memories from high school. Frequently people remember one or two memorable poems they read and oft times were made to memorize at school. In the English-speaking world it might be a Wordsworth, or a Robert Frost, beautiful and safe. Maybe 'The Lovesong of J. Alfred Prufrock'? In Italy, a Leopardi or maybe an Ungaretti; in Germany, Goethe or, for the 'daring', a Heine. France might be a Mallarme or, with a more hip teacher, Jacque Prevert? In Israel there is a wonderful tradition that pop singers frequently use poetry, first class even, as lyrics to their saccharin tunes and with an interesting cultural result, the saccharin metabolizes, the poetry rests. But my impression is that for most poetry ceases to be an integral part of one's life, with different degrees of sorrow or regret. Once one loses the habit it is difficult to reacquire it ('I'd rather go to the gym than open a poetry book').

This last year, almost simultaneously, I received as a gift two collections of the Polish 1996 Nobel Prize winner, Wistawa Szymborska: one from a dear friend in, yes, Wroclaw, a slim English-Polish bilingual collection entitled *Here* (*Tutaj* in Polish) and the other from the wonderful Polish researchers at the European University Institute, a thick volume with all the poems in Polish and Italian. That I had not read Szymborska before is without explanation. But now I am making up for it, and so should those in a similar circumstance. If it were the first poem you ever read since high school or you are an addict such as I, your pleasure, stupor, edification will all be there in abundance. Not convinced? Here are a few teasers:

From the title poem of *Here* (the first stanza)

Here

I can't speak for elsewhere,
But here on Earth we've got a fair supply of everything
Here we manufacture chairs and sorrows,
Scissors, tenderness, transistors, violins,
Teacups, dams, and quips.

....

Vermeer

So long as that woman from the Rijksmuseum
in painted quiet and concentration
keeps pouring milk day after day
from the pitcher to the bowl
the World hasn't earned
the world's end.

Need I say more? I am not recommending any specific collection – any will do. There is plenty online. It may be the best of the pick after all. But a note of warning: I now have her collected poems by my bed; it is an addiction.

Michael S. Pardo and Dennis Patterson, *Mind, Brains, and Law: The Conceptual Foundations of Law and Neuroscience*. New York: Oxford University Press, 2013

I remember the sense of incongruity I felt when Charlesworth and Chinkin first published their path-breaking feminist analysis of international law. I distinctly recall the veritable sense of Eureka I felt not even halfway through. How could one not have seen this before? You may well experience the same incongruity and then sense of Eureka reading Pardo and Patterson's book. Some things are immediately transparent: the relevance of neuroscience in issues like lie-detection technology in the criminal process. You can excuse your incongruity by simple factual ignorance. But where the book challenges and then soars is when you get to the parts that go to fundamental and foundational blocks of law (and legal theory), such as the nature of truth and presumptions of the human condition that go to responsibility, agency, and the like. Legal thinking has lagged behind moral philosophy in thinking through or at least thinking about these issues. You will learn a lot and certainly become wiser.

Maria Aristodemou, *Law and Literature: Journeys from Her to Eternity*. Oxford: Oxford University Press, 2000

This book goes back to 2000. My Harvard days. But I came across it only this year. Aristodemou published in *EJIL*, 'A Constant Craving for Fresh Brains and a Taste for Decaffeinated Neighbours' (vol. 25, no. 1, available at http://ejil.oxfordjournals.org/content/25/1/35.full.pdf+html). She then inaugurated our EJIL: Live! podcast and YouTube service with a fascinating interview. It has, to a discerning audience of course, been a hit. By this time my curiosity was whetted by this unusual and extraordinary mind and I ordered her 2000 book. The genre has been around for some time now; we do not come to it as novices. And Fresh Brains prepared me for psychoanalysis aplenty, totally sober feminism, a lot of dreaming in the strict sense. But what is so captivating in the book is that Maria (emphasis on the first A I was instructed at the interview) Aristodemou clearly loves the literature as much as she loves what it can teach us about the law (whether she loves the law is a different question). And with all the flights of imagination, startling insights and a certain levity, there is never a sense of frivolity, none of the odious 'ironic shrug', never forgetting that law, the yoke of the Law, is there with all its weight, as both an instrument impacting the social but also

as a cultural artifact that shapes our very self-understanding. In that crowded corner, this book stands out.

Thomas D. Seeley, *Honeybee Democracy*. Princeton: Princeton University Press, 2010

Jürgen Tautz, *The Buzz about the Bees. Biology of a Superorganism*. Berlin, Heidelberg: Springer Verlag 2008

For the last 18 years I have been an amateur and *amatore* (in the strict sense) beekeeper. The reaction of most: ouch! Not at all. It is not only the wonderful honey that we steal from bees, forcing them to produce more and more for their own sense of survival. It is not only the knowledge that far more important than honey is the life-giving pollination that bees provide. The British Beekeepers Association estimates that a full third of what we eat is fully or partially dependent on bee pollination. The real joy, however, is to follow the life of the colony. Although among the most ancient and hence studied insect species, this process has only been slowly and partially deciphered.

These two books, each in their own way, shift the interest from the individual bee to the 'super organism' – the hive, the colony, and give the reader, even those with no prior interest in bees, a most remarkable, hugely interesting set of lessons about sociality, political organization, democracy – according to Seeley – in life and death decisions made by the hive. The queen may lay up to 2000 eggs a day during the season. The hive, starting from a mere 800 bees at the end of the winter hibernation, can grow to become 40 or 50 or even 60 thousand large. But the real highlight of the life of the hive, the real 'multiply and procreate' imperative, takes place at the moment of swarming, when the colony, having made provision for a new queen, splits in two and a new colony, in predetermined stages, migrates to a new habitat, a new land if you wish. Professional beekeepers try to arrest, control or subsequently capture the swarming colony. *Amatori* like myself look forward to it. To stand still in the midst of, say, 30,000 bees swarming around you (no danger for the cognoscenti) before they settle down in a grape-like formation ahead of the next stage of migration is nothing less than a spiritual experience, a connection with nature that is hard to equal. Many are familiar with the famous bee dance – the manner in which the foragers communicate the direction and distance of usable nectar and pollen. But it is only in recent years that the much more complex decisional and communicative mechanisms related to the swarming process have begun to be understood. And, as an aside, this society, with its naturally wise and in some respects democratic decisions, is essentially female. The useless drones are killed off and disposed with a handful preserved for emergency mating. Both books provide compelling reading. I read Tautz when it came out; Seeley only this year. Take your pick. Perhaps some naturalist fodder for constitutional pluralists.

JHHW[*]

* The views expressed here are personal to the Editor-in-Chief and do not reflect the official position of either the *European Journal of International Law* or the European University Institute.