Estudios

Arbitraje, vol. IV, nº 3, 2011, pp. 653–666

Crossing the Mare Liberum: The Settlement Of Disputes in an Interconnected World *

Christiaan KRÖNER

Secretary–General
Permanent Court of Arbitration

Members of the Faculty, Students, Ladies and Gentlemen,

It is a privilege for me to be with you today. As a fellow Dutchman, I am honored to have been asked to give the lecture that bears the name of Hugo Grotius, my esteemed compatriot.

My topic for this evening is the settlement of disputes in an interconnected world. Yet I wish to approach this timely subject not simply from the perspective of the Permanent Court of Arbitration –an institution engaged in the settlement of international disputes on a daily basis– but also with reference to Grotius and the context in which he lived and worked.

I.

You have all heard of Grotius referred to as the "father of international law." Although the complex arguments of *De Jure Belli ac*

* "IV Conferencia Hugo Grocio" patrocinada por el del Centro Internacional de Arbitraje, Mediación y Negociación (CIAMEN): que tuvo lugar el miércoles 15 de junio de 2011 en la Sede de la Real Academia de Jurisprudencia y Legislación.

Pacis, his major work, are now the domain principally of scholars of legal history, there remains a common recognition that his work was foundational to the modern system of international law. In the intervening 400 years, the substance of international law has changed almost beyond recognition. Yet, the concept of a community of nation states, bound to a system of law governing the totality of relations among them, and the persistent role of a secular vision of natural law in shaping the contours of the law of nations remain with us and originate with Hugo Grotius[1].

My interest, however, differs from this classic understanding. I am interested less in the persistent principles that hold true from Grotius' day to our own, than I am in the role he played in the world around him. For Grotius was very much a practicing international lawyer, deeply involved in the international disputes of his day and wielding legal argument as a tool on behalf of the Netherlands. Moreover, Grotius was practicing as an international lawyer at a time of great turmoil and change in the international system: The discovery of the new world and the increasing reach of Spanish, Portuguese, and Dutch trade brought the European system for the first time into regular contact with a wide range of different peoples. At the same time, the thirty years war raged across Europe as the continent struggled to adapt to a system in which both political and religious unity were absent and out of reach[2]. As we confront the myriad changes of our own globalizing world –different from those of the seventeenth century, but no less profound– I submit to you that we may yet draw lessons from the role of law in earlier times.

* * *

Grotius' *Mare Liberum* is a paramount example of his role as a legal advocate. An argument for what is now a central tenet of international law –the freedom of navigation over the high seas– it was, at the time it was written, far from an unquestioned principle. Ocean sailing was a new reality, yet the rules for international relations in

[1] *Vid.* H. Lauterpacht, "The Grotian Tradition in International Law", *British Yearb. Int'l L.*, vol. 23, 1946, pp. 1–53. On the relationship between natural law and other sources of international law, *vid.* E. Lauterpacht (ed.), *International Law: Being the Collect Papers of Hersch Lauterpacht*, I, 1979, pp. 75–77; H. Lauterpacht & C.H.M. Waldock(eds.), *The Basis of Obligation in International Law: And Other Papers by the Late James Leslie Brierly*, 1958, pp. 1–68. *Vid. also* Stephen Hall, "The Persistent Spectre: Natural Law, International Order and the Limits of Legal Positivism", *European J. Int'l L.*, vol. 12, nº 2, 2001, pp. 269–307.

[2] *Vid.* C.V. Wedgwood, *The Thirty Years War*, 1938.

this wider world remained unsettled. *Mare Liberum* was one piece (the twelfth chapter) of a much longer work, subsequently published as *De Jure Praedae* (On the Law of Prize), commissioned by the Dutch East India Company to justify the seizure of a Portuguese merchantman, the *Santa Catarina*, by Dutch vessels in the Singapore straights[3]. *Mare Liberum* is a refutation to the Spanish and Portuguese claim to exclusive dominion and control over oceanic trade routes and newly discovered lands[4] – an attempt to establish the justness of Dutch resistance. In his work, Grotius proceeds systematically through the authority of the Papacy under Canon law to award control of the seas; the possibility of acquiring title through war, occupation, or prescription; the treatment of the seas under Roman law; and the place of trade in natural law. *Mare Liberum* is deeply scholarly, yet its purpose was to justifying keeping the rich cargo of a Portuguese ship on the grounds that Portuguese restrictions on trade could legally be countered with private force. Moreover, Grotius' factual account of Portuguese actions was based on a set of accounts from Dutch captains that were subsequently published under the title of "The Cruel, Treasonous and Hostile Procedures of the Portuguese in the East Indies"[5]. This was *not* neutral legal scholarship!

The status of *Mare Liberum* as –effectively– a legal brief has long served to decrease interest in its arguments and to focus attention instead on Grotius' use of natural law[6]. Yet the critical question of *why* it was written remains. *Why did the Dutch East India Company feel the need to devote resources to procure a legal defense of its actions at a time when Dutch naval power was on the rise and when*

---

[3] For a historical account of the capture of Santa Catarina, *vid.* M.J. van Ittersum, *Profit and Principle: Hugo Grotius, Natural Rights Theories and the Ries of Dutch Power in the East Indies 1595–1615*, 2006, pp. 1–42.

[4] The Spanish and Portuguese claim of that time had Papal sanction, in the form of the Papal Bull Romanis Pontifex, which forbade the other Christian nations "to carry or cause to be carried merchandise and other things permitted by law, or to navigate or cause to be navigated those seas, or to fish in them, or to meddle with the provinces, islands, harbors, seas, and places, or any of them, or with this conquest, or to do anything by themselves or another or others, directly or indirectly, by deed or counsel, or to offer any obstruction whereby the aforesaid King Alfonso [of Portugal] and his successors and the infante may be hindered from quietly enjoying their acquisitions and possessions, and prosecuting and carrying out this conquest". The Bull *Romanus Pontifex* (Nicholas V), January 8, 1455, *available at* <www.nativeweb.org/pages/legal/indig–romanus–pontifex.html>. The same claim was also the underlying basis for the Treaty of Tordesillas, Spain–Portugal, signed June 7, 1494, dividing newly discovered lands between the two monarchies.

[5] M.J. van Ittersum, *supra* note 3 at 24.

[6] *Vid. v.gr.*, E. Gordon, "Grotius and the Freedom of the Seas in the Seventeenth Century", *Willamette J. Int'l L. and Dispute Resolution*, 16, 2008, pp. 252, 260–61.

the Amsterdam Admiralty Courts had already approved the seizure of the Santa Catarina? If this were an isolated incident, one might dismiss it merely as public relations, or as an effort to assuage the concerned shareholders of the Company. Yet legal arguments pervade the international disputes of that time. *Mare Liberum* itself was rushed into print in the hopes of affecting treaty negotiations between Spain and the Netherlands. The King of Spain thereafter commissioned a full response to Grotius, rebutting in detail the Roman and Canon law arguments of *Mare Liberum*[7]. Nor was such attention limited to relations between Spain and the Netherlands: Grotius' arguments took center stage in Dutch disputes with the English over the spice trade –where Grotius himself served as a negotiator, only to find the English citing his own work against him[8]– and over the valuable North Sea herring fisheries, where technological advances had given the Dutch near primacy. Ever short of funds, James I of England sought to supplement his treasury by extending his taxes to all Dutch fishing vessels, the proceeds of which could be used to construct an English fishing fleet along Dutch lines. Unsurprisingly, the dispute escalated and took a turn for the worse when the captain of a Dutch warship seized the Royal tax collector and returned with him to Holland (where he was promptly released, with profuse apologies, by the cooler–headed members of the Dutch Estates–General). A Dutch delegation then traveled to England for negotiations that became an extended debate on the place of fishing rights in the law of nations and in which the briefing documents of the English Privy Council consisted of extended extracts from *Mare Liberum* itself[9].

* * *

How then does this historical reckoning – interesting, no doubt, but clearly somewhat obscure – relate to our role as modern inter-

---

[7] Franciscus Seraphin de Freitas' *De Just Imperio Lusitanorum Asiatico* was prepared specifically at the request of the King of Spain and published, after some delay in 1625. *Vid.* C.H. Alexandrowicz, "Freitas Versus Grotius", *British Yearb. Int'l L.*, vol. 35, 1959, pp. 162. For a survey of the overall responses to *Mare Liberum vid.* also M.B. Vieira, "*Mare Liberum* vs. *Mare Clausum*: Grotius, Freitas and Selden's Debate n Dominion over the Seas", *Journal of the History of Ideas* , vol. 64, nº 3, 2003, p. 61; Gordon, *supra* note 6 at 261–68.

[8] G.N. Clark, "Grotius's East India Mission to England", *Transactions of the Grotius Society,* 20, 1935, pp. 45 ss, esp. 76–83.

[9] *Vid.* M.J. van Ittersum, "*Mare Liberum* Versus the Propriety of the Seas? The Debate between Hugo Grotius (1583–1645) and William Welwood (1552–1624) and its Impact on the Anglo–Scotto–Dutch Fishery Disputes of the Second Decade of the Seventeenth Century*", Edinburgh L. Rev.*, 10, 2006, pp. 239 ss, esp. 256–271.

national lawyers? My argument is that, in critical respects, our world and that of Grotius are not so very different. Both are in the midst of profound change and uncertainty. And in this context, the role of international law in framing international disputes and providing a language for their resolution is no less important today.

We live in a world characterized by globalization. In practical terms, this means change, and a form of change in which the ultimate outcome is neither evident, nor readily predictable[10]. While we may not know precisely know what the future may bring, it is apparent that globalization has effected lasting changes in the way we interact with one another – as nations, corporations, and individuals. First, global communications and commerce have irreversibly changed *who we interact with*. Through the internet and satellite technology, businesses and governments can easily cooperate –or conflict– with counterparts they would never previously have met, and state–of–the–art practices spread worldwide. Daily activities increasingly involve networks of far–flung actors of differing nationalities. Second, globalization effects equally lasting changes in *how often we interact*. At its most basic level, globalization means accelerating interaction. States interact more with private actors, whatever the balance between them. But States also interact more with one another, just as corporations enter into increasingly complex transactions among themselves. Globalizing interactions happen more quickly, more often, and from greater distances. Finally, globalization radically changes *what we interact over*. New technology brings new opportunities and new concerns, and the process is accelerating. If the changes of the last few years (much less those that have occurred during the lifetimes of everyone in this room) teach us anything, it is that we cannot easily predict the nature or content of the interactions of the future.

At the time Grotius penned *Mare Liberum*, technological advances in oceanic sailing had only recently developed to permit European captains to reach the far corners of the world. Yet actually completing such a voyage remained time–consuming, uncomfortable, and dangerous. In contrast, we now interact globally on a daily basis –often

[10] In the immediate wake of the Cold War, it was common to predict that globalization would result in transformational change – the end of the nation–State, the dominance of the multinational corporation, the erasure of cultural differences, and the subordination of public values to the dictates of the market. *Vid. v.gr.*, K. Ohmae, *The End of the Nation State: The Rise of Regional Economies*, New York, Simon and Schuster Inc., 1995; J.E. Stiglitz, *Globalization and Its Discontents*, New York and London, W.W. Norton & Company, 2002. It may be questioned whether any such predictions have, or will, prove accurate, yet that the world of tomorrow will be different seems assured.

without second thought– "crossing" Grotius' free seas with the aid of modern communications and travel. Then as now, this changed interaction offers great opportunities. Then, the products of the Spice Islands were literally worth their weight in gold. Today, multinational corporations have seized the opportunities of globalization to construct highly–profitable new business models that are, in the process, more than ever detached from the boundaries of any particular jurisdiction. The international disputes of Grotius' day concerned the basic rules for an expanding world: *Who was permitted to sail where? How would fishing and other resources be allocated and regulated?* If we have, to some extent, answered those questions, our increasing interaction has only provided new ones. With globalization, outcomes are less predictable, and conflicts that would once have been local now play out on a global stage. The stakes are higher for both good and ill, and the failure to properly manage this change risks undermining its advances. In the midst of this change, we as lawyers are engaged in the same task as Grotius: endeavoring to use law to moderate and resolve the difficulties and disputes that arise in the context of a changing world.

II.

In the face of these challenges, the international legal order offers an alarming lack of new rules and procedures. In describing the means he saw to avoid unjust war, Grotius lists only four: negotiation, arbitration, dueling, and the casting of lots. In perusing this list, I am forced to ask: *have we, in the intervening four hundred years, added to these measures? And as globalization continues to bring change, are our institutions able to cope?* New forms of interaction and business increasingly foster disputes for which we have no experience and that extend to areas in which the law offers but uncertain guidance. Common cultural touchstones and traditions can no longer be taken for granted when we regularly deal with individuals and organizations from many different nations. Yet I doubt very much that any of these changes will bring back dueling as an accepted means for the resolution of international disputes . . .

If we cannot add substantially to Grotius' list, we should yet not discount it – in particular, the useful power of arbitration. As a process, arbitration is by no means new. Nor was it new to Grotius, who quotes Thucydides to describe the peaceful arbitration of disputes

among the Greek city states[11]. But in this history, flexibility and efficiency have long been the hallmarks of arbitration, and in our changing and globalizing world, it is these characteristics that give it a continuing role in the maintenance of order through law.

* * *

As globalization fundamentally changes the way we interact, arbitration offers an answer to each change. As *who we interact with* expands, trust and legitimacy in the means of dispute resolution becomes of great importance, yet also more elusive. With interaction and commerce increasingly transnational in character, judicial systems tied to individual nation States are often viewed –rightly or wrongly– as favorable to one side or another of the disputes that arise. By creating a forum apart from national institutions and permitting the parties a hand in the formation of the tribunal, arbitration fosters legitimacy through its emphasis on impartiality. Equally important, however, the procedural flexibility of arbitration offers the promise of bridging the cultural differences that remain among the parties. Some scholars observe the persistence of what may be termed "litigation cultures" –focused on adversarial process and winner–take–all results– and "conciliation cultures" with a preference for mediation the search for integrative, mutually beneficial outcomes. The growth of arbitration, however, suggests another trend – toward the harmonization of different approaches within the arbitration process. By tailoring procedure, arbitration can offer process that is not exclusively adversarial or conciliatory, nor tied irrevocably with a particular legal tradition. Although the roots of legal systems may be different, arbitration serves to overcome the divide[12].

In the face of the accelerating *pace* of globalized interaction, arbitration constitutes a critical tool in coping with the equally–accelerating growth in disputes, which increasingly demand prompt

[11] H. Grotius, II *De Jure Belli ac Pacis*, chap. XXIII, s. VIII, para. 1.

[12] *Vid.* M.C.W. Pinto, "Thoughts on the 'True Nature' of International Arbitration", *in* G. Aksen, K.H. Böckstiegel, et al., eds., *Global Reflections on International Law, Commerce and Dispute Resolution: Liber Amicorum in Honour of Robert Briner*, 619, 637 (2005) ("the coming century is likely to see the convergence of Western and Asian concepts of law and political organization. It will be achieved not through the triumph of one approach over the other, but through their interaction and the recognition that both have their roots in reason. In the field of international dispute settlement, that process may already have begun: the outcome will not be Western, Asian or African, but international"); *vid. also* B.M. Cremades, "Overcoming the Clash of Legal Cultures: The Role of Arbitration", *Arb. Int'l*, vol.14, nº 2, 1998, pp. 157–72.

resolution. The efficiency of arbitration lies in its ability to constitute a separate mechanism –whether it be a tribunal or an individual arbitrator– for each dispute that arises. What we see in this process is a move away from the proposition that established institutions will alone provide justice and order. Through arbitration, States gradually guarantee to provide and protect the space for the processes of dispute resolution to operate and adapt on their own. This move takes place on the national level – as the justice systems of densely populated countries increasingly recognize the need to channel cases from growing dockets to the most appropriate combination of mediation, arbitration, or adjudication[13]. And it takes place on the international level as the contracting States to investment treaties agree –as a matter of public international law– to the arbitration of private disputes over the treatment of investments. This efficiency is made possible by the careful "mixture of tolerance, encouragement, protection of its autonomy *and* supervision"[14] that States provide to the arbitral process through legislation, limited judicial review, and key international conventions,[15] and which makes arbitration complimentary to – rather than abdication of – the traditional government role of providing justice and engaging with the international legal order.

Finally, as globalization transforms the *content* of our interactions and brings new concerns –and, inevitably, new disputes– more rapidly than the institutions of justice can easily adjust, arbitration's inherent flexibility serves to protect and advance the international legal order.

Arbitration's flexibility is innovative first in the realm of *procedure*. We cannot comfortably anticipate the contours of the disputes that globalization will continue to bring. *Who should decide such disputes? What expertise must they have? How will new types of evidence be collected and examined?* Judicial approaches are –very deliberately– aimed at applying a proven process across a wide range of situations. Once established, judicial process changes only slowly – by

[13] F.E.A. Sander, "Varieties of Dispute Processing", 70 *Federal Rules Decisions* 111 (1976); *vid. also* J.W. Stempel, "Reflections on Judicial ADR and the Multi–Door Courthouse at Twenty: Fait Accompli, Failed Overture, or Fledgling Adulthood?", *Ohio State Journal on Dispute Resolution,* 11, 1966, p. 297.

[14] W.M. Reisman, "The Supervisory Jurisdiction of the International Court of Justice: International Arbitration and International Adjudication", *Recueil des Cours* , t. 258, 1996, pp. 9, 39.

[15] Internationally, the New York Convention serves as a keystone, linking arbitrations worldwide to the national legal systems and courts of the vast majority of States. *Vid.* New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 330 *U.N.T.S.* 38.

design. In contrast, arbitration offers parties, arbitrators, and arbitral institutions the luxury of adapting proceedings to novel circumstances. Modern arbitration already makes productive use of the testimony of fact witnesses and is adept at incorporating experts in evaluating –both in the court room and through site inspections of remote locations– such diverse matters as the dynamics of bomb damage, the geodetic locations of survey coordinates, and complex financial evaluations. Global innovation will undoubtedly create the need for new methods of fact finding. Employed in this fashion, arbitration is not only the most adaptable form of dispute resolution in its own right, but is also an innovative laboratory for new procedure that can subsequently be adapted to judicial efforts to build order and law in international affairs.

Yet arbitration also operates in support of the *substantive* development of international law. Without beginning to suggest that arbitration performs a law–*making* function, the frequent citation of arbitral awards on matters of international law necessarily gives them –like the pronouncements of other courts and tribunals– persuasive influence as a gloss on the current state of the law[16]. Or to use more modern terminology, arbitration operates as plug–in software, to improve the working hardware of the international legal order. Yet arbitration plays an even more crucial role as globalization introduces new activities and areas for potential dispute beyond those that the law could contemplate. When made available, arbitration permits the rapid application of the principles of current law to new and emerging situations. This provides a mechanism for the legal resolution of individual disputes without waiting for the slow wheels of diplomacy to extend specific rules of law in the wake of globalization's changes – a process in which diplomacy will always remain several steps behind. Equally important, each arbitration also provides a critical datum of experience in the application of law for subsequent efforts to develop future conventions or to advance the reach of international law. Indeed, it may come as no surprise that many of the international instruments that provide for arbitration deliberately set forth legal rules at a high level of generality, an approach that permits agreed principles to be made applicable in the absence of comprehensive agreement or the

[16] In the terms of Article 38 of the Statute of the International Court of Justice, such decisions serve only as a "as subsidiary means for the determination of rules of law". Regarding the risks of conflating law–making and non–lawmaking sources, *vid.* W.M. Reisman, "Unratified Treaties and other Unperfected Acts"*, Vanderbilt J. Trans'l L.*, vol. 35, 2002, pp. 729–747.

ability to predict all possible scenarios[17]. Employed in this fashion, recourse to arbitration should be seen as a useful tool in the operation and development of international law.

* * *

The potential for arbitration to meet the demands posed by globalization can be seen in the rapidly growing caseloads of nearly every arbitral institution. Yet arbitration has also changed as a result of this process. It is doubtful that Grotius could have imagined a world in which private entities would regularly be permitted to arbitrate against sovereigns. The growth of mixed arbitration, however, is one of the most important ways that international law has responded to profound changes in the international system.

My own institution, the Permanent Court of Arbitration was intended by its founders to provide for the peaceful resolution of disputes *among States*. Indeed, the 1899 Hague Peace Conference was convened to effect disarmament and prevent the next great war – an objective that unfortunately proved beyond the reach of the Conference delegates. Despite the circumstances of its creation, however, the PCA was drawn into mixed arbitration at a very early stage, in the case of *Radio Corporation of America v. China*. [18] In 1928, the Government of China entered into an agreement with the Radio Corporation of America, better known now as "RCA," for the establishment of a radio circuit service between China and the United States. Five years later, the Government of China entered into another agreement with a different U.S. company for a second radio link. RCA promptly objected to the loss of its monopoly and claimed a breach of the agreement. After the parties failed to resolve their dispute through negotiations, it was agreed to submit it to arbitration. A tribunal was constituted and the tribunal president approached the PCA to administer the proceedings. Recognizing the significance of the dispute, the International Bureau determined that the flexible mandate in the Hague Conventions gave it the capacity to assist the tribunal, and received

[17] The protections offered by investment treaties are notoriously broad, and make no attempt to predict the full range of activities to which they could apply. In like manner, the UN Convention on the Law of the Sea provides only most general principles for the critical delimitation of maritime boundaries between states, despite the Convention's extraordinary detail in other areas. *Vid.* United Nations Convention on the Law of the Sea, Art 74, 83 (1982); *vid. also* R.R. Churchill & A.V. Lowe, *The Law of the Sea* 181–82 (3rd ed. 1999).

[18] *Radio Corporation of America v. The National Government of the Republic of China*, *available at* <http://www.pca–cpa.org/upload/files/RCA%20v.%20China.pdf>.

the approval of the PCA's Administrative Council to do so.[19] The following year, the tribunal found in favor of China and held that the first agreement could not be construed to imply the exclusion of other radio connections[20].

The *Radio Corporation* case predated modern investor–State arbitration by more than half a century, yet it was indicative of the changing role of private entities in international relations and international law. Even Grotius would have recognized the potential for private international disputes to escalate into public ones – he was, after all, a significant advocate for the Dutch East India Company, whose disputes were almost automatically political – but until relatively recently it was the exceptional company whose activities were significant enough to play a role in relations between States. This balanace has changed gradually over the last centuries – and rapidly over the last decades – to the point where private financial markets and the flows of investment capital now hold significant sway in government decision–making.

Through the first half of the last century, disputes with private parties, when significant enough to merit international attention, were dealt with through the mechanism of diplomatic protection. States espoused the international claims of their nationals – or declined to do so – and the vast majority of the claims commissions that were established in the early twentieth century sought to resolve private disputes on an inter–State footing.[21] Such resolution was unpredictable for the private parties involved, however, and had the unfortunate effect of interjecting such disputes into the political relations of the States involved. In this context, it was by no means uncommon for States to bring force, as well as words, to bear in support of their nationals' claims. Indeed, the PCA's second arbitration, the case concerning the *Preferential Treatment of the Blockading Powers*

[19] 1934 Report of the Administrative Council of the PCA, at 7. In addition to empowering the International Bureau of the PCA to support tribunals constituted to hear disputes between States, the drafters of the 1899 and 1907 Conventions gave the PCA the power to assist "the operations of any special Board of Arbitration" that the signatory States might convene. When the *Radio Corporation* arbitration was brought to the Hague, it was determined that the drafting of this provision had been deliberately broad and that it encompassed disputes between a private party and a State. The PCA's Administrative Council thereafter adopted the institutions first specialized set of Optional Rules for mixed arbitration in 1962.

[20] *Radio Corporation of America v. The National Government of the Republic of China*, *available at* <http://www.pca–cpa.org/upload/files/RCA%20v.%20China.pdf>.

[21] K. Parlett, *The Individual in the International Legal System: Continuity and Change in international Law,* Cambridge, CambridgeUniversity Press, 2011, pp. 48–84.

Against Venezuela, involved the interpretation of a repayment agreement extracted from Venezuela by the naval might of Germany, Italy, and the United Kingdom after damage to their nationals' property in the course of Venezuela's civil war[22]. The shift to arbitrating such disputes directly between the private party and the State concerned –first through the creation of the International Centre for Settlement of Investment Disputes and subsequently through the adoption of hundreds, and now thousands, of bilateral investment treaties– was an effort to depoliticize such disputes and preserve the peace, as much as to promote investment.[23] Today, arbitrations brought by private parties under investment treaties constitute a substantial portion of the PCA's work.

* * *

Yet globalization has not simply shifted arbitration from one type of dispute to another. The growth of mixed arbitration has not resulted in a decrease in arbitration between States. Rather, the opposite has occurred. At the PCA in recent years, our caseload of arbitrations between States is higher than it has ever been – even during the height of interest in arbitration before the First World War. This result is in part due to certain key treaties, notably the UN Convention on the Law of the Sea, that provide prominently for arbitration. As a result of the treaty structure (in which arbitration is the default mechanism), seven of the nine major disputes brought for resolution under the Convention have been submitted to arbitration; the PCA is currently handling two such cases. Yet I would suggest that this trend is not entirely due to a few key treaties, and that arbitration's flexibility in the face of the change wrought by globalization is proving equally valuable in the realm of disputes between States. International disputes are becoming increasingly complex, and highly–technical evidence correspondingly common. As new types of disputes arise for which procedural precedents are lacking, arbitration's ability to tailor

---

[22] *Preferential Treatment of Claims of Blockading Powers Against Venezuela*, Award (1903) *available at* <http://www.pca–cpa.org/upload/files/Pref.%20Tr.%20Engl.%20award.pdf>.

[23] A. von Walter, "Le contentieux lié à l'investissement: entre dépolitisation et repolitisation", remarks at the conference on *L'arbitrage relatif aux investissements: nouvelles dynamiques internationales*, Paris, France, March 4, 2011, *available at* <http:// www.convention–s.fr/documents/CNV_journ%C3%A9e%20arbitrage_dossier_ tr.pdf>; I.F.I. Shihata, "Toward a Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA", *ICSID Rev*., I, nº 1, 1986, pp. 22 ss; D.A. Solely, "ICSID Implementation: An Effective Alternative to Armed Conflict", *Int'l Lawyer,* 19, 1985, p. 521.

the resolution process to the needs of a particular dispute –through site visits, through the effective integration of technical experts, and by accelerating proceedings as may be necessary to accommodate political realities– will only become more important.

III.

I began this address with a disquisition on Hugo Grotius and the importance of law in the resolution of international disputes. The importance of law is, perhaps, the greatest point of continuity between his time and ours. One could have viewed the disputes over navigation and the Spice Islands in Machiavellian terms of *raison d'état*, or one could have viewed them in terms of law. Grotius chose the latter, and made the more–lasting contribution. In the disputes of an interconnected world, law may not always provide a solution, but it offers a lexicon – a universal vocabulary of principle and understanding in which the disputes of a changing world can be negotiated, or arbitrated. As we face our own increasingly inter–connected world and "cross" Grotius' free seas, I believe that we will need this legal lexicon more than ever. We simply cannot know the contours of the future, the place that private actors will occupy, or how the States of tomorrow will react to new situations and disputes. We will also need dispute resolution more than ever. And in an inter–connected world, arbitration is a very useful tool in the management of disputes. I do not begin to suggest that arbitration is perfect. As one distinguished scholar has cogently put it: "Arbitration like any other form of delegated power, is susceptible to moral hazard"[24] and some criticism will always be accurate. Yet a world in which arbitration did not count among the tools for managing the many differences of our complicated modern lives strikes me as deeply unpalatable. Globalization is simply too complicated for any of us to meet without this most–adaptable forms of dispute resolution.

What does this mean for us as international lawyers? Here, globalization charges us with a heavy burden. Bringing law to the multiplying disputes of an inter–connected world demands the best from those who practice it, as does arbitration. Arbitration's capacity to adapt and innovate is a never–ending process of experimentation, correction, and improvement, while always safeguarding the rights of

[24] W.M. Reisman, "The Supervisory Jurisdiction of the International Court of Justice: International Arbitration and International Adjudication", *Recueil des Cours*, t. 258, 1996, pp. 9, 39.

those who empower it to resolve their disputes. Its utility is directly linked to the wisdom and quality of the awards that are rendered. And it places great trust in the hands of individuals – to resolve disputes of sometimes staggering value, or to finally determine such issues as the boundaries of national sovereignty. Together, our task must be to ensure that arbitration's rapid spread does not come at the cost of quality and to enable international law to meet the challenges of the world we face.

I thank you for the work you have already done in this vital area and for the work that you have yet to do. And I wish all of us good luck . . .

* * *