KEYNOTE ADDRESS

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Confronting Global Challenges: From Gunboat Diplomacy to Investor-State Arbitration
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Members of the Court, Mr Secretary-General, Excellencies, Ladies and Gentlemen, Friends and Colleagues

The Peace Palace is the coalface. This is where the work of international law is carried out, and the responsibility of states is examined, tested, articulated, debated, refined – and indeed established. For the international community to consider that it has a system of law, its subjects must somehow be held responsible for breaches of legal obligations. One can hardly claim to advise on any aspect of international law – whether the law of war, human rights, trade and investment, or environmental protection – without knowing how breaches of its supposed rules might result in liability on the part of the most relevant actors: states.

International law originally developed as a set of rules defined by treaties or proposed by scholars and leaders interested in building an international community. But what if the treaty was breached, or the proposals ignored? For many generations, sovereigns were accountable only to God. In the 20th century, pronouncements of various international tribunals set out rules of liability and reparation in a piecemeal manner. At the dawn of the 21st Century, draft Articles on the Responsibility of States for Internationally Wrongful Acts finally emerged from the UN’s International Law Commission, purporting to codify international law.¹ What it was codifying was in large part the result of a century of work focused on what was taking place, or might take place, within these walls.

With your permission, I shall make some general observations on what goes on in this Peace Palace, before making some only slightly less general observations on the theme of this seminar: investor-state arbitration.

First, it is heartening to see that the increased activity of two Courts has not been accompanied by any sort of rivalry or estrangement. To the contrary, the list of individuals who have served as ICJ Judges as well as PCA Arbitrators is a lengthy one, and there is little talk of one institution shouldering out the other. I suggest that there is an equable general willingness to acknowledge that some disputes are better suited for one forum than the other. Perhaps one case requires distance from the protagonists because the issues debated are of critical and general importance, and thus better suited for decision by a standing body of judges; perhaps another benefits from the particular empathy and understanding that might be expected of arbitrators especially chosen for that case alone. At any rate, it is exhilarating for international lawyers to see how these two institutions, at the apex of international law’s delivery system, have set such exemplary standards in terms of the quality of their procedures and the rigorous recruitment of their personnel.

Second, international dispute resolution is not and can not be an exclusively Western phenomenon. The Carnegie Foundation and the Netherlands have gone to great lengths to build up The Hague as a centre, if not the centre, of international law and dispute resolution, and the Peace Palace as a symbol and as a workplace. It has been a success. The Palace is an invaluable asset, without which the renewal of the institutions which it hosts might never have occurred. But The Hague is still very much a European center. As a goal for the next hundred years, the Carnegie Foundation and the Netherlands may do well to consider how to spread that experience, partnering with other countries around the world to establish “new peace palaces” – other facilities of a similar symbolic stature and operational flexibility – for the use of the PCA, ICJ, ICSID, and other institutions involved in the resolution of international disputes. The reputation of the Peace Palace, in other words, has the potential to be leveraged to great and beneficial effect at a global level. May I express the hope that its custodians may perceive, internalize, and act on that lofty ambition.

Thirdly, moving in the direction of the topic of investor-state arbitration, allow me to recall Hans Jonkman’s plea, on the occasion of the PCA Administrative Council’s centenary meeting in 1999, for that Council to play a greater role in the PCA’s development. It remains an issue today: intergovernmental organizations engaged in the resolution of international disputes require the active support of their Member States to remain effective. This is true of all international courts and tribunals, but particularly of institutions engaged in types of arbitration for which private sector dispute resolution alternatives also exist. When states create their own fora for the resolution of disputes, they should surely ensure at least the level of attention and support that the private sector makes available to private arbitral institutions.

In the past, such attention and support has too often been lacking. The PCA’s long period of dormancy, with only two registered cases between 1940 and 1988, was not a period when arbitrations were extinct. Rather, the PCA’s Member States simply forgot about the institution they had created and its potential. With respect to resources, intergovernmental organizations can, of course, also support their work by charging fees in respect of particular disputes. But significant public interest activities – many of which Member States will describe as priorities – can be accomplished only with public funding. It is worth emphasizing how much can be achieved. Few members of the New Directions study group in 1991 could likely have imagined the renewal that has taken place at the PCA in the past 22 years. At the same time, while this achievement is worth celebrating, it amounts to only a small fraction of what could be achieved by the PCA with sustained interest and support. With its flexible mandate, and the capacity created by many separate tribunals, the PCA’s potential for expansion seems unlimited, and perhaps exceeds the capacity of any other international court or tribunal, in the Netherlands or elsewhere.

Now I move squarely into the area of investor-state arbitration, although with no intention of preempting the round table that follows. I wish to make three further observations, and then I shall yield the podium.

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I wish to suggest – and this is thus my fourth point – that investment arbitration may and should be viewed as a logical progression of the PCA’s founding purpose. From time to time, I am reliably informed, the PCA is confronted with the assumption that investment arbitration is a matter of lesser importance than the PCA’s role in “traditional” inter-state arbitration, or even that it is a distraction from the PCA’s “primary” purpose because it “commercializes” the institution by moving away from matters relating to international peace. Missing from this discussion is the fact that a majority of the PCA’s early inter-state arbitrations precisely involved private interests (of the type that would typically now be dealt with through investor-state arbitration), espoused by the State in question through diplomatic protection. The *Norwegian Shipowners* 5 and the *Lighthouses* 6 cases, for instance, primarily involved the interests of private parties. Moreover, the treatment of such private interests could and did pose a significant challenge to international peace, as evidenced by the *Blockading Powers against Venezuela* arbitration.7 A significant reason for States to begin arbitrating directly with foreign nationals, and hence for the development of investment arbitration, was to depoliticize such disputes by removing them from the realm of diplomacy and inter-state relations. In supporting investment arbitration, the PCA is not departing from the types of cases it was established to deal with, but is simply handling the same sorts of dispute in a different way, through a process which reduces the likelihood that a major dispute will threaten international peace, indeed a process which is now manifestly preferred by states.

Controversies have arisen as this type of arbitration has come to the fore over the last two decades. I wish to suggest, however, that the challenges of investment arbitration are reduced when one considers two plain propositions which have not been adequately understood: (i) the purpose of investment protection treaties is not to protect investments, and (ii) investment arbitration awards have shown themselves to be commendably predictable. These are my last two points.

I am of course trying to get your attention, but I am quite serious. The protection of investments made by foreigners is the expected byproduct of a BIT, but it is not the objective of such treaties. For at least one of the states involved, the reason for signing the treaty is to ensure that foreigners will invest with the lowest possible rate of return, so that most of the benefit of the economic activity in question can be retained at home. The attainment of that objective is assisted by the avoidance of legal risk premiums. A country blessed with institutions and laws in which foreigners have complete confidence may even attain the ultimate achievement of attracting investments in the form of bank deposits against the credible promise that the money is safe and will be returned, even with no interest at all. Such a country does not need BITs, because foreigners fully trust its institutions even without the support of international law and international remedies. Other countries are perceived as presenting significant legal risk, often referred to by analysts as “country risk”, and seek to reduce the risk penalty by extending the promise that investments will be treated in accordance with international law, and that breaches of that promise will be repaired by international remedies.

Such promises can have their effect only if they are credible. States lose the power of a making meaningful promise if it may be repudiated unilaterally. Imagine that under international law promises to foreigners are subject to each state’s determination that conditions have changed and the promise is withdrawn, or that such promises may be addressed only by the state’s own courts, or that such promises imperatively lapse after some limited period of time, or whenever there is a new head of state. If that is

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what international law provided, it would disable states from making the promises they may wish to make in order to obtain long-term investments on the best terms. There will always be foreign investment in even the most corrupt and volatile countries, but the risk-reward ratio will be skewed, and the type of investor would be different: more motivated by short-term speculation than by permanent contribution to the local economy, and highly dependent on ephemeral and perhaps unsavoury political alliances with local elites. For international law to debase the state’s promises in such a fashion would be squarely against the macro-economic policies of the country which I have the honour of representing as a member of the PCA, as I believe it would be against the policies of most others. And fortunately international law does no such thing. 90 years ago, a few steps from where we find ourselves today, the PCIJ’s judgment in the case of the S/S Wimbledon⁸ held that the right of entering into international engagements is an attribute of state sovereignty.

Thus was preserved the invaluable power of states to make meaningful promises, including those they make in order to enhance the terms of international exchanges.

As for the predictability of investment arbitration, consider first that this is a matter which is axiomatically dependent on the wording of the legal duty in question. There is a big difference of predictability between a precise undertaking that “licenses obtained from the Ministry of Mining in accordance with its published regulations shall be valid for a term not to exceed x years” and the open-textured promise to the effect that “foreign licensees shall be accorded fair treatment.” But lawyers can deal with such formulations too; they must do so, because such formulations are everywhere. When faced with malleable words, the lawyer may tell the client that, after having considered the factual circumstances as explained by the client, there is, say, a 70% chance that the claimant will win. Now let us imagine hypothetically that the identical factual circumstances were presented to ten different tribunals. And seven times the claimant wins, three times it loses. Is this unpredictability? It seems the opposite: in my example the prediction was perfect. Ranges of possible outcome, rather than certainty, will always be with us until law becomes a science and all disputes can be resolved by impartially programmed computers.

Is this possibility intolerable, of a 30% chance that the “right” outcome would not be reached? If so, let us be clear where the responsibility lies, and acknowledge that the authors of texts that define legal responsibility cannot avoid words like “fairness” and “due process”, or “discrimination” and “equitable”. There are zones of legal decision-making which perforce require discernment and the development of jurisprudence. To deny properly appointed decision-makers the authority to interpret words and weigh evidence in accordance with their discernment is to disqualify the legal process.

I conclude. This law we are at pains to construct — is it

_ but a paltry thing,

A tattered coat upon a stick,

Or can we, like the poet Yeats, find comfort in the thought that there is a Byzantium toward which we can sail, looking for “monuments of its own magnificence” and finding solace in “the artifice of eternity”?

We may find ourselves disheartened by the hypocrisy with which the powerful view the law — and when I speak of power I mean power over communities and sects as well as over continents. We may therefore indeed see ourselves as paltry, as “tattered coats”, but we who gather today in this edifice and on this occasion surely know that our enterprise seeks to construct if not an edifice for eternity, then at least one for the ages. As proof, I present the Centenary of the Peace Palace as my Exhibit A.

Thank you so much for your kind attention.