THE ROLE OF INSTITUTIONS IN THE ARBITRAL PROCESS:  
THE PERMANENT COURT OF ARBITRATION

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Gracias, José, por tus muy amables palabras. Espero que me disculpen por no hablarles en su idioma, pero les aseguro que será mejor así que tener que escucharme hablar en español durante diez minutos.¹

I have been asked to speak to you about the role of the institution in the arbitral process. And, of course, the quick answer to that question is that the role of arbitral institutions is to provide administrative and logistical support and often to serve as third-party decision-makers for disputes that arise within the context of the arbitral process, such as decisions on appointments in the absence of party agreement, and on challenges or arbitrator fees where such intervention proves necessary.

Taking the question on a broader level, however, the traditional role of the arbitral institution could be said to be to help the arbitral process to be as efficient and effective as it can be—efficient in the sense of saving time and cost, and effective in the sense of producing a decision that has both the legitimacy and binding effect as to truly resolve the underlying dispute.

However, I will not speak today about these roles, but rather about another role of the arbitral institution. Today, I submit to you that the fundamental role of an arbitral institution must be to adapt to the needs of its users. And this is something which the institution that I head—the Permanent Court of Arbitration—has enjoyed a very particular experience throughout its history.

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¹ Thank you, José, for that kind introduction. I hope you will forgive me for not speaking to you in your native language, but I assure you that this will be better than having to listen to me speak in Spanish for ten minutes.
When the PCA was created in 1899, only State-to-State disputes were envisaged to be brought before it. Sovereign States were not only the most important actors in international law, they were the only actors and subjects of international law. So, in a context where States were the only holders of rights and obligations on the international plane, they were also the protectors of their nationals wherever trouble might befall them—and they often protected their nationals by force. Thus, when the PCA was founded, Tsar Nicholas II of Russia presciently stated that one of the main kinds of disputes that States should be able to resolve peacefully by arbitration is where—and I quote from his 1898 letter to Queen Wilhelmina of the Netherlands—“[o]ne State demands of another material indemnity for damages and losses caused to it or its nationals by the acts of the defendant State or its nationals, which the former State deems contrary to law.” The decades that followed the PCA’s creation thus saw claims for diplomatic protection replace armed reprisals by the State of nationality. The post-World War II decades then saw the evolution completed: from reprisals by one State against another, to diplomatic protection by the State of nationality, to the investment and contract claims involving States and State entities that we regularly see today.

Crucial to this development was the establishment of the system of investment treaties and investment arbitration that we have today. Along with economic development goals, the fundamental idea encapsulated in these instruments is the attempt to de-politicize investment disputes—the belief that such disputes do not truly represent a conflict between States as States, and should be possible to resolve directly between the foreign investor and the host State.

So, how has the PCA fared in the midst of such rapid change in the nature of the disputes it was originally envisaged to administer? In the 1930’s, in the midst of the evolution just described, the PCA’s Member States authorized the PCA to administer its first arbitration between an private entity and a State in the case of Radio Corporation of America v. China. However, this important step was not nearly enough. By the late 1960’s, developments had completely overtaken the PCA: with the establishment of the International Court of Justice as the preferred forum to settle inter-State disputes and ICSID to hear investment cases, as well as the growth of existing major commercial arbitration institutions, the PCA had been left without a mandate. And so Sleeping Beauty fell into a slumber.

So, what brought Sleeping Beauty back to life? Although it was quite fortuitous when, in 1976, Pieter Sanders and other principal figures in the preparation of the UNCITRAL Rules placed a call to the then-Secretary-General of the PCA in order to resolve a critical impasse that had emerged with the procedure for constituting a tribunal where a party, or the party-appointed members of a tribunal, failed to make an appointment in accordance with the Rules. They awakened the Baron Van Boetzelaer quite literally in the middle of the night (New York, of course, being well behind The Hague), but he was at least sufficiently lucid to accept this proposal. As a result, the PCA Secretary-General was included in the default mechanism for appointments under the UNCITRAL Rules, in lieu of the creation of a new UN
body for that purpose. Since then, my predecessors and I have regularly acted to designate appointing authorities or, directly, to appoint arbitrators, decide challenges, and perform certain other roles in a wide variety of disputes involving parties from around the world.

Soon thereafter, another coincidence saw the PCA in a position to assist in the establishment and initial work of the Iran-US Claims Tribunal in The Hague. The PCA next adopted various sets of optional rules, first, to cover the domain of so-called “mixed arbitration” between States and private parties more comprehensively than just the field of foreign direct investment and, secondly, to adapt the UNCITRAL Rules to the particular context of arbitrations involving public entities and develop practices that better reflect the public nature of such disputes as compared to the commercial character of the UNCITRAL process. Within the latter project, the PCA also took on the mantle of administering disputes between international organizations and private parties. Finally, through a series of initiatives, the PCA sought to develop knowledge and expertise in areas where arbitration remains underused or faces particular challenges. In this way, the PCA has developed rules or other proposals to enhance best practices in environmental or natural resource disputes, multi-party disputes, cultural heritage disputes, and mass-claims processes. These efforts continue, as demonstrated in the PCA’s partnership and role as appointing authority under the rules of a new institution by the name of PRIME Finance, set up to handle complex financial disputes following concerns about the adequacy of national courts in the aftermath of recent financial crises.

So, did these efforts bear fruit? Well, the answer is borne out by the numbers—and by a trend of growth that appears, if anything, to be accelerating. As of this moment, the PCA is administering 73 pending cases, including 5 inter-State arbitrations, 50 arbitrations under bilateral or multilateral investment treaties, and 18 arbitrations in contract disputes involving States, State entities, or intergovernmental organizations. If the usefulness of any institution is ultimately determined by its users, then the PCA is demonstrably thriving once again.

The moral to this story is one that can clearly be observed here in Latin America with certain States’ reactions to the developments in the investment treaty system. While not ignoring that many of the criticisms of the investment treaty system are substantive rather than procedural, there is for many countries in the region a growing feeling of distance between institutions located in Washington, Paris, Stockholm, and The Hague, and those governments and stakeholders whose interests are affected by investment arbitrations on a local level. The feeling is growing that existing institutions are inadequate and foreign, as are the majority of participants in these processes. Proposals are therefore being developed for new institutions and procedures to fill this perceived void.

There is also a general questioning of the propriety of the sovereign submission to arbitration with a private party and the idea of de-politicization of such disputes. Last year, the PCA saw an arbitration
where Ecuador sought in an arbitration against the United States a definitive and binding interpretation and application of a specific provision of the US-Ecuador BIT. In a previous case between Italy and Cuba, the claims of certain Italian investors were dealt with by diplomatic protection before a State-to-State arbitral tribunal presided by Yves Derains, one of our guests of honour at this Congress whom we paid homage to yesterday. If these cases are any indication, States no longer uniformly agree that such disputes should be settled directly between the investor and the host State on a purely case-by-case basis, and we may thus see more such cases in the future.

Whether such States’ policies are correct or incorrect—and it is frankly not our business to question our Member States’ policy—it is not just in our interests, but it is our duty to adapt to new realities in such a way that we can continue to serve the community of States in resolving their disputes, for the only absolute is that we cannot let these disputes fester for absence of a proper forum in which to resolve them. If the bedrock of international arbitration is party autonomy, we must address these concerns such that States continue to choose to bring their disputes to arbitration. And if the key characteristic of arbitration is flexibility and the ability to adapt the procedure to the needs of the case, so too must our institutions adapt to meet the needs of participants in the process.

Therefore, if we are to make sure that our institutions remain relevant, I submit that we must always take these concerns seriously and, within the limits of our mandates, and while continuing to guarantee neutral, efficient, and effective dispute resolution, be willing to effect the necessary rapprochement, and be ready to adapt as institutions to serve our users, near and far, now and in the future.

In conclusion, I must say that I was heartened to hear comments made in a similar vein by our other guest of honour, Bernardo Cremades, yesterday. And as he is almost an institution all by himself, and well-known to all of the organizations represented on this panel, his words resonate particularly strongly.

Thank you. Muchas gracias.