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‘To The Hague!’ - International Dispute Settlement from Practice to Legal Discipline



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‘To The Hague!’ - International Dispute Settlement from Practice to Legal Discipline

Inaugural lecture given by

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on the acceptance of his position as professor of

International Dispute Settlement Law

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Universiteit
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Mijnheer de Rector Magnificus, your Excellencies, zeer gewaardeerde toehoorders,

You may wonder why the title of my inaugural lecture starts with ‘to The Hague’, something that may seem at first sight rather activist. Fear not, or do not be misled - depending on the expectations you have from what I will say today-, I am and remain a pragmatist and realist -or some would say a cynic-, when it comes down to international dispute settlement law. I do not have the ambition today to promote the use of international dispute settlement in international law. ‘To the Hague’ also is not a mercantorial device to promote the Hague as a venue of international dispute settlement. The Hague is of course the ‘International City of Peace and Justice’ and hosts some of the most important dispute settlement mechanisms in international law, such as the International Court of Justice, the Permanent Court of Arbitration, and the Iran-United States Claims Tribunals, yet I do not have the intention to focus exclusively on the Hague. So, what these words ‘to The Hague’ do represent will become clear throughout the lecture.

In this lecture, my inaugural address, I intend to trace the emergence of international dispute settlement as a legal discipline. I will first give a very brief overview of the current status of international dispute settlement as an academic discipline, after which I will turn to the reasons behind the historical absence of such attention to international dispute settlement. Finally, I will discuss whether and why the lack of academic attention has changed.

I do not intend here to engage in the question whether as a legal discipline, international dispute settlement is an autonomous legal discipline, or whether it is a component of the legal discipline of international law a question I do not intend to settle here. When I use the phrase ‘international dispute settlement as a legal discipline’, this therefore may in fact also be understood to mean ‘international dispute

settlement as part of *the* international legal discipline’. So far, the caveats, which are inherent in any legal speech as we often, as lawyers, spend an even amount of time explaining what we do not do, than what we do or will do.

International Dispute Settlement as an Academic Enterprise

The area of international dispute settlement, is relatively new in the international legal discipline in terms of it being an academic enterprise. In this respect, it is remarkable that there are only a handful of chairs that are dedicated to this legal field, even if one broadens the search to related terms such as ‘international dispute resolution’, or ‘international arbitration’ in an international law setting. This may well be the consequence also of the fact that international dispute settlement is a discipline practiced by general international law professors also. However, the situation is quite different when one looks at the commercial law or private international law fields, where chairs in arbitration or alternative dispute resolution (ADR) are more widespread. It is also notable, that the chair I am currently holding is not ‘international dispute settlement’, but rather ‘international dispute settlement *law*’, an addition that was made in a relatively last instance. The word ‘law’ is revealing. It ascertains that this chair, and what I am and will be doing indeed is about the ‘law’ of international dispute settlement, and not some other esoteric discipline that would be alien to legal research in that field.

When one looks at the curricula of international law programmes, one also - until recently - found few courses entirely dedicated to international dispute settlement. There are of course exceptions. In fact, a compulsory course on international dispute settlement has been traditionally included in Leiden University’s Law School Master of Laws programmes since long, and of course in several other Universities, but one could find until recently few other examples until the increased activity of the International Court of Justice and other dispute settlement mechanisms over the past decade. Courses on international arbitration

in international law were similarly mostly absent from international curricula, at least until the recent surge in investment arbitrations. In contrast, international arbitration in commercial law and private international law has been slightly more popular, although the first genuine course on international arbitration dates only from 1985 at Queen Mary University London.¹

These two facts - few chairs in international dispute settlement and few independent international dispute settlement courses - exemplify the main thrust of my argument today - that international dispute settlement has until relatively recently not been considered nor given space as a separate field of research within the international legal discipline. The reasons for this are manifold, but one reason is in my view central: international dispute settlement was long considered more practice than discipline, a practice that occasionally deserved some academic attention, but that was not considered as an area of research in its own right within the broader field of international law. International dispute settlement was more *about the law* than *law in itself*.

Let me now turn to some of the aspects of this assertion.

The Position of International Dispute Settlement in the Study of International Law

The position of international dispute settlement in the study -broadly speaking- of international law can be captured by three interrelated points:

First, settling international disputes and devising a mechanism to that effect has long been something more akin to an aspirational, diplomatic and political endeavour than a question of law. Rather than looking into what *the* international law of international dispute settlement is, attention was more geared towards how to avoid war and whether international dispute settlement mechanisms could contribute thereto. So, is international dispute settlement really

law or rather a political endeavour -or as our former Leiden colleague Jean d'Aspremont would say a 'belief system'?

Secondly, if international dispute settlement is law, then a second question arises, namely: is there sufficient legal practice to study? Until the end of the 1990s, the field was characterized by a relatively limited practice - especially when contrasted to domestic litigation - with the exception of certain peaks.

Thirdly, and related to the two previous points, international dispute settlement has long been considered more as a practice than something part of international law. Dispute settlement was more doing law, than thinking about the law.

After an analysis of these three ideas, I will subsequently address the overarching question that underlies this address, namely: should we see international dispute settlement as a legal discipline?

I will offer an answer to this question that will, hopefully, convince you. But let me start with the first question.

The Aspirational Nature of International Dispute Settlement

International dispute settlement has long been perceived as something more akin to a diplomatic and political endeavour, being aspirational in character. Those involved were characterized by dichotomy between the 'believers' and 'non-believers' in a form of compulsory dispute settlement mechanism for States. The aspirational nature of international dispute settlement is visible from the excessive focus in the history of international dispute settlement, both in politics and scholarship, on the exclusive question whether there is a need or not for a *compulsory* method to settle disputes. The believers considered that there is such a need, inspired by a sense of justice for those States whose rights have been breached, by the idea that dispute settlement is necessary to avoid recourse to war³, or by the less philanthropic idea that dispute settlement, or more broadly enforcement, is necessary in order

for international law to be considered law.⁴ So, the question whether international dispute settlement is law, is intimately related to the broader discussion whether international law truly is law and the focus on enforcement as a requirement for such qualification.

I will shortly discuss the rise of dispute settlement mechanisms and how this shaped the international legal system. I will not retrace here the history of international dispute settlement, which has been done by others already and which is essentially characterized by a cyclical rise and fall of the use of - sometimes rudimentary - forms of arbitration.⁵ Rather, since my lecture today is confined to the question of the surge of international dispute settlement as a legal discipline, I will start with the period when international law itself was 'born' as a legal discipline, which is commonly considered to have been somewhere towards the end of the 19th Century, not the least through the creation of the *Institut de Droit International* in the Town Hall of Ghent.⁶

From the 1870s onwards, proposals for the establishment of some system to arbitrate international disputes were becoming common, in line with the general favourable attitude towards international law and its role in international society.⁷ This fervent trust in international arbitration found confirmation in the increased practice of international arbitration, and the relative successes of arbitration to settle highly sensitive disputes, such as the arbitration of the *Alabama claims* between the United Kingdom and the United States in 1872, and the *Fur Seal Arbitration* between the same parties, concluded in 1892. It is also the period in which arbitration was professionalised, in the sense that arbitrators were increasingly selected because of their qualifications rather than their political status: foreign heads of State were replaced by legal scholars, judges or diplomats as arbitrators.⁸ This resulted in a formalisation of international arbitration which found its culmination in the creation of the Permanent Court of Arbitration - the PCA - during the first Hague Peace Conference of 1899.

What is important is that international arbitration - even after the creation of the PCA - was seen not only as a means to settle disputes - which it still is today and which I will discuss in my next two points - but another ambition also was attached to it. International arbitration was seen, and still is seen today, as the method - *par excellence* - to avoid recourse to war and as the means to achieve respect for international law or ensure implementation of international law. This noble goal had been vigorously defended during the 1899 and 1907 Hague Peace Conference, but which by no means was shared by everyone, resulting in the ill-named Permanent Court of Arbitration.

During the first Hague Peace Conference of 1899 during which the PCA was created, for the first time in history something akin to a permanent international arbitral tribunal was created. But there was no compulsory submission of disputes to the PCA, and the PCA, despite its name, had nothing of a permanent tribunal, leading to quite some disillusionment amongst those who had strongly militated in favour of a mandatory recourse to arbitration to avoid recourse to war. As the Dutch jurist Tobias Asser, who had participated in the negotiations of the treaty establishing the PCA, explained: 'Instead of a permanent court, the Convention of 1899 gave but the phantom of a court, an impalpable spectre, or to be more precise yet, it gave us a recorder with a list.'⁹ The statement, while a fine example of Dutch straightforwardness, has a strong note of disappointment.

When the second Hague Peace Conference was convened in 1907, disappointment made way for some renewed enthusiasm for the idea of a permanent tribunal with compulsory jurisdiction, but again the dichotomy between the political preference for a mandatory system of dispute settlement was at its apex. The Russian delegate, Mr. de Martens asked all delegates to join him in achieving 'progress'. He explained: 'there have always been in history epochs when grand ideals have dominated and enthralled the souls of men; sometimes it was religion, sometimes a system of philosophy, sometimes a

political theory. The most shining example of this kind was the crusades. From all countries arose the cry 'To Jerusalem ! God wills it'. Today, the great ideal which dominates our time is that of arbitration.'

And so, Martens continued

'Whenever a dispute arises between the nations, even though it be not amenable to arbitration, we hear the unanimous cry, ever since the year 1899, 'To The Hague''.¹⁰

This statement, while encouraging, was in fact more wishful thinking, and the outcome of the Second Hague Peace Conference showed that the Russian delegate had not managed to convince his fellow delegates to create a truly compulsory court of arbitration. After Dutch directness, and Russian optimism, let us turn to some Belgian pragmatism. The Belgian delegate, Mr. Beernaert, opposed the creation of a compulsory court of arbitration, based not necessarily on a self-interested Belgian opposition to the project, but on the pragmatic consideration that such a project, if adopted, would simply not gather the necessary support of the States and thus remained a 'dream'. Beernaert explained:

'Never has the national sentiment been at a higher pitch, and old nations and old languages that had thought of as having passed to oblivion, are again calling for their place in the sun - no one of us would renounce his own land, his own and cherished fatherland, and no one would certainly consent to being governed from afar, and hence ill governed. Therefore, in my judgement, we must regard as a fearful Utopia, the dream of a world state or of a universal federation, of one sole parliament, of one court of justice supreme over all nations.'¹¹

That 'higher' aspirational goal dominated international attention and discussion -including in scholarship, to which I will come back in a couple of minutes - since the 'birth' of international law as a legal discipline. The question was *whether* to settle a dispute and the role dispute settlement could play in avoiding war, rather than analysing, from a legal

perspective, how a dispute is to be settled or which procedural rules apply.¹²

These questions continued to gather attention in the 20th Century, although the context in which the discussion took place was slightly different. After the creation of the Permanent Court of International Justice - the PCIJ - in 1920, discussion on whether or not an institution with compulsory jurisdiction needed to be created, became of less relevance since many believers had achieved what they were longing for - a standing court worthy of that name. Yet the PCIJ had no compulsory jurisdiction, despite proposals to that effect from the Advisory Committee of Jurists headed by the Belgian Baron Descamps¹³, but its permanent and especially its standing character was considered a major achievement. According to the American lawyer James Brown Scott the 'Hague system' was relegated to a 'heresy'¹⁴, and replaced by the 'Geneva system', comprised of the Permanent Court of International Justice and its political counterpart the League of Nations which had been established at the same time. The PCIJ, much as the Permanent Court of Arbitration, was seen as part of the 'system of war prevention'¹⁵, but there is one important difference with the discussions in the context of the Permanent Court of Arbitration: the PCIJ was established in the context of a strong belief not only in a form of compulsory settlement of disputes to avoid 'war', but also in an institutionalisation to bring about peace and development, as exemplified by the creation of the League of Nations.¹⁶

After the Second World War, the United Nations and its principal judicial organ, the International Court of Justice - the ICJ - were created. The ICJ, similar to the PCIJ, was considered important to provide a system of enforcement against those states who would breach the law and to that end high hopes again were put in this ambitious endeavor by the negotiators of the Statute of the ICJ and the United Nations Charter. It is not a coincidence that the obligation to settle disputes in a peaceful way is provided in Article 2 para. 3 of the UN Charter,

just before the prohibition on the use of force, mentioned in Article 2 para. 4 of the UN Charter. The failures of the PCIJ and the League of Nations were considered to have been addressed with these new institutions, although many features of the PCIJ had simply been taken over in the Statute of the ICJ. Yet, the hopes that were put in the ICJ - and the UN for that matter - in relation to the capacity of both to provide an effective alternative to recourse to war were, as Wilhelm Grewe puts it 'illusory from the very beginning', and the expectations of a turn to 'justice' raised from the creation of the two military tribunals of Nuremberg and Tokyo 'could only impress zealots and starry-eyed idealists who were blind to or dazzled by the realities of world politics'.¹⁷

This brief historical inquiry brings me to my second question, namely whether all these developments were sufficient to transform international dispute settlement to international dispute settlement *law*, notably through the generation of sufficient practice.

Limited Practice and Limited Institutions

Until recently, the extent of the practice of international courts and tribunals and arbitration has remained all in all relatively limited, with the exception of certain peaks of activity, which were limited in time and also limited to one particular institution or method of dispute settlement, thus hindering any transformation of that stand-alone practice into something broader and more systemic, something worthy of the attention of a legal discipline. Dispute settlement mechanisms resulting in a binding outcome remained confined to two institutions only: the Permanent Court of International Justice and its successor the International Court of Justice, and international arbitration.

As far as arbitration is concerned, the Permanent Court or Arbitration initially had a quite impressive activity, and international arbitration more generally had its 'Golden Age' in the late 19th an early 20th Century. The first edition of the

'Survey of International Arbitrations' compiled by Alexander Stuyt¹⁸, who obtained his law degree at Leiden University, but then worked as Secretary at the Permanent Court of Arbitration and became a professor of international law at the University of Nijmegen, contains some 330 arbitrations conducted between 1794 and 1919, 242 of which took place between 1870 and 1919. After the creation of the PCIJ, and then the ICJ, the PCA had almost fallen into oblivion after the second World War and until the end of the 1990s, with little to no international arbitrations conducted under its auspices. More generally, interstate arbitrations then were very limited.¹⁹

As far as judicial settlement is concerned, one can only say that the PCIJ was a relatively successful, yet short-lived experiment. Moreover, the Covenant of the League of Nations was premised on the idea that there were two types of disputes in international law.²⁰ First, those that were 'suitable for arbitration or judicial settlement', and those that were not because of their political nature. It was thus generally accepted that international dispute settlement, either through arbitration or the PCIJ, was unsuitable to settle disputes concerning the 'vital interests and honour of States'²¹, and the PCIJ's case-law was thus restricted mostly to legal technical issues. Initially, many disputes were settled by the PCIJ, which has delivered decisions in 31 contentious cases between States, and 27 advisory opinion between 1922 and 1940.²² But its activities were in steep decline in the 1930s, the Court was unable to sit between 1941 and 1944 - during the Second World War - and it ceased work in 1945. The successes the PCIJ had achieved in this short period of time were not sufficient to create something akin to a dispute settlement system, and international scholarly attention to the PCIJ, rapidly faded away as the PCIJ's activities declined.

The International Court of Justice's jurisdiction knows of no distinction between political and legal disputes, and has repeatedly refused to dismiss a claim or a request for an Advisory Opinion because of the 'political' nature of the

question. Yet the abandonment of this dichotomy has not yielded much activity for the Court. Until the end of the 1970s, the ICJ rendered only 39 judgements and 16 advisory opinions, which related to disputes and questions which have been described as of 'minor importance'.²³

Political settlement dominated judicial settlement.²⁴ This 'dispute settlement inactivity' can be traced back to the fact that the sovereignty and sovereign equality of States still requires the explicit consent of the States parties to a dispute to have this dispute settlement through arbitration or international adjudication, and the paralleled rise in the post-World War II period, of international legal realism emphasising the distinction between confined legal-technical disputes and political tensions or conflicts which were not capable of being or should not be settled through legal dispute settlement mechanisms such as courts and tribunals.²⁵ Despite opposition to legal realism and to that specific question from several scholars, notably by Hersch Lauterpacht²⁶, legal realism found its way to Governments and domestic policies for several decades.²⁷

Moreover, there was also a massive distrust of newly independent States, and notably African States, not towards the idea of international disputes settlement, but to Western institutions such as the International Court of Justice and the Court's decisions in the 1966 *South West Africa* cases.²⁸ In those cases - the first brought before it by African States - Ethiopia and Liberia were denied *locus standi* in relation to the subject matter of the dispute - which related to the obligations of South Africa towards the mandated territory of *South West Africa* - although the Court had earlier concluded that both States had *locus standi* as a matter of jurisdiction.

Therefore, and until recently, the number of disputes settled through international arbitration or international courts or tribunals had remained all in all relatively limited, with the exception of the inter-war period, when the Permanent Court

of International Justice was active, and the early years of the International Court of Justice until roughly the early 1960s.²⁹

International Dispute Settlement as a Practice

Related to my two previous points, international dispute settlement has since long been regarded as a practice, and not something worthy of study in an independent legal discipline. This view of the field is perhaps the logical consequence of my previous points that international dispute settlement and specifically international arbitration was considered as a mere way to diplomatically settle conflicts between two or more States, or between States and private parties at a later stage, a *means* to apply the law or to ensure respect for the law, rather than itself *law* as such.

This is of course inherent in the fact that we are dealing here with the settlement of international disputes. Settling disputes is intrinsically practical in nature and is in its purest form indeed nothing more than applying the law rather than law in itself, and there would therefore be, as a consequence nothing more to say about this procedure than what the outcome of that exercise was. This perception has however changed and I will come back to this in a couple of minutes.

For long, the translation of the idea that international law is about applying to law rather than anything else, can be found in the general view that acting as arbitrator is not a profession in and of itself - one is asked to settle a dispute as a - remunerated - service to society. This idea has existed since long and still is firmly embedded in international practice, both on the international and the domestic legal levels. As posited by Thomas Clay in 2005:

'Arbitration is not... a profession; it is a mission, a temporary function, not a profession. All those who act as arbitrators have, in principle, another job, a main occupation that provides them with a steady income and a social status. Arbitration is their side activity.'³⁰

This statement was made in the context of commercial

arbitration - and one can ask the question whether it is still valid today - but it is inherent in the arbitral function. Parties to the dispute select they consider to be best placed to decide their case.³¹ As Philippe Fouchard explained in 1965, arbitration is '[an] apparently rudimentary method of settling disputes, since it consists of submitting them to ordinary individuals whose only qualification is that of being chosen by the parties.'³²

And because the very idea in domestic legal systems to have recourse to arbitration is precisely to avoid recourse to courts and tribunals, it is characteristic of the arbitral function that it is proposed to individuals who precisely are not 'professional' adjudicators - such as judges. In fact, a recent survey shows that having held a position as a high-ranking civil servant, such as a judge, is a characteristic considered of least importance in the selection of arbitrators.³³

In international law, the same is without doubt also - and perhaps even more - true. Because of the predominance of the use arbitration to settle international law disputes, the vast majority of international disputes were settled by individuals who did this alongside any other function they had - they were temporarily called upon to exercise an arbitral function as a service to the international society of States. Especially at a time when international courts and tribunals did not exist, this was inevitable. But even thereafter, this practice persisted, probably for the same reason that arbitrators in commercial disputes are not professional adjudicators. Moreover, in line with the historical focus on the diplomatic and political nature of international dispute settlement, arbitrators in international law were typically indeed not practising attorneys, but rather, foreign sovereigns, heads of State, ministers, legal advisors and law professors.³⁴

That perspective of the arbitral function, in international law, as a service to society is of course characteristic of the (international) legal system. My main point here however

is that, until recently, this has resulted in a perception of international dispute settlement, and especially arbitration, as a field of practice in essence.

Let me turn now to the impact of these elements on academic attention and scholarship in international dispute settlement.

Academic Attention to International Dispute Settlement

The three elements I just described - the aspirational nature of dispute settlement, the limited practice of courts and tribunals and the view of international dispute settlement as a practice, have had an important impact on scholarship on the subject.

First, the basically non-legal academic debate between the 'believers' and 'non-believers' has obstructed the move towards treating international dispute settlement as a question that relates to law rather than political preference, and as explained already, much of the original attention devoted to arbitration and dispute settlement orbited around the specific question of the desirability of compulsory dispute settlement.³⁵ This is most visible through various publications on international arbitration which appeared during the so-called 'Peace Movement' between the 1870s and the early nineteenth Century³⁶, because that was the main question diplomats and negotiators were in fact discussing.

Secondly, and until recently, international dispute settlement suffered from a lack of institutionalisation - which I take here in its broadest sense as referring to the establishment and recognition of the concept of dispute settlement within the international society. Until recently indeed the limited practice of courts and tribunals, has always been the produce of a single institutional setting - the PCA, the PCIJ, and then the ICJ - with occasional surges in arbitration. There was thus a form of institutionalisation, which of course attracted the necessary attention and comments, but this institutionalisation was limited mainly to that single mechanisms to settle disputes - international dispute settlement as such was not

institutionalised or considered to be more than the limited practice the PCIJ, the ICJ or of inter-State arbitral tribunals produced. And institutionalisation is important since, amongst others, it implies the transformation of a certain practice from something merely practical or aspirational into a legal scientific concern. *Ad hocism* is not a catalyst for recognition as a legal discipline - it is only when certain institutions are created that an area of practice becomes of interest to the legal academic community. International criminal law provides a good example in that respect also - it is really only when the two *ad hoc* Criminal Tribunals for Rwanda and the Former Yugoslavia were created that international criminal became accepted as a legal discipline.

10 Thirdly, up to the increase in disputes settled through arbitration and international courts and tribunals, and the creation of new avenues to that effect, the limited practice in international law has had as main consequence that the *relevance* of international arbitration and international adjudication for international law simply was limited. But, as disputes were submitted to the existing mechanisms, alongside the question whether a compulsory system of dispute settlement should be created, academic attention increased and moved from that question into three other aspects, which are strictly speaking not related to the law of international dispute settlement. These aspects very much accord to the idea of the field being practice-oriented.

A first aspect is the output of dispute settlement processes. The main works dealing with international courts and tribunals, historically, were focusing on how courts and tribunals apply the law and whether and how decisions rendered by these courts and tribunals have contributed to the development or clarification of the law. Examples are Hersch Lauterpacht's 'The Role of Law in the International Community' of 1933³⁷, Georg Schwarzenberger's 'International Law as applied by International Courts and Tribunals' originally published in 1945³⁸, and Bin Cheng's 'General Principles of Law as Applied

by International Courts and Tribunals' published in 1953.³⁹ In the field of arbitration, research was even more limited not the least because many of the arbitral awards rendered escaped public scrutiny and thus scholarly attention.

A second aspect relates to the fact that even if such procedures were in and of themselves interesting from a legal scientific perspective, the idea that dispute settlement merely is about applying the law resulted in the fact that most attention was paid to compiling the practice rather than analysing it. The survey conducted by Alexander Stuyt in 1938, and which was updated in 1989, which I mentioned above is significant in that respect. Also, the writings on arbitration were often confined to the sphere of mixed arbitrations between States and foreign companies and commercial arbitration, and were focusing also more on the outcome of arbitration or compiling that practice - not the least also because of the general distrust of practitioners towards non-practising academics.⁴⁰

A third aspect, is the focus on certain practicalities or institution-oriented questions relating to dispute settlement and arbitration, or on how a specific court or tribunal functioned.⁴¹ Also, because of the practice-oriented approach to the field, academic attention and publications in the field of international dispute settlement and most notably in international arbitration, was mostly the work of practitioners and academics/practitioners who in most cases limited their research and writings to practical problems in the arbitration they were facing in their practice.⁴² Little attention was directed to the proper law of arbitration or to theories and concepts in that law.

To sum up, international dispute settlement as such thus was not really touched upon until the 1990s⁴³. Little publications on dispute settlement specifically can be found between 1950 and 1990. Writing in 1986, Richard Bilder wrote 'Unfortunately, we do now know as much as we would like to know about disputes and dispute settlement, either within or

among nations. While sophisticated empirical and theoretical research is beginning to be done concerning dispute processing within domestic societies, our study of international disputes and the way they are dealt with is less developed, and our knowledge is still to a considerable extent intuitive and anecdotal'.⁴⁴

A search on the Peace Palace Library catalogue shows that it is indeed only in the 1980s that the notion of 'international dispute settlement' made its appearance in the titles of articles and books. The handbook 'International Dispute Settlement' by John Merrills, the first edition of which appeared in 1984, was unique at that point in time. But Merrills, while still being today one of the only handbooks on the subject, takes an approach to dispute settlement - at least in the first versions of his book- which is reminiscent of the perception of dispute settlement as a practice, and which consists chiefly of discussing the various methods of dispute settlement available to States in international law.

This is not to say that international dispute settlement remained completely unnoticed in scholarship. In addition to the exceptions mentioned above, the vast majority of international law handbooks or textbooks in that period did pay attention to the ways in which international disputes are settled. Charles Rousseau for instance, spent more than 50 out of the 400 pages of his 'Droit International Public' of 1979 to international dispute settlement, covering international arbitration, political settlement, judicial settlement and other diplomatic methods of settlement such as conciliation.⁴⁵ These and other works that were published, were in view of the limited institutions, geared towards compiling the practice of a specific institution, such as the International Court of Justice, and to explaining the working procedures of the specific institutions. Thus, here again, the analysis was more than often confined to the output of dispute settlement, rather than dispute settlement as such.

This brings me to my next question: why has it changed? Is

-and why is- international dispute settlement now a legal discipline on its own?

Has it Changed, and Why has it Changed?

The first question you will ask yourself, of course, is whether from a legal scientific perspective there is indeed more to say about international dispute settlement than what I just explained. Of course there is ; I would otherwise not be standing here today. But what I will say next should not be read as an apology aimed at a justifying my position or what I - and other colleagues throughout the world - have been doing since more than a decade. International dispute settlement has become a legal discipline, as I will explain, and an appropriate piece of evidence to convince you upfront is that our new LLM Advanced Programme in International Dispute Settlement has just been accredited and will start as of September this year.

It is beyond doubt indeed that academic research on international dispute settlement has increased rapidly over the past two decades. First, from a research perspective, attention has shifted from looking only to the *output* of dispute settlement or a specific institution, to also examine the law of international dispute settlement with even specific law journals dedicated to the field, such as the *Journal of International Dispute Settlement*. And, secondly, the curricula of law schools show an increased training in the fields of dispute settlement, evidenced not only by the introduction of various courses on the subject but also by the introduction of dispute settlement-focused master programmes in Geneva, and, as said, as of September also here in Leiden.

But why has this occurred? What has changed compared to the three perspectives on dispute settlement discussed earlier?

An Increase in the Practice of International Dispute Settlement

The first and most obvious reason relates to the fact that, as said earlier, international arbitration and international courts and tribunals cannot nowadays - quantitatively - be

marginalised in view of the large number of disputes settled through such means. The International Court of Justice has (almost) never been as active as it now is, although some critics have pointed out that, in view of the increase in the number of United Nations Members States from 1945 until today - from 55 to some 194 - there is proportionally not really an increase in the Court's activity compared to the early years.⁴⁶ The International Tribunal for the Law of the Sea has since it heard its first case in 1997 decided some 25 disputes, the World Trade Organisation Dispute Settlement System has decided over 500 disputes since 1995; and the total number of arbitrations in which the PCA acted as a registry amounted to 148 in 2016, of which 40 were initiated in that year.⁴⁷ Of the total number of PCA administered cases in 2016, 86 were investor-state arbitrations arising under bilateral or multilateral investment treaties and national investment laws, and 7 were interstate arbitrations. The International Centre for Settlement of Investment Disputes (ICSID), the most used forum for the settlement of investment disputes, has similarly - as is widely known- registered a record number of cases over the past decade. The recent statistics of the caseload of ICSID show a massive increase in the number of investor-State arbitrations starting in the late 1990's with a record of 52 new registered cases in 2015.⁴⁸ As for 30 June 2017, ICSID had registered a total number of 619 cases, of which 250 were registered in the past five years.

With the quantitative increase of the relevance of international dispute settlement and arbitration, comes an increase in public and academic attention to the field. Questions such as how the courts and tribunals function, what their role is in international law and society, who the arbitrators and judges that decided cases are, why a certain method of dispute settlement is more effective than another or preferred, or what the authority of international courts and tribunals is, become relevant only to the extent that such courts and tribunals become academically visible and meaningful as a subject of enquiry, which in turn rests in part on a quantitative increase

of their output.

The Institutionalisation of Dispute Settlement

Recent decades have seen a clear increase in the number of legal dispute settlement mechanisms, referred to as 'the proliferation of judicial institutions'; I prefer to use institutionalisation since the so-called proliferation of courts and tribunals, has to be seen hand in hand with the increase in the use of arbitration, the move towards an increased acceptance - in advance - of the jurisdiction of international courts and tribunals and of international arbitral tribunals, and the increased recognition and acceptance of international dispute settlement as part of international law.

The proliferation of legal dispute settlement mechanisms has been termed in legal scholarship 'the single most important development of the post-Cold War age'.⁴⁹ The International Tribunal for the Law of the Sea heard its first case in 1997, the World Trade Organization Dispute Settlement Understanding was created by the 1994 Marrakesh Agreement, and a whole range of regional international courts and tribunals also started functioning over the past two decades.⁵⁰ The use of arbitration has similarly risen substantially, as explained a couple of minutes ago.

The increase in the practice and of dispute settlement institutions as such, should be coupled to an increased acceptance by States of the jurisdiction of courts and tribunals, and of arbitral tribunals. To become a member of the World Trade Organisation implies the acceptance of the compulsory competence of the dispute settlement system provided for in the Marrakech Agreement. Parties to the Law of the Sea Convention likewise are bound - with certain exceptions - to choose submission of disputes that arise under that convention to either the Law of the Sea Tribunal, the International Court of Justice, or to arbitration, the Law of the Sea Tribunal having moreover two instances of compulsory jurisdiction. In the area of investor-State arbitration, it is finally noticeable that the vast majority

of the 3000 or so investment treaties provide direct access for foreign investors to international arbitration resulting in a quasi-compulsory dispute settlement system. As a consequence, as Samantha Besson has put it 'current international law can no longer be understood without its judicial dimension'⁵¹, to which I would add the arbitral dimension.

Here also, of course, one should wonder why this is the case, since from the perspective of the principle of sovereign equality and the need for an explicit consent to have dispute settled, not much has changed since the discussion during the two Hague Peace Conference.

A first explanation is the self-interested or self-centred nature of States - States accept the competence of a court or tribunal in advance only to the extent that it serves their interest. This has always been the case and has not changed much, with the exception of certain areas of international law which have grown substantially in importance in the past decades. A first example is dispute settlement at the World Trade Organisation where the downsides of not settling disputes that would impact the free flow of goods - such as the drop in import and export or economic countermeasures- outweigh clinging to the principle of sovereign independence and the sporadic ad hoc acceptance of the jurisdiction of a court to settle that dispute. The same holds true in respect of investor-State arbitration where the main reason underlying the signature of an investment treaty with an arbitration clause giving foreign investors direct access to arbitration still is that such a treaty stimulates foreign investment and capital flows between the signatory States, although the balancing exercise in that field is increasingly under tension as we have seen recently with the negotiations of the Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union.

A second reason relates to recent surge in State's - at least some States- idealistic strive for and renewed believe in the idea of justice, which has weakened the traditional diplomatic

aspects of dispute settlement and the realist perspective on international law with had very much influenced international politics during the Cold War era.⁵² States seem to be less reluctant to bring a claim against another State before the Court, and to seek a remedy for what they consider to be a violation of international law⁵³, also in cases which are of more global concern than of concern for a specific State, as was evidenced by the *Whaling in the Antarctic* case brought by Australia against Japan.⁵⁴ The end of the Cold War without doubt has contributed to this.

A legal technical complement to this evolution is the relinquishment of the old debate on the distinction between political and legal disputes. This can be seen in the recent *Marshall Islands* cases before the International Court of Justice, which concerned the obligations of India, Pakistan and the United Kingdom in relation to the cessation of the nuclear arms race and to nuclear disarmament.⁵⁵ Vice-President Yusuf, in his dissenting opinion in the case against the *United Kingdom*, described the 'justiciability' of disputes - the technical translation of the distinction between legal and political disputes - as an 'old and controversial concept' and as a 'legal relic'.⁵⁶ While a dissenting opinion, it is important to point out that the ICJ has over the past decades not refused to hear any case because the subject-matter would be 'non-justiciable'.

But, of course, State interests continue to play a role in this debate. The limited number of acceptances of the compulsory jurisdiction of the International Court of Justice can also be explained by the fact that States are unwilling to relinquish control over certain of their interests, especially those which were previously captured by the category of 'non-justiciable disputes', which is why permanent Members of the Security Council such as the United States, China, and the Russian Federation have not done so. The same reason explains the opposition of States to the jurisdiction of the Court or of arbitral tribunals which have been established based on the

consent expressed in treaties in advance of the dispute, as we saw recently with China's refusal to participate in the arbitration in relation to the South China Sea brought by the Philippines although China is a party to the UN Convention on the Law of the Sea and had thus accepted the jurisdiction of the arbitral tribunal. To keep a certain liberty in deciding whether or not to accept the Court's jurisdiction on an *ad hoc* basis is also why the number of States which have accepted the compulsory jurisdiction of the International Court of Justice has not grown substantially over the past decades.

Is International Dispute Settlement still a Practice?

This brings me to my last point - is international dispute settlement still a practice. Of course, international dispute settlement still is a practice. But not in the same sense as it was perceived before. For sure, arbitrators and judges still are appointed because they are considered best suited to settle the dispute - and settling the dispute still is their main task.

But the increase in the number of courts and tribunals, has nonetheless given rise to research into who these international judges are⁵⁶, and how the community of international litigators operates⁵⁸, not the least because the community formerly engaged in international dispute settlement is now much broader than 10 or 20 years ago.⁵⁹

More generally, the increased academic attention given to international dispute settlement, has removed the field from the ambit, which was already fading since a couple of decades, of the perception of dispute settlement as only a practice and not of any legal scientific relevance. My argument here has a form of circularity, I admit. It is inevitable that the perception of dispute settlement as a legal discipline rather than only a practice goes hand in hand with the increase of interested scholarship. That scholarship however has moved beyond analysing specific courts or the outcome of decisions to tackle more overarching theoretical and conceptual debates on international dispute settlement, including socio-legal studies,

critical studies, and empirical studies to name but a few.⁶⁰ International dispute settlement is considered now as much more than a mere practical application of the law. The distance between the research in international dispute settlement from the practical realities of the field⁶¹ clearly show, the dissociation between theory and practice, which in this particular field is incremental towards achieving the status of legal discipline, if one would want to define this as status. It is worth pointing out in this respect that one of the ways in which this can be viewed is that one no longer has to be a practitioner in order to be an academic researching and teaching on international dispute settlement, although that idea still is very much extant in the field of international arbitration. International dispute settlement has moved from 'doing law' to 'thinking about law'.⁶²

I would like to conclude my inaugural lecture by thanking everyone who has contributed to my appointment to this chair. I find it a great honour. Thank you in particular to the Rector Magnificus. My gratitude also goes to all past and present members of the Grotius Centre for International Legal Studies, who, since we are a large centre, are too many to mention. I would also like to thank the present and previous Faculty Board, for their confidence in me and specifically I thank our current Dean, Joanne van der Leun, and the current Academic Director of the Institute of Public Law, Willemien den Ouden.

Finally, a special thanks to my family, and in particular my partner Katia Gevaert for, amongst many other things, her patience, support, and encouragement.

Ik heb gezegd.

Notes

- 1 See for an overview Stavros Brekoulakis, 'International Arbitration Scholarship and the Concept of Arbitration Law', 36(4) *Fordham International Law Journal* (2013), 763.
- 2 Jean d'Aspremont, *International Law as a Belief System* (Cambridge: Cambridge University Press, 2017).
- 3 See Mary Ellen O'Connell, 'Arbitration and Avoidance of War: The Nineteenth-Century American Vision', in Cesare P.R. Romano (ed.) *The Sword and the Scales : The United States and International Courts and Tribunals* (Cambridge: Cambridge University Press, 2009), 30-45.
- 4 See the discussion in H.L.A. Hart, *The Concept of Law* (Oxford: Oxford University Press, 1997 - 2nd Edition), Chapter X. See also for a discussion Samantha Besson, 'Legal Philosophical Issues of International Adjudication. Getting over the *Amour Impossible* between International Law and Adjudication', in C.P.R. Romano, K.J. Alter, and Y. Shany (eds), *The Oxford Handbook of International Adjudication* (Oxford: Oxford University Press, 2013), 415.
- 5 See notably Wilhelm G. Grewe, *The Epochs of International Law* (De Gruyter, 2000), who retraces this history in various chapters throughout the various 'epochs' of international law.
- 6 Martti Koskenniemi, *The Gentle Civilizer of Nations. The Rise and Fall of International Law 1870-1960* (Cambridge University Press: 2001), 39-41 and Luigi Nuzzo and Miloš Vec, 'The birth of international law as a legal discipline in the 19th century', in Luigi Nuzzo and Miloš Vec (eds) *Constructing international law : the birth of a discipline* (Frankfurt am Main : Klostermann, 2012), IX-XVI.
- 7 Wilhelm G. Grewe, *The Epochs of International Law* (De Gruyter, 2000), 517.
- 8 *Ibid.*, 520.
- 9 Tobias M.C. Asser, Speech, in Scott, *The Proceedings of the Hague Peace Conference*, II, 232, 235.
- 10 *Ibid.*, 325-328.
- 11 *Ibid.*, 332-336.
- 12 See among others Edouard Descamps, *Essai sur l'organisation de l'arbitrage international. Mémoire aux Puissances par le Président de l'Union interparlementaire* (Bruxelles, Guyot: 1906).
- 13 Charles Rousseau, *Droit International Public* (Paris: Dalloz, 1979), 327.
- 14 J.B. Scott, Introduction, in Otfried Nippold, *The Development of International Law after the World War* (transl. by A Hershey, Clarendon. Oxford, 1923), viii.
- 15 Wilhelm G. Grewe, *The Epochs of International Law* (De Gruyter, 2000), 616.
- 16 See Luciano Tosi, 'The League of Nations: An international relations perspective', 22(1) *Uniform Law Review* 2017, 148-157.
- 17 Wilhelm G. Grewe, *The Epochs of International Law* (De Gruyter, 2000), 667.
- 18 A.M. Stuyt 'Survey of International Arbitrations 1794-1939' (Dordrecht: Martinus Nijhoff, 1939 ; reprinted by Springer, 2014).
- 19 See A.M. Stuyt 'Survey of International Arbitrations 1794-1989' (Dordrecht: Martinus Nijhoff, 1990).
- 20 See Article 13(1) Covenant of the League of Nations.
- 21 Martti Koskenniemi, *The Function of Law in the International Community: 75 Years After*, 353 *British Yearbook of International Law* 79 (1) (2008), 355.
- 22 See <http://www.icj-cij.org/en/pcij> and for an overview and assessment: Charles Rousseau, *Droit International Public* (Paris: Dalloz, 1979), 333.
- 23 Ignaz Seidl-Hohenveldern, *Völkerrecht* (Köln: Heymanns Verlag, 1980), 341.
- 24 Wilhelm G. Grewe, *The Epochs of International Law* (De Gruyter, 2000), 665.
- 25 See Hans Morgenthau, *Die internationale Rechtspflege. Ihr Wesen und ihre Grenzen* (Leipzig: Noske, 1929), 60.
- 26 Hersch Lauterpacht, *The Function of Law in the International Community* (Oxford: Oxford University Press, 1933; reprinted in 2001), 161 ff.

- 27 Martti Koskenniemi, *The Gentle Civilizer of Nations. The Rise and Fall of International Law 1870-1960* (Cambridge University Press: 2001), 413 ff.
- 28 See for an overview of the decisions on the main criticism: Makane Moïse Mbengue and Najib Messihi, 'The South West Africa Cases: 50 Years Later', *Ethiopian Yearbook of International Law* 2016, 11-33.
- 29 One exception needs to be mentioned here. In the 1960s one did see a relatively important number of arbitrations involving States, State organs or State-owned companies, and private companies, mainly due to the inclusion of arbitration clauses in investment contracts. While interstate arbitrations were limited during the Cold War, mixed arbitrations were taking place and paved the way for the large number of investment arbitrations we are currently witnessing. Laying on the limits of private and public law, this exception however does not detract from my general argument not the least because the vast majority of the early mixed arbitrations were contract-based arbitrations, rather than arbitrations based on consent expressed by two or more States on in the international legal level.
- 30 Thomas Clay, 'Qui sont les arbitres internationaux – Approche sociologique' in J Rosell (ed.), *Les arbitres internationaux: Colloque du 4 février (Société de Législation Comparée, Paris, France, 2005)*, 31: 'L'arbitrage n'est... pas un métier; c'est une mission, une fonction temporaire, mais pas une profession. Tous ceux qui sont arbitres ont en principe un autre métier, une occupation principale qui leur garantit une rémunération régulière et leur fournit un statut social. L'arbitrage est leur activité annexe.' Translation by Emmanuel Gaillard, 'Sociology of International Arbitration', 31 *Arbitration International* 2015, 30.
- 31 That club of individuals moreover was limited in number - the 'grand old men' as Yves Dezalay and Byant Garth have called them more recently (Yves Dezalay and Byant G. Garth, *Dealing in Virtue* (Chicago: University of Chicago Press, 1996), 20).
- 32 P. Fouchard, *L'Arbitrage Commercial International* (Paris: Dalloz, 1965), 1, 30-31, translated by Redfern and Hunter, *Law & Practice of International Commercial Arbitration*, 2004, 2.
- 33 Thomas Schultz and Robert Kovacs, 'The Rise of a Third Generation of Arbitrators?', 28(2) *Arbitration International* 2012, 168.
- 34 A close look at the individuals who acted and act as arbitrations reveals indeed the occasional character of the function. From the first edition of the 'Survey of International Arbitrations' compiled by Alexander Stuyt mentioned before, one can readily see that until 1939, the vast majority of those who sat as arbitrators were foreign sovereigns, heads of State, ministers, legal advisors and law professors, who arbitrated disputes as a service to international society. See A.M. Stuyt 'Survey of International Arbitrations 1794- 1939' (Dordrecht: Martinus Nijhoff, 1939 ; reprinted by Springer, 2014).
- 35 See for instance Robert Finlay, 'International Arbitration', 179 *The North American Review* (1904), 659-670 ; Paul S. Reinsch, 'The Concept of Legality in International Arbitration' 5(3) *American Journal of International Law* (1911), 604-614 and Hans Wehberg, 'Restrictive Clauses in International Arbitration Treaties' 7(2) *American Journal of International Law* (1913), 301-314.
- 36 See Mary Ellen O'Connell and Lenore Vanderzee, 'The History of International Adjudication' in C.P.R. Romano, K.J. Alter, and Y. Shany (eds), *The Oxford Handbook of International Adjudication* (Oxford: Oxford University Press, 2013), 40-61 and Mary Ellen O'Connell, 'Arbitration and Avoidance of War: The Nineteenth-Century American Vision', in Cesare P.R. Romano (ed.) *The Sword and the Scales : The United States and International Courts and Tribunals* (Cambridge: Cambridge University Press, 2009), 37.

- 37 Hersch Lauterpacht, *The Role of Law in the International Community* (Oxford: Clarendon Press, 1933).
- 38 Georg Schwarzenberger, *International Law, as applied by international courts and tribunals* (London: Steven & Sons, 1945).
- 39 Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (London: Stevens & Sons, 1953)
- 40 Thomas Schultz, 'Editorial: Arbitration as an iPhone, or Why Conduct Academic Research in Arbitration', 2(2) *Journal of International Dispute Settlement* (2011), 281.
- 41 See for instance Alexander Pandelli Fachiri, *The Permanent Court of International Justice: its constitution, procedure and work* (Oxford: Oxford University Press, 1925) and Manley O. Hudson, *The Permanent Court of International Justice : a treatise* (New York : The Macmillan Company, 1934).
- 42 See Stavros Brekoulakis, 'International Arbitration Scholarship and the Concept of Arbitration Law', 36(4) *Fordham International Law Journal* 2013, 763 ff and Thomas Schultz, 'Editorial: Arbitration as an iPhone, or Why Conduct Academic Research in Arbitration', 2(2) *Journal of International Dispute Settlement* (2011), 280.
- 43 Samantha Besson, 'Legal Philosophical Issues of International Adjudication. Getting over the *Amour Impossible* between International Law and Adjudication', in C.P.R. Romano, K.J. Alter, and Y. Shany (eds), *The Oxford Handbook of International Adjudication* (Oxford: Oxford University Press, 2013), 415.
- 44 Richard B. Bilder, 'An Overview of International Dispute Settlement', 1(1) *Emory Journal of International Dispute Resolution* 1986, 2.
- 45 Charles Rousseau, *Droit International Public* (Paris: Dalloz, 1979).
- 46 See Eric Posner, 'The Decline of the International Court of Justice', Coase-Sandor Working Paper Series in Law and Economics (2004), available at https://chicagounbound.uchicago.edu/law_and_economics/500/.
- 47 Permanent Court of Arbitration (PCA) (2016), 116th Annual Report, 2016, <https://pca-cpa.org/wp-content/uploads/sites/175/2017/03/ONLINE-PCA-Annual-Report-2016-28.02.2017.pdf>.
- 48 ICSID Caseload – Statistics (Issue 2017 - 2), [https://icsid.worldbank.org/en/Documents/resources/ICSID%20Web%20Stats%202017-2%20\(English\)%20Final.pdf](https://icsid.worldbank.org/en/Documents/resources/ICSID%20Web%20Stats%202017-2%20(English)%20Final.pdf).
- 49 Cesare Romano, Romano, *The Proliferation of International Judicial Bodies: The Pieces of the Puzzle*, 31 *New York University Journal of International Law and Politics* (1999), 709.
- 50 See for an overview Ruth Mackenzie, Cesare Romano, Philippe Sands, and Yuval Shany, *The Manual on International Courts and Tribunals* (Oxford: Oxford University Press, 2010) and Project on International Courts and Tribunals, *Synoptic Chart*, 2004, available at http://www.pict-pcti.org/publications/synoptic_chart.html.
- 51 Samantha Besson, 'Legal Philosophical Issues of International Adjudication. Getting over the *Amour Impossible* between International Law and Adjudication', in C.P.R. Romano, K.J. Alter, and Y. Shany (eds), *The Oxford Handbook of International Adjudication* (Oxford: Oxford University Press, 2013), 415.
- 52 Sean D. Murphy, 'The United States and the International Court of Justice: Coping with Antinomies', in Cesare P.R. Romano (ed.) *The Sword and the Scales : The United States and International Courts and Tribunals* (Cambridge: Cambridge University Press, 2009), 48.
- 53 See the various contributions in Natalie Klein (ed.), *Litigating International Law Disputes* (Cambridge: Cambridge University Press, 2014).
- 54 Tim Stephens, 'International Environmental Disputes: to Sue or Not to Sue', in Natalie Klein (ed.), *Litigating International Law Disputes* (Cambridge: Cambridge University Press, 2014), 289.
- 55 Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament

- (*Marshall Islands v. United Kingdom*), Judgement of 5 October 2016, Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (*Marshall Islands v. India*), Judgement of 5 October 2016, and Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (*Marshall Islands v. Pakistan*), Judgement of 5 October 2016 available at <http://www.icj-cij.org/en/list-of-all-cases>.
- 56 Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (*Marshall Islands v. United Kingdom*), Judgement of 5 October 2016, Dissenting Opinion of Vice-President Yusuf, paras. 10 and 11.
- 57 Leign Swigart and Daniel Terris, 'Who are International Judges', in C.P.R. Romano, K.J. Alter, and Y. Shany (eds), *The Oxford Handbook of International Adjudication* (Oxford: Oxford University Press, 2013), 619-638.
- 58 Antoine Vauchez, 'Communities of International Litigators', in C.P.R. Romano, K.J. Alter, and Y. Shany (eds), *The Oxford Handbook of International Adjudication* (Oxford: Oxford University Press, 2013), 655-668.
- 59 J.E. Alvarez, 'The Democratization of the Invisible College', 6(1) *Transnational Dispute Management* 2009, at http://www.law.nyu.edu/sites/default/files/ECM_PRO_065334.pdf.
- 60 Thomas Schultz, 'Editorial: The Evolution of International Arbitration as an Academic Field', 6 *Journal of International Dispute Settlement* (2015), 229-230.
- 61 See on this Thomas Schultz, 'Editorial: Arbitration as an iPhone, or Why Conduct Academic Research in Arbitration', 2(2) *Journal of International Dispute Settlement* (2011), 279-286.
- 62 Thomas Schultz, 'Editorial: Doing Law and Thinking about the Law', 4(2) *Journal of International Dispute Settlement* (2013), 217-218.

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