Introduction

Thank you for hosting me here today. I receive it as an immense honor to take part in this Hugo Grotius Lecture.

Many of you are familiar with the words of the thirty-second President of the United States, Franklin D. Roosevelt, spoken at his first inauguration held on 4 March 1933: "[T]he only thing we have to fear is fear itself". And so it is nowadays amongst the international arbitration community.

Faced with what I regard as a manufactured so-called "crisis of legitimacy", sparked by scaremongering non-governmental organizations ("NGOs") and left-wing academics, anti-globalization groups, and misinformed politicians of other States, those of us who know and understand investor-State dispute settlement ("ISDS") must defend our ground. This is particularly so where traditional capital-exporting States have "jumped ship" after finding themselves on the receiving end of claims. Spain, for example, is already facing 20 claims –and this number is rising– filed by solar power investors before the International Centre for Settlement of Investment Disputes ("ICSID"), not to mention the additional cases filed before other arbitral institutions or under different arbitral rules[1]. Some States in this position are tempted to denounce the entire system of international dispute resolution and adopt a "bunker" mentality –blasting the notion of treaty restrictions on "national policy space" in its entirety. You may be

[1] Lacey Young, *Spain Faces 20th Renewable Energy Claim at ICSID*, Global Arbitration Review (27 Aug. 2015).

aware that the European Commission itself has not helped matters. Just last month it unveiled a new draft "Investment Chapter" for the Transatlantic Trade and Investment Partnership ("TTIP") which proposes dismantling the entire existing system of arbitral appointments[2]. As I will explain today, such an approach is shortsighted and ultimately a mistake.

I have refuted the arguments advanced by skeptics in several written works recently, including "*We have met the enemy and he is us!" Is the industrialized north "going south" on investor-state arbitration?* [3] –an article in the March issue of *Arbitration International*– and in *What's in a meme? The truth about investor-state arbitration: Why it need not, and must not, be repossessed by states*[4], which was published in the Columbia Journal of Transnational Law[5].

Both of the aforementioned articles examine what I refer to as "NEO-NIEO", or the increasing embrace by developed, fully industrialized States of the 1970s New International Economic Order ("NIEO") that they fought so bitterly 40 years ago at the United Nations. The 1974 UN General Assembly Resolution No. 3201, entitled "Declaration on the Establishment of a New International Economic Order", represented the defining moment of NIEO in that it provided States with a blank check to nationalize property without any compensation, and it contained not a single

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2 European Commission Press Release IP/15/5651, Commission Proposes New Investment Court System for TTIP and Other EU Trade and Investment Negotiations (19 Sep. 2015); European Commission Draft Text TTIP – Investment (16 Sep. 2015), http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153807.pdf

3 Charles N. Brower & Sarah Melikian, *'We Have Met the Enemy and He Is Us!' Is the Industrialized North 'Going South' on Investor-State Arbitration?*, 31 Arbitration International 19 (Mar. 2015).

4 Charles N. Brower & Sadie Blanchard, *What's in a Meme? The Truth About Investor-State Arbitration: Why it Need Not, and Must Not, Be Repossessed by States*, 52 Columbia J. Trans'l L. 689 (2014) (hereinafter "*What's in a Meme*").

5 For related materials, see Charles N. Brower & Sadie Blanchard, *From "Dealing in Virtue" to "Profiting from Injustice": The Case Against "Re-Statification" of Investment Dispute Settlement*, 55 Hrvd. Int'l L. J. 45 (2014); Charles N. Brower & Stephan W. Schill, *Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?*, 9 Chi J. Int'l L. 471 (2009).

reference to international law or peaceful international dispute resolution[6]. It also forecast a "Charter of Economic Rights and Duties of States", adopted in a second resolution shortly thereafter[7]. Troubled "Northern countries" –among them, Belgium, Denmark, Germany, Luxembourg, the United Kingdom, and the United States– voted against the adoption of the Charter at the time. Others abstained, among them Austria, Canada, France, Ireland, Israel, Italy, Japan, the Netherlands, Norway, and Spain[8]. NIEO fortunately abated in the following decades as thousands of bilateral investment treaties ("BITs") and several multilateral investment treaties were concluded, and arbitral awards enforcing them flourished. ISDS has functioned and has done so fairly for at least 40 years. So what is there to fear?

Allow me to share briefly some of the facts –the reality– showing why we should not buy into the "fears" about investor-State arbitration. The International Bar Association ("IBA") recently published a statement highlighting some of the same points[9].

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6 Declaration on the Establishment of a New International Economic Order, G.A. Res. 3201 (S-VI), U.N. GAOR, 6th Special Sess., U.N. Doc. A/RES/3201 (S-VI) (1974); *see also* William W. Park, Arbitration of International Business Disputes (2d ed. 2012), Chapter 3 (providing historical perspective on the 1974 NIEO movement).

7 Charter of Economic Rights and Duties of States, G.A. Res. 3281, U.N. GAOR, 29th Sess., Supp. No. 31, U.N. Doc. A/9631 (1974).

8 *See* Wolfgang Fikenscher & Irene Lamb, *The Principles of Free and Fair Trading and of Intellectual Property Protection in the Legal Framework of a New International Economic Order, in* Reforming the International Economic Order (Thomas Oppermann & Ernst-Ulrich Petersmann eds. 1987) at 83 nº. 4.

9 *See Fact v. Fiction: The IBA Releases Statement on ISDS*, Global Arbitration Review (22 Apr. 2015).