

LECTURE

The Past and Future of the Great Compact

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The architecture of the world order that was constructed from the ruins of the Second World War has preserved a precarious peace, while allowing historically unprecedented economic growth. In his Nobel Peace Prize speech, Barack Obama warned that ‘[a] decade into a new century, this old architecture is buckling under the weight of new threats’. It is dispiriting to reflect on how prescient Obama’s words, delivered in 2009, were. Even allowing for the fact that at any moment there will be contrary trends towards and away from goals, key pillars of that world order do seem wobbly and in danger of buckling. Consider just two foundational arrangements. First, the prohibition of conquest and acquisition of territory by force continues to be flouted in an increasing number of cases—Crimea, Nagorno Karabakh, Abkhazia, South Ossetia, Abyei, the West Bank, East Jerusalem, the Golan Heights, Western Sahara, South China Sea, Tibet, the list goes on. Second, judgments of the International Court of Justice are effectively ignored, not by States ordinarily thought to be international renegades but also by sister judiciaries with long-standing claims to championing the rule of law: the US Supreme Court and the Italian Constitutional Court. China and Russia, designers of the Charter of the United Nations (UN) and principal custodians of world order by virtue of their permanent membership in the UN Security Council, simply ignore inter-State awards of the Permanent Court of Arbitration.²

Now, one of the girders of the economic system that has allowed for the unprecedented production and wider distribution of wealth—the international trade and investment system—seems to be wobbling. Whether it is actually buckling or is only adjusting, as part of the ongoing dialectic of all law, requires us to identify and trace the origins of what I will call ‘the Great Compact’, the foundational normative arrangement that undergirds the contemporary international investment system.

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² Charter of the United Nations (opened for signature 26 June 1945, entered into force 24 October 1945).

I. FROM THE DRAGO LETTER TO THE PORTER CONVENTION

From the rise of European imperialism, in particular, direct foreign investment acquired, in many quarters, the image, not entirely undeserved, of an exploitative instrument of mercantilism and foreign domination. Later, the staggered distribution of the fruits of the industrial revolution enabled European transportation and communication companies to carry their technologies to comparatively less developed countries. Key parts of direct foreign investment were henceforth dedicated to, and often controlled, the exploration and exploitation of natural resources and infrastructural development and its management in other national economies. To many citizens of those States, it seemed that the great corporations and mighty banks and financial institutions of a distant metropolitan ‘owned’ their natural resources, their electrical grids, their water supply, their railroads and their countries.

Customary international law, the product of the practice and *opinio juris* of the major powers of the time, had established minimum standards for the protection of aliens and their property, but, in the absence of institutional methods for applying those standards, their modes of implementation were left to the discretion of the investors’ States. Euphemistically called ‘diplomatic protection of nationals’, these methods of protection could be as coercive as the investor’s State wanted.

This functioned as an effective system for protecting foreign investments from political interference by the governments of States where the investments had been made. But ‘diplomatic protection’, like all unilateral exercises, was susceptible to abuse for the State exercising it was judge, jury and executioner. Predictably, it generated discontent among—and efforts to push back by—the weaker States who found themselves on the receiving end. Many were in Latin America.

Luis M. Drago, then Minister of Foreign Relations of Argentina, gave voice to this discontent in a letter to the USA, the country that President James Monroe had summarily appointed as the regional gendarme. Drago protested the British, German and Italian naval blockade of the principal ports of Venezuela in 1902 in a debt collection exercise³ and proposed that ‘the public debt cannot occasion armed intervention nor even the actual occupation of the territory of American nations by a European power’.

Drago’s proposal provoked heated discussion at the third Pan-American Conference (Rio Conference) in 1906. It did not produce a draft treaty thanks largely to Theodore Roosevelt’s ostensible concern that a meeting attended mostly by debtor States was not the forum to resolve the matter.⁴ Without American

³ Reprinted in the Supplement to (1907) 1 AJIL 1.

⁴ Amos S Hershey, ‘The Calvo and Drago Doctrines’ (1907) 1 AJIL 26, 40; Theodore Roosevelt, ‘Sixth Annual Message to the Senate and House of Representatives’ (3 December 1906) <<http://www.presidency.ucsb.edu/ws/?pid=29547>> accessed 3 February 2017: ‘[S]uch action ... would have the appearance of a meeting of debtors resolving how their creditors should act, and this would not inspire respect. The true course is indicated by the terms of the program, which proposes to request the Second Hague Conference, where both creditors and debtors will be assembled, to consider the subject.’ As President Theodore Roosevelt, in Message to Congress, explained:

‘It is doubtless true that the non-payment of public debts may be accompanied by such circumstances of fraud and wrongdoing or violation of treaties as to justify the use of force. This Government would be glad to see an international consideration of the subject which shall discriminate between such cases and the simple nonperformance of a contract with a private person, and a resolution in favor of reliance upon peaceful means in cases of the latter class.’

support, the conference only recommended that the matter be referred to the Second Peace Conference at The Hague.⁵

One year later, this conference adopted the Porter Convention.⁶ Its Article 1 endorsed the limitation on the use of force sought by Drago but, in return for a mandatory *quid pro quo*, international arbitration:

The Contracting Powers agree not to have recourse to armed force for the recovery of contract debts claimed from the Government of one country by the Government of another country as being due to its nationals.

This undertaking is, however, not applicable when the debtor State refuses or neglects to reply to an offer of arbitration, or, after accepting the offer, prevents any *compromis* from being agreed on, or, after the arbitration, fails to submit to the award.

It is further agreed that the arbitration mentioned in paragraph 2 of the foregoing Article shall be subject to the procedure laid down in Part IV, Chapter 3, of The Hague Convention for the Pacific Settlement of International Disputes. The award shall determine, except where otherwise agreed between the parties, the validity of the claim, the amount of the debt, and the time and mode of payment.⁷

The Porter Convention, coinciding with the Permanent Court of Arbitration, laid the groundwork for a later Great Compact in international investment law: investors' States waiving the deployment of their superior power to protect their investors in return for host States' agreeing to submit the disputes with those investors to international arbitration by independent third party determination.

II. THE WASHINGTON CONVENTION AND ICSID

After the Second World War, as the great European empires were dismantled, many of the new States that emerged from them adopted the command economy model and, along with it, an image of foreign investment and its international modalities of protection as an equally sinister, but more subtle, neo-colonialist instrument. The most explicit normativization of this view of foreign investment was to be found in the UN General Assembly's Declaration on the Establishment of a New International Economic Order (NIEO)⁸ and its Charter of Economic Rights and Duties of States (CERDS).⁹ In excluding the application of international law by a tribunal independent of the State, the lawfulness of whose actions is in issue, NIEO and CERDS purported to reject an integral part of the package that comprised the Great Compact.

It is not felt, however, that the conference at Rio should undertake to make such a discrimination or to resolve upon such a rule. Most of the American countries are still debtor nations, while the countries of Europe are the creditors. If the Rio conference, therefore, were to take such action it would have the appearance of a meeting of debtors resolving how their creditors should act, and this would not inspire respect. The true course is indicated by the terms of the program, which proposes to request the Second Hague Conference, where both creditors and debtors will be assembled, to consider the subject.'

⁵ Roosevelt (n 4).

⁶ Hague Convention on the Limitation of Employment of Force for Recovery of Contract Debts (opened for signature 18 October 1907, entered into force 26 January 1910) (Porter Convention).

⁷ *ibid* 2251–2.

⁸ GA Resolution A/RES/S-6/3201 (1 May 1974).

⁹ GA Resolution A/RES/40/182 (17 December 1985).

Ironically, this burst of economic nationalism in many of the newer States coincided with a demand for national economic development. The political imperative for elites in many of these States was to grow their national economies, increase the national wealth and, through some form of distribution, whether by provision of opportunity, entitlement or some mix of both, to expand the economic and other life opportunities of their citizens. For non-democratic elites, the promise and delivery of economic development became a substitute basis for political legitimacy. No surprise then that in 1986 the UN General Assembly that had earlier decreed a 'new international economic order' resolved not only that 'the right of development is an inalienable human right' but also that 'states have the duty to take steps individually and collectively to formulate international development policies with a view to facilitating the full realization of the right to development'.¹⁰

The International Bank for Reconstruction and Development (IBRD), which was the original name of the World Bank, had been established as a UN specialized agency with the task of assembling and then lending the public international funds necessary for reconstructing a Europe that had been devastated by the Second World War. The IBRD project succeeded. By the late 1950s, Europe's economies had rebounded. But, by then, more and more of Europe's former colonial territories, now independent, desperately needed to develop.

Development cannot simply be secured by legislative fiat. The new States turned for assistance to the international organizations that had midwived them. Because the demand for development capital exceeded the supply of public international funds available to meet that demand, the only available source that could realistically address the shortfall was private direct foreign investment. Recall, however, that foreign investment was then being vilified as a neo-colonial tool rather than as a potential adjunct tool for national development.

The real significance of the 1965 Washington Convention, by which developed and developing States established the World Bank's International Centre for Settlement of Investment Disputes (ICSID),¹¹ was the consensus decision that underlay it. As a result of the indispensability of private investment to national economic development, an international seal of approval was accorded to private direct foreign investment as an indispensable means for assisting in national development. According to a central plank of the consensus, the capital-exporting States bound themselves to abjure the espousing of 'diplomatic protection' on behalf of their investors, while capital-importing States bound themselves to submit to the arbitration of disputes with foreign investors.

So far, this tracked the Porter Convention. But a critical addition was that the initiative to establish a tribunal, theretofore through the agreement of both State parties, was henceforth to be at the instance of the foreign investors themselves. Powerful governments of capital-exporting States, which were already removed from the process of forcefully implementing customary international law's standards of protection of aliens, were also excluded from any role in establishing and managing the arbitral process. Now the responsibility for their application was assigned to international tribunals, constituted on the initiative of the private foreign investor.

¹⁰ Declaration on the Right to Development, GA Resolution A/RES/41/128 (4 December 1986).

¹¹ Convention on the Settlement of Investment Disputes between States and Nationals of Other States (opened for signature 18 March 1965, entered into force 14 October 1966) (ICSID Convention).

The package that comprised the Great Compact, in its 2.0 version, had something for everyone. From the perspective of the capital-importing State, the Compact exorcised the specter of coercive collection. From the perspective of the Foreign Office of the capital-exporting State, the Compact depoliticized investment disputes by transferring the politically expensive burden of espousing national claims to a reliable external applier. From the perspective of the foreign investor, it dispelled uncertainty about whether its own government would be willing, when needed, to bear the political cost of bringing a claim against another State. And from the perspective of the arbitrators to whom the exclusive responsibility for resolving the dispute was being assigned, it cleared the way for deciding solely on legal grounds. This was, in sum, the Great Compact on which the modern system of international investment law was built. And I might say that all States—developed, developing, liberal, socialist and communist—participated on an equal footing in fashioning it.

III. THE REFINEMENT OF THE INTERNATIONAL STANDARD

In short order, a network of bilateral and plurilateral international agreements and their dispute resolution mechanisms assumed a role in two dimensions: first, in confirming, as the *lex specialis* agreed to by both State parties, what will constitute the standards for the governance of foreign investment by the host State and, second, and equally important, in designating the default modalities with the exclusive competence for supervising and implementing them. Bilateral investment treaties (BITs) are the handiwork of State officials. Although there are variations between them, their common assumptions are striking. Each BIT validates and endorses the value of international investment and, moreover, undertakes to establish an orderly framework for it by creating, in the language of the trilateral investment treaty between South Korea, China and Japan (I intentionally choose three non-Western States, each with its own distinct political economy), ‘stable, favorable and transparent conditions for investment by investors of one Contracting Party in the territory of the other Contracting Parties’.¹² This Treaty, thus acknowledges, as do thousands of BITs using similar language, that ‘stable, favorable and transparent conditions’ are comprised of more than natural phenomena, such as climate, ecology, geography and natural and human resources. Critically, ‘favourable conditions’ encompass appropriate internal legal, administrative and regulatory arrangements, conducted through procedures designed to ensure that the arrangements are applied as they are supposed to be applied. This, in turn, requires an effective system of implementation, composed of impartial courts, an efficient and legally restrained bureaucracy and transparency in decision making.

This international standard of governance is a prescriptive component of international law’s control mechanism over governments, whether dealing, through its human rights law ‘window’, with their own nationals or, through its investment law ‘window’, with foreign investors. Thus, parallel to international human rights

¹² Investment Promotion and Protection Agreement between Japan, Republic of Korea and China (signed 13 May 2012, entered into force 17 May 2014). An unofficial English translation of the treaty was published by the Japanese Ministry of Trade.

institutions extending into the erstwhile reserved domain of domestic jurisdiction, the institutions of contemporary international investment law were being called upon to play a more particularized and increasingly intrusive and assertive role in supervising governance arrangements within State parties. In investment law, the Compact assigned this role to compulsory international arbitration—at the initiative of the investor. BITs, in the aggregate, were being applied in ways that raised international law's bar for the way States conducted their internal affairs.

IV. REACTION FROM A SURPRISING QUARTER

As far as capital-exporting States were concerned, this part of the Great Compact was fine as long as it was confined to appraising the actions of developing countries in disputes with foreign investors. But, to paraphrase the poet Robert Southey,¹³ the chickens were coming home to roost, for, in the meanwhile, the once rather clear delineation between capital-importing or developing States and capital-exporting or developed States had become blurred, as the developed States became magnets for foreign investment, and it became critical to the growth of their own national economies. One of the consequences of this role reversal has been the increasing number of treaty-based investment disputes launched against developed countries—with more in the wings. Now developed countries were facing the prospect of their own regulatory actions being subjected to review by international tribunals in terms, *inter alia*, of a fair and equitable treatment (FET) standard.¹⁴ Now it was the turn of constituencies in developed countries to complain that their sovereign right to regulate was being arrogated by international investment law.

It was only a matter of time until developed States, theretofore the proponents and champions of international legal protection of their foreign investors, would begin to think more like prospective respondents and use their considerable influence to push back against their own creation.¹⁵ This push-back has given rise to a number of changes that they, until then, had stoutly resisted:

- The content of the substantive obligations of FET and expropriation, compared to earlier formulations, has been defined and confined in the newer generations of investment agreements; henceforth the effort has been to anchor FET in the customary international law of the minimum standard of treatment.¹⁶ A State's non-discriminatory and, perhaps, non-confiscatory regulatory actions adopted for public purposes generally will not constitute indirect expropriations. For reasons I explored in 'Canute Confronts the

¹³ Robert Southey, *The Curse of Kehama* (Longman, Hurst, Rees, Orme, and Brown, Paternoster-Row, London 1810).

¹⁴ Guillermo Aguilar Alvarez and William W Park, 'The New Face of Investment Arbitration: NAFTA Chapter 11' (2003) 28 *Yale J Intl L* 365.

¹⁵ See eg Michael Waibel and others, *The Backlash against Investment Arbitration: Perception and Reality* (Kluwer Law International 2010); Elizabeth Warren, 'The Trans-Pacific Partnership Clause Everyone Should Oppose' *Washington Post* (25 February 2015) <https://www.washingtonpost.com/opinions/kill-the-dispute-settlement-language-in-the-trans-pacific-partnership/2015/02/25/ec7705a2-bd1e-11e4-b274-e5209a3bc9a9_story.html> accessed 3 February 2017.

¹⁶ Whether the contents of the fair and equitable treatment and the minimum standard of treatment are different is another question. See W Michael Reisman, 'Canute Confronts the Tide: States vs Tribunals and the Evolution of the Minimum Standard in Customary International Law' (2015) 30(1) *ICSID Rev—FILJ* 616.

Tide', this effort at push-back promises limited and only short-term success.¹⁷

- The generative force and inter-generational equalizing effect of a most-favored-nation clause has been defined restrictively and, in particular, will not be applied to international dispute resolution procedures.¹⁸
- A new model of an independent investment court system, consisting of a permanent tribunal and an appeal tribunal, has been introduced in the recently signed European Union–Canada Comprehensive Economic and Trade Agreement, replacing the traditional investor–State arbitration mechanism.¹⁹ At least in investment disputes between the large economies of the European Union and Canada, only the State parties will be selecting the judges; claimant investors will henceforth have no role in constituting the tribunals.

Finally, the Trans-Pacific Partnership is gone,²⁰ and the Transatlantic Trade and Investment Partnership is in the balance.²¹

None of these changes, to date, goes to the heart of the Great Compact. But, with the surge of anti-globalization and nationalist sentiment in many economically important States, the future of international investment law could be at a critical crossroads. Many of the features of this complex reaction to the Great Compact prove, on close examination, to be counter-intuitive. First, the reaction is not being led by the governments of developing and capital-importing countries, from whom antipathy to foreign investment law's increasing application of high international standards to domestic governmental actions would usually have been expected. Although a few mineral-rich States have denounced some of their investment treaties, the vast majority of the developing countries continue to subscribe to arrangements that were forged to encourage cross-border direct foreign investment.²² Indeed, many of the developing countries that had formerly led the chorus denouncing as 'neo-colonial' the international legal arrangements fostering foreign investments have adjusted, or are now adjusting, their own policies and laws to accommodate them. Rather, the current reaction is impelled by the governments of developed countries, who were the original leaders, shapers and champions of the Great Compact and international law's investment system.

¹⁷ W Michael Reisman, 'Negotiating Investment Treaties: Mechanisms for Anticipating and Controlling Textual Drift' (2016) Yale Law Economic and Research Paper no 546, 17–19 <<https://ssrn.com/abstract=2789796>> accessed 3 February 2017. Reisman (n 16).

¹⁸ See eg art 9.5(3) of the now defunct Trans-Pacific Partnership (TPP) (signed 4 February 2016, not entered into force) <tpp.mfat.govt.nz> accessed 3 February 2017.

¹⁹ European Commission, 'CETA: Summary of the Final Negotiating Results' (February 2016) 11. European Commission–Canada Comprehensive Economic and Trade Agreement (CETA) (final draft of 29 February 2016).

²⁰ Peter Baker, 'Trump Abandons Trans-Pacific Partnership, Obama's Signature Trade Deal' *New York Times* (23 January 2017) <<https://www.nytimes.com/2017/01/23/us/politics/tpp-trump-trade-nafta.html>> accessed 3 February 2017.

²¹ Transatlantic Trade and Investment Partnership (TTIP) (draft dated 12 November 2015).

²² One notable example is Argentina, which had been the respondent in many investment disputes at the end of the twentieth and the beginning of the twenty-first centuries. This bitter experience notwithstanding, on 6 November 2016, it signed its first bilateral investment treaty in 15 years with Qatar. Nevertheless, some provisions have reflected lessons learned from previous disputes—eg, (i) art 1(2) on the definition of 'investment' does not include express reference to bonds and other financial instruments; (ii) the definition of 'investor' under art 1(1) has been much more narrowly crafted; (iii) art 4(4) states that the most-favoured-nation clause will not be applied to the dispute settlements procedure and (iv) art 13 can be viewed as an express self-judging essential security clause as it provides that 'nothing in this Treaty shall be construed to preclude a Contracting Party from applying measures that it considers necessary'. Agreement for Reciprocal Promotion and Protection of Investments Between the Argentine Republic and the State of Qatar (signed 6 November 2016, not entered into force) (Argentina–Qatar BIT).

Second, the reaction is not elite led or ‘top-down’, as is the usual pattern with the initiation of complex economic programs but, to a significant extent, is ‘bottom-up’ or rank-and-file driven. This participation is enhanced by the fact that many of the States that are leading the reaction are still vibrantly democratic.

I submit that the reasons for these reactions have less to do with the failings of the Great Compact, which I submit is a remarkable achievement that has accomplished its mission, and more to do with the convergence of momentous social changes.

V. THE COSTS OF GLOBALIZATION

In an increasing number of sectors, the trans-nationalization of civic activity is rendering the corresponding parts of the State’s governmental apparatus, with the resources at its disposal, insufficient for the protection of national public order. Whether one looks at efforts to maintain viable national economies, to control health, crime, market monopolization, immigration or the protection of intellectual and material property and, of course, protection of the environment, a single State’s government, whether of a micro-State or a superpower, can no longer accomplish what is expected of it without locking itself into increasingly complex and durable intergovernmental arrangements – each of which promises some palpable gains while requiring a coordinate surrendering of some erstwhile exclusively national competence. There are no exceptions to this phenomenon.

The growing networks of intergovernmental arrangements that all of these changes have necessitated may enhance the political and economic security of those who participate in them, but they also lead to deep ambivalences and insecurities in the strata of the populations of these States. Robert A. Dahl has written:

A country’s economic life, physical environment, national security, and survival are highly, and probably increasingly, dependent on actors and actions that are outside the country’s boundaries and not directly subject to its government. Thus the members of the demos cannot employ their national government, and much less their local governments, to exercise direct control over external actors whose decisions bear critically on their lives.²³

In Europe, one regional laboratory, centralized transnational bureaucracies are making more and more decisions that penetrate deeply into the fabric of national and local life. Not surprisingly, this trend has already generated powerful counterforces: the broad spectrum of anti-Maastricht reaction in Europe, the increased influence of far-right political parties on many continents, Brexit and beyond, and the recrudescence and, surprisingly, legitimization of isolationism in the politics of a superpower. In Europe, even the centre’s promise of deference to local decision—the so-called ‘subsidiarity’ principle—has not stemmed the reaction.

Yet, in a further paradoxical twist, rational responses to this increasingly ‘global’ condition always seem to require and involve the creation of alternative alliances and more transnational governmental structures, which in turn further minimize opportunities for individual agency in the policy decisions that affect one’s life.

²³ Robert A Dahl, *Democracy and Its Critics* (1989) 319.

The point is that globalization, for all of its manifest and promised benefits, has a darker underside that exacerbates at many levels a sense of personal insecurity or even inessentiality. These experiences compel some to throw themselves into desperate searches for security, thereby providing fertile soil for proponents of authoritarian systems and celebrations of nativism.

Incomplete and disruptive transnational integration is coinciding with, and being exacerbated by, a second aggravating factor: a radical transition in the production process. Dramatic technological advances, especially in artificial intelligence, automation and robotics, are opening up production possibilities that are rendering obsolete manufacturing as it has been understood since the beginning of the industrial revolution. Of course, each new technique—from Johannes Gutenberg's movable type to the present—has had profound and often transforming effects on politics, economics, sociology, military strategy and practice and possibly on the individual neurological organization. But, compared to devices like the telegraph and the telephone, the cybernetic revolution promises to have more far-reaching consequences in many spheres. Their potentially radical character and implications for world order are not entirely understood.

One consequence, with special relevance to international investment law, is that opportunities for certain types of employment have been substantially reduced. Work is more than a source of individual income; it is also a status, affording its bearer self-respect and functioning as a central part of the organization of the individual self-system. Sigmund Freud, *pace* Erik Erikson, said 'love and work are the cornerstones of our humanness'.²⁴ While the loss of work opportunities for critical strata is part of what Joseph Schumpeter called capitalism's 'creative destruction', the destructive component of the dyad is supposed to be succeeded by capitalism's creative counterpart. This has not yet occurred on a sufficient scale, and it may not. Here again, national programs to address this have proved inadequate.

Even where employment opportunities have not suffered, the profit from the new technologies has favoured capital more than labour, for many of the labour-saving innovations permit the producer to operate more economically while reducing the pool of work opportunities and increasing the competition for them among labourers. This has also skewed the calculus of economic equity that had existed until then and has aggravated class conflicts. Once again, there is resentment of international investment law as if it were the *causa causans* of these developments.

All of these effects have been exacerbated by the coinciding phase of the business cycles in many States. Still another coinciding factor is the aggregating effects of climate change. One would have expected this to provoke governmental programs, which would have been an economic stimulus, but this has not occurred.

Another factor is the 'too-big-to-lose' syndrome: the political willingness to dismantle the Great Compact, which has proven itself an efficient and fair program of dispute resolution supporting transnational productive economic

²⁴ Sigmund Freud, *Civilization and Its Discontents*, translated by James Strachey (WW Norton 1961) 48. In this work, Freud wrote: 'The communal life of human beings had, therefore, a two-fold foundation: the compulsion to work, which was created by external necessity, and the power of love.' Freud's writing was paraphrased into 'love and work are the cornerstones of our humanness' by Erik Erikson. Erik H Erikson, *Childhood and Society* (1986).

activity, simply because your State might lose a case. This simply boggles the mind!

At the centre of this perfect storm of uncertainties about the future of the international legal arrangements for the protection of cross-border investment is the new administration in the United States.

VI. THE FUTURE OF THE GREAT COMPACT?

The stresses that investment law-making and law applying have experienced in the recent past are part of a dialectical process characteristic of all robust systems of law. Every legal arrangement is the product of the identification of some common interest shared by those who have shaped it. No sooner than any such arrangement is installed, however, it begins to be tested and challenged—not only by those who do not share in that specific common interest but even by actors within the entities and communities that established and participated in the arrangement but who have since come to believe that their interests are either being insufficiently served or have changed. Thus, every legal arrangement, whether substantive or procedural, is always under some pressure for change. The net result is that law, for all of its pretensions to being stable and unchanging, is actually a continuously dynamic process of agreement, challenge, adjustment, accommodation, new agreement, new challenges and so on *ad infinitum*. The struggles through which this process operates are not indicative of a weak system but, rather, of a robust one.

A coalition of States, which I have referred to figuratively as ‘The Empire’, is striking back at some current trends and tendencies. Until now and for the most part, the agitation for adjustments has taken place within the Great Compact and has not shaken its foundational arrangements, but every moment of a constantly eroding present contains a wide range of embryonic futures. We cannot assume a straight-line projection from the past or an organic extension of the current situation into the future. Especially in view of the political and economic vicissitudes that the world is now experiencing, there is no assurance that the Great Compact will survive intact. If it does not, the Empire will have struck back at its own interests.

Most proponents of international investment law, no matter where they stand on particular issues, seek a future that promises enhanced production and the efficient use of the resources of our planet in ways that sustain the environment, a future in which everyone is net better off and in which there are efficient and timely procedures for the adjustment of arrangements that benefit all yet have downsides for some and in which there are internationally supervised modes of dispute resolution. The resulting interdependence, one hopes, will also act as a restraint on the unilateral use of violence, one of the objectives of the Great Compact and, in my view, an ancillary objective of all economic integration.

At the moment, however, it seems to have become fashionable in some quarters to see everything in zero-sum terms. President Theodore Roosevelt, certainly no ‘softie’ on international politics, in his sixth annual message to Congress, in which he laid the diplomatic groundwork for the Porter Convention and, through it, the Great Compact, said:

It is a mistake, and it betrays a spirit of foolish cynicism, to maintain that all international governmental action is, and must ever be, based upon mere selfishness, and that to advance ethical reasons for such action is always a sign of hypocrisy. ... It is neither wise nor right for a nation to disregard its own needs, and it is foolish—and may be wicked—to think that other nations will disregard theirs. But it is wicked for a nation only to regard its own interest, and foolish to believe that such is the sole motive that actuates any other nation. It should be our steady aim to raise the ethical standard of national action just as we strive to raise the ethical standard of individual action.²⁵

Let us hope that our leaders, the current custodians of the Great Compact, will have the wisdom to act—internationally, nationally and individually—as Roosevelt counselled.

²⁵ Roosevelt (n 4).