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# Keynote Address to the Atlas Conference: “International Business Disputes In An Era Of Receding Globalism”

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**KEYNOTE ADDRESS TO THE  
ATLAS CONFERENCE “INTERNATIONAL  
BUSINESS DISPUTES IN AN ERA OF RECEDING  
GLOBALISM”**

**Lord Goldsmith QC, PC**

**Monday, October 23, 2017**

INTRODUCTION

It is a pleasure and an honor for me to have been invited here to Atlanta to speak at this Conference of the Atlanta International Arbitration Society.

This is a very appropriate conference. It has been an excellent debate with thoughtful and knowledgeable observations so far. So, it has covered the ground well. Indeed, as I look at what I am about to say, I am reminded of the remark by a member of the House of Lords at the end of a long debate saying: “Everything that can be said on this topic has already been said but not yet by everyone.”<sup>1</sup> I am going to pick up some thoughts and give my views and perception on the problem. Because if we understand the phenomenon of globalism, we are better placed to judge if it is dwindling and whether it will decline further.

The title of this conference raises an interesting and timely challenge. It brings to mind three questions. What do we mean by globalism? Is it receding? And if so, why and what impact, then, will this have on the ways in which international trade is conducted and so on the ways in which disputes that are inevitably concomitant with any exchange of goods or services are resolved? It is this last question that must be of great interest to arbitration lawyers, which is why this is a very appropriate topic for this Society.

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1. ROBERT ROGERS, ORDER! ORDER!: A PARLIAMENTARY MISCELLANY 203 (2009).

I'm no economist, but I can claim some other expertise. I was a member of the British government at the beginning of this century, a period which some commentators now regard as being the peak (or at least the local maximum) of globalism. I continue to be a member of our Upper House and so am engaged in Parliament with some of these issues. One is Brexit, to which I will return.

Either side of that spell in government I have been engaged in legal practice as counsel and arbitrator, a great deal of it focused on international disputes in all their forms, and have seen firsthand some of the trends and change across that sector. I hope today to share a little of what I have learned along the way.

I'm going to do that by attempting to tackle the three questions.

### *I. What Is Globalism?*

The first point worth exploring is what globalism is. Because if we can understand the phenomenon, we are better placed to judge if it is indeed receding and whether it will decline further.

“Globalism” has received a lot of mainstream attention in the last two or three decades, but the idea is older. The sort of globalism we are discussing here is thought to have emerged in the aftermath of World War II. At that time, in the wake of the destruction wrought when modern militaries with never-before-seen firepower had laid waste to most of the continent of Europe and many other spheres beyond for six years, the international community pulled together with the general intention “never again.”

One of the proposals for stopping nations from becoming rivals and resorting to arms was to increase integration between them, particularly at the economic level. As U.S. Secretary of State Cordell Hull was to go on to write in his memoirs:

I saw that you could not separate the idea of commerce from the idea of war and peace. You could not have serious war anywhere in the world and expect commerce to go on as before. And [I saw] that wars were often [largely] caused by economic rivalry. . . . I thereupon came to believe

that . . . if we could increase commercial exchanges among nations over lowered trade and tariff barriers and remove international obstacles to trade, we would go a long way toward eliminating war itself.<sup>2</sup>

So in July 1944, a large conference of the forty-four Allied Nations was held in New Hampshire to discuss ideas first put forward by economists John Maynard Keynes and Harry Dexter White. It was called the United Nations Monetary and Financial Conference or, as you probably know it better, the Bretton Woods Conference.<sup>3</sup> The primary idea driving the discussions was the creation of open markets or, as U.S. Treasury Secretary Henry Morgenthau put it in his speech at the end of the conference, the end of economic nationalism: putting an end to “destructive impediments to trade” and instead lowering barriers to trade and the movement of capital, particularly among the industrialized Western nations, in order to revive international trade.<sup>4</sup>

The agreements reached at that conference resulted in the establishment in 1946 of formal and informal institutional structures to support economic integration at the global level, notably the World Bank, the International Monetary Fund, and the International Bank for Reconstruction and Development.<sup>5</sup> The integrationist movement in trade expanded in 1948 with the coming into operation of the

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2. 1 CORDELL HULL, *THE MEMOIRS OF CORDELL HULL* 84 (1948). More recently, in early 2017, Jack Ma, the founder and CEO of China’s biggest online retailer, echoed this sentiment when he spoke in Melbourne at the launch of Alibaba’s Australia and New Zealand headquarters and said: “The world needs globalization, it needs trade. . . . If trade stops, war starts.” Samuel Osborne, ‘If Trade Stops, War Starts’ Alibaba Founder Who Visited Donald Trump Warns, *INDEPENDENT* (Feb. 5, 2017, 4:52 PM), <http://www.independent.co.uk/news/business/news/jack-ma-alibaba-donald-trump-trade-war-jobs-a7564021.html> [<https://perma.cc/DV2P-EVVU>].

3. See generally United Nations Monetary and Financial Conference, *Final Act and Related Documents*, United States Dep’t of State, Pub. No. 2187 (1944) (collecting speeches, reports, and other materials related to the conference, which took place in Bretton Woods, New Hampshire from July 1 to July 22, 1944).

4. Henry Morgenthau, Jr., United States Sec’y of the Treasury, Address at the Closing Plenary Session at the Bretton Woods Conference (July 22, 1944) in United Nations Monetary and Financial Conference, *supra* note 3, at 7, 7.

5. Final Act, annex C: Summary of Agreements of Bretton Woods Conference in United Nations Monetary and Financial Conference, *supra* note 3, at 98, 98–99.

General Agreement on Tariffs and Trade (GATT).<sup>6</sup> Such structures were created to discuss and coordinate economic policies, establishing a common ground to address the major economic challenges of the time.<sup>7</sup>

The ideas central to this new globalist movement post-World War II included:

- (1) Reducing the power of the nation-state and increasing global cooperation, in the belief that a transnational order might provide a new kind of international leadership, distinct from (and so hopefully unburdened by) local political prejudices;
- (2) speeding reconstruction and helping to alleviate the economic difficulties of countries most hard-hit by the economic impact of the War; and
- (3) broadly, fostering economic development by increasing global free trade and open markets, particularly via successive reductions in trade barriers and a reduction in regulation, trade blocs, and economic spheres of influence.<sup>8</sup>

The decades that followed have taken these ideas, developed them, and applied them to trade all across the world. Various instruments gave life and form to globalist policy, including firm rules requiring nations to liberalize their trade policies and enforcement and dispute resolution mechanisms to ensure that these new rules were followed.

The GATT is a good example. It established principles and rules through which barriers to trade erected during the interwar period, widely believed to have contributed to the Second World War, were dismantled. It also created an international dispute settlement system, which evolved quite remarkably over the ensuing fifty years.<sup>9</sup> It was

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6. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194.

7. Barbara Barone & Roberto Bendini, European Parliament Directorate-Gen. for External Policies, Policy Dep't, *Protectionism in the G20*, at 5 (2015).

8. John Ralston Saul, *The Collapse of Globalism*, HARPER'S MAG., Mar. 2004, at 33, 36, <https://www.globalpolicy.org/globalization/defining-globalization/27669-the-collapse-of-globalism.html>.

9. *Historic Development of the WTO Dispute Settlement System: The System Under GATT 1947*

amended on numerous occasions, reducing or eliminating tariffs and swelling the signatory countries from the original 23 up to 123 at the Uruguay Round of discussions in 1986.<sup>10</sup> That Uruguay Round ultimately led to the establishment of the World Trade Organization (WTO) in 1995, into which the GATT has now been subsumed. The Dispute Settlement Understanding, containing the rules for dispute settlement in the WTO,<sup>11</sup> introduced a strong dispute settlement system, which today is one of the most active international dispute settlement mechanisms in the world. Since 1995, over 500 disputes have been brought to the WTO and over 350 rulings have been issued.<sup>12</sup>

Similar developments have been seen through the growth of free-trade areas, each with their own approach to trade liberalization and mechanisms for enforcement of their rules. For example, the globalist approach can be seen in the development of the multilateral treaties such as NAFTA (1994),<sup>13</sup> COMESA (the Common Market for Eastern and Southern Africa, also dating from 1994),<sup>14</sup> or the CEFTA (the Central European Free Trade Agreement, from 1992).<sup>15</sup> Of course, one of the primary examples of this was the development in Europe from the European Coal and Steel Community (ESCS) in 1951<sup>16</sup> and the European Economic Community (EEC), established by the Treaty of Rome in 1958,<sup>17</sup> through to the modern European

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*and Its Evolution Over the Years*, WORLD TRADE ORG.: DISP. SETTLEMENT SYS. TRAINING MODULE, [https://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_settlement\\_cbt\\_e/c2s1p1\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/dispu_settlement_cbt_e/c2s1p1_e.htm) [https://perma.cc/TV9Q-9LEA] (last visited Feb. 8, 2018).

10. Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, 1867 U.N.T.S. 14 (1994).

11. Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401.

12. *Chronological List of Disputes Cases*, WORLD TRADE ORG., [https://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_status\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm) [https://perma.cc/A58K-DBAA] (last visited Feb. 16, 2018).

13. North American Free Trade Agreement, Dec. 17, 1992, 32 I.L.M. 289 (1993) (entered into force Jan. 1, 2014).

14. Common Market for Eastern and Southern Africa, Nov. 5, 1993, 33 I.L.M. 1067 (1994).

15. Central European Free Trade Agreement, Dec. 21, 1992, 34 I.L.M. 3 (1995).

16. Treaty Establishing the European Coal and Steel Community, April 18, 1951, 261 U.N.T.S. 140.

17. Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11.

Union that was established by the treaties of Maastricht (1992),<sup>18</sup> Amsterdam (1997),<sup>19</sup> Nice (2001),<sup>20</sup> and Lisbon (2007).<sup>21</sup>

Outside of these multilateral arrangements, bilateral investment treaties (and other related bilateral treaties dealing with double taxation or other trade issues) have flourished, creating an environment that attempts to remove or reduce restrictions on international trade while promising protection for investments from overseas and providing enforcement mechanisms to enable states and, more innovatively, private individuals and corporations, to ensure that treaty commitments are observed by their signatories.

This last issue is one that is worth dwelling on because it is the one with the most relevance for arbitration lawyers. Initially, the only method an investor in an overseas territory could use to get legal help when he considered he had been treated unfairly—e.g., his investment had been expropriated or subjected to unfair discrimination—was to take action in the local court of the country where he had invested (where he might suffer discrimination, a biased court, or quite simply a court bound by national law to give effect to the unfair treatment the country had imposed upon his investment) or to ask his own state to intercede. Intercession by diplomatic interventions was classically the more popular route for redress, but it depended on the vagaries of diplomatic endeavors and often risked becoming bound up in other disputes. Depending on the nations involved, it might have resulted in gunboat diplomacy, such as the famous *Don Pacifico* incident in 1850, where the British seized and detained the Greek navy and blockaded Greece's ports to force compensation for attacks on the private property of a British citizen.<sup>22</sup> The advance of globalism has seen investment treaty

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18. Treaty on European Union, July 29, 1992, 1992 O.J. (C 191) 1.

19. Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, Oct. 2, 1997, 1997 O.J. (C 340) 1.

20. Treaty of Nice Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, Feb. 26, 2001, 2001 O.J. (C 80) 1.

21. Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, Dec. 13, 2007, 2007 O.J. (C 306) 1.

22. David Hannell, *Lord Palmerston and the 'Don Pacifico Affair' of 1850: The Ionian Connection*, 19 Eur. Hist. Q. 495, 495 (1989).

arbitration now established as the key means of international dispute resolution in the field of investments. Since the inception of the International Center for the Settlement of Investment Disputes (ICSID) in 1966, it has administered 619 cases under the ICSID Convention and the Additional Facility, of which the majority have been in the last 10 years (with 52 in 2015, 48 in 2016, and 22 to June 30 [2017] alone).<sup>23</sup>

The growth in cross-border commerce that has resulted from these various "globalist" measures over the last three or four decades has been accompanied by the emergence of a new preferred method of dispute resolution between private entities on the international plane. Supported by the guarantees of enforceability provided by the New York Convention of 1958,<sup>24</sup> the gradual adoption by increasing numbers of jurisdictions of "arbitration friendly" domestic laws (many based on the UNCITRAL Model Arbitration Law<sup>25</sup>) and the development of increasingly sophisticated institutions to administer cases, international commercial arbitration is widely recognized as the leading form of final dispute resolution for private parties in conflict. The statistics of some of the leading institutions confirm just how popular international commercial arbitration has become: In 2015, the International Center for Dispute Resolution (the international branch of the American Arbitration Association) registered 1,063 new case filings;<sup>26</sup> the International Chamber of Commerce (ICC) saw 966 new cases in 2016, involving 3,099 parties

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23. Int'l Ctr. for Settlement of Inv. Disputes [ICSID], *The ICSID Caseload—Statistics*, Issue 2017-2, at 7 (Aug. 1, 2017), [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) [<https://perma.cc/RT7D-L6L3>].

24. United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Dec. 29, 1958, 330 U.N.T.S. 3.

25. UNCITRAL MODEL LAW ON INT'L COMMERCIAL ARBITRATION (UNITED NATIONS COMM'N ON INT'L TRADE LAW, 1985), U.N. Sales No. E.08.V.4 (amended 2006).

26. AM. ARBITRATION ASS'N, INT'L CTR. FOR DISPUTE RESOLUTION, 2015 ANNUAL REPORT AND FINANCIAL STATEMENTS 19 (May 5, 2016), [https://www.adr.org/sites/default/files/document\\_repository/2015\\_AAA\\_AnnualReport\\_Financials\\_0.pdf](https://www.adr.org/sites/default/files/document_repository/2015_AAA_AnnualReport_Financials_0.pdf) [<https://perma.cc/CX8C-Z9RV>].

from 137 countries;<sup>27</sup> and closer to my home, the London Court of International Arbitration saw 303 new cases in 2016.<sup>28</sup>

International trade flowing from globalist trade policies is apparent wherever we as practitioners look. The growth of globalism since the 1940s has assisted and supported the explosion in international trade as a force for good and for peace, and the systems of dispute resolution that have accompanied it have helped to depoliticize many investment disputes and to provide the security of good enforcement mechanisms for private actors. That is the “globalism” we are discussing.

## *II. Why Is Globalism Now Said to be Receding?*

So came the inrushing of the tide, and much like Canute, those who questioned whether globalism was a universal good found no clear means for it to be halted. But the point of this conference is to consider the flipside. Having come this far, are we now seeing a turn in the tide? Certainly, there are some recent indications that in many economic respects globalization has reached a plateau and, in some areas, is in reverse.

An analysis from the Peterson Institute for International Economics from 2016 argues “that ratios of world trade to output have been flat since 2008.”<sup>29</sup> That is “the longest period of such stagnation since the [S]econd [W]orld [W]ar.”<sup>30</sup> According to Global Trade Alert, the “volume of world trade stagnated between January 2015 and March 2016, though the world economy continued to grow.”<sup>31</sup> “The stock of cross-border financial assets peaked at [57%]

27. *ICC Reveals Record Number of New Arbitration Cases Filed in 2016*, INT’L CHAMBER OF COM. (Jan. 18, 2017), <https://iccwbo.org/media-wall/news-speeches/icc-reveals-record-number-new-arbitration-cases-filed-2016/> [https://perma.cc/66QM-5VPC].

28. LONDON COURT OF INT’L ARBITRATION, *FACTS AND FIGURES 2016: A ROBUST CASELOAD 5* (Apr. 3, 2017).

29. Gary Clyde Hufbauer & Euijin Jung, *Why Has Trade Stopped Growing? Not Much Liberalisation and Lots of Micro-Protection*, PETERSON INST. FOR INT’L ECON. (Mar. 23, 2016, 12:00 PM), <https://piie.com/blogs/trade-investment-policy-watch/why-has-trade-stopped-growing-not-much-liberalization-and-lots> [https://perma.cc/68HR-3CSY].

30. *Id.*

31. SIMON J. EVENETT & JOHANNES FRITZ, *GLOBAL TRADE PLATEAUS: THE 19TH GLOBAL TRADE ALERT REPORT 9* (July 13, 2016), <http://www.globaltradealert.org/reports/15/>; see also SIMON J.

of global output in 2007, falling to [36%] by 2015”—a marked reduction in cross-border investments.<sup>32</sup> Globally, “inflows of foreign direct investment have remained well below the [3.3%] of world output attained in 2007, though the stock continues to rise, albeit slowly, relative to output.”<sup>33</sup>

This evidence indicates that at least some of the impetus towards further economic integration has stalled and in some respects gone into reverse. That is, on these figures there is some evidence that globalization is no longer driving world growth, at least to the extent it used to.<sup>34</sup>

It is widely suggested that this has been fueled by, or at least accompanied by, an ebbing away of the belief in open markets and a return to the nationalism which globalism was established to reject.

While the events that led to the election of President Trump may be an especially visible sign of this, the movement started well before his political campaigning. In the 1990s, Western media was already using the term “antiglobalization” for movements that arose contesting the supposed global benefits of globalism.<sup>35</sup> The movement’s participants, for their part, referred to themselves as seeking “alterglobalization” or “global justice.”<sup>36</sup> Criticism focused on the negative effect that free trade policies were accused of having, especially in the developing world. The policies were blamed for the proliferation of sweatshops in East and Southern Asia, farmers being pushed off their land, and downward pressures on wages.<sup>37</sup>

More broadly, and in the decades following, criticism has been levied against globalism for perceptions of:

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EVENETT & JOHANNES FRITZ, FDI RECOVERS?: THE 20TH GLOBAL TRADE ALERT REPORT 12 (Aug. 30, 2016), <http://www.globaltradealert.org/reports/13>.

32. Martin Wolf, *The Tide of Globalization is Turning*, FIN. TIMES (Sept. 6, 2016), <https://www.ft.com/content/87bb0eda-7364-11e6-bf48-b372cdb1043a> [<https://perma.cc/VX96-TCCX>].

33. *Id.*

34. *Id.*

35. Nikil Saval, *Globalisation: The Rise and Fall of an Idea That Swept the World*, GUARDIAN (July 14, 2017, 12:28 AM), <https://www.theguardian.com/world/2017/jul/14/globalisation-the-rise-and-fall-of-an-idea-that-swept-the-world> [<https://perma.cc/QUB4-G9YB>].

36. *Id.*

37. *Id.*

- (1) Its contribution to structural changes in the composition and distribution of economic activity;
- (2) the rapid change in the social and demographic structure of many Western societies; and
- (3) increased income inequality (and a sense in which those benefitting most from globalism were those who already had money).<sup>38</sup>

One particular concern has been an effect of globalism witnessed in the last two decades or so in the industrialized Western economies. The promise of globalism, from the point of view of economic theory, was that as markets became more open and free, regional inequalities would diminish. Poorer regions—that is, regions in which workers and capital would cost less, and so where doing business would be cheaper—would attract investment from richer regions, so resulting in those poorer regions growing faster. They would, over time, catch up with the richer regions.

For a long period this was true, at least within the industrialized nations. More open markets resulted in the lagging industrialized economies catching up with the richer ones. To take one example, between 1950 and 1973, the real output per person in Italy rose from being 33% of the output of an American person to 62%.<sup>39</sup> The same was also true within smaller regions. In the U.S.A., for example, between 1880 and 1980, the income gaps between different States in the Union closed at an average annual rate of 1.8%, with much of this change coming in the postwar period.<sup>40</sup> A similar reduction of inequalities could be seen within European countries and in Japan.

Since the 1990s, however, this process has stalled. Between 1990 and 2010, the income gaps between U.S. states have been closing at less than half the rate of the previous century, and recent figures

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38. JEREMY LAWSON, STANDARD LIFE INVS., POPULISM AND THE THREAT TO GLOBALISATION (Apr. 2017), [https://www.standardlifeinvestments.com/Global\\_Populism\\_Globalisation\\_Paper\\_TCM.pdf](https://www.standardlifeinvestments.com/Global_Populism_Globalisation_Paper_TCM.pdf) [https://perma.cc/NC73-3JHQ]; Saul, *supra* note 8, at 33, 36.

39. *Globalization Has Marginalized Many Regions in the Rich World*, ECONOMIST (Oct. 21, 2017), <https://www.economist.com/news/briefing/21730406-what-can-be-done-help-them-globalisation-has-marginalised-many-regions-rich-world> [https://perma.cc/2CAR-6YD3].

40. *Id.*

suggest that the convergence rate is now close to zero, or even in reverse.<sup>41</sup> Instead, recent studies suggest that we are now seeing the winners of globalism—the cities and regions that have excelled in a particular field, like California in computing and technological spheres, or New York and London in financial spheres—now continue to draw in players in those fields and get richer, while poor areas correspondingly lose out and get poorer still. A recent study from the OECD [Organisation of Economic Co-operation and Development] found that, within the members of the OECD (the majority of which are comparatively rich countries), the difference in productivity between the most productive 10% of regions within a country and the least productive 75% of that country's regions has increased by a remarkable 60% over the last 20 years.<sup>42</sup>

Many have observed that this is one of the natural consequences of the open markets that are at the heart of the globalist movement. As particular cities or regions around the world become known as leaders in a particular field, it makes sense for others in that field—or for new entrants looking to establish a presence—to go to that place and so benefit from the existing infrastructure and pool of workers. The competition that results from open markets creates winners. On both a global and a domestic scale, however, it also seems to have created losers, and those regions that have lost out to a competitor, possibly within their own country or possibly overseas, seem now to be falling further and further behind.

In practical terms, and relevantly for this conference, this worsening inequality appears in recent years to be leading to popular dissatisfaction and a rising distrust among populations for what is termed “the establishment”—politicians and business people that typically have been among the “winners” of the dynamics created by open markets.<sup>43</sup> When that establishment has for a long time been associated with globalism, it is easy for that rising mistrust to settle

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41. *Id.*

42. *Id.*

43. Saval, *supra* note 35.

also on the globalist movement and its features, and to turn instead back towards the economic nationalism that globalism rejected.

### III. *Recent Events with Practical Impacts*

We can all identify recent examples of events that appear to have been driven by this rising popular concern about the effects of globalism. [Recent examples include] not only popular demonstrations, but also [] a number of elections in which mainstream parties—whose traditional positions have been to support the globalist movement and its aims—have lost substantial ground to newer, “populist” parties, many with elements of antiglobalism to their policies.

In the United Kingdom, of course, it has now been over fifteen months since the country voted in a referendum to leave the European Union (EU).<sup>44</sup> Some might say that is the starkest popular rejection of the globalist approach (although I’ll come back to that).

France witnessed the success of Marine Le Pen in the first round of the presidential election, in a campaign in which she had warned that “[t]he main thing at stake in this election is the rampant globalization that is endangering our civilization.”<sup>45</sup> Although she was defeated by the current President, Emmanuel Macron, in the second round of the vote, that second round saw one of the lowest voter turnouts for decades,<sup>46</sup> and even Monsieur Macron was the head of a new party, not a member of any of the old establishment parties.

In Italy, the Five Star Movement has gathered momentum, initially standing on a platform that it wanted to hold its own referendum on

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44. *EU Referendum Results*, ELECTORAL COMMISSION, <https://www.electoralcommission.org.uk/find-information-by-subject/elections-and-referendums/past-elections-and-referendums/eu-referendum/electorate-and-count-information> (last visited Feb. 16, 2018) [<https://perma.cc/WU7N-2XET>].

45. Angelique Chrisafis, *Marine Le Pen Rails Against Rampant Globalization After Election Success*, GUARDIAN (Apr. 24, 2017, 6:36 PM), <https://www.theguardian.com/world/2017/apr/24/marine-le-pen-rails-against-rampant-globalisation-after-election-success> [<https://perma.cc/3CLB-W8Z7>].

46. *Id.*

whether to take Italy out of the EU, although in more recent months it seems to have resiled from that.<sup>47</sup>

Similarly, the Law and Justice party in Poland, Alternatif fur Deutschland in Germany, the Justice and Development Party in Turkey, Fidesz in Hungary, the Party for Freedom in The Netherlands, the Freedom Party in Austria, Unidos Podemos in Spain, Sweden Democrats in Sweden, and the Golden Dawn in Greece have all seen significant increases in support over the last series of elections, all standing on platforms that involved, to a greater or lesser extent, rejection of one or more of the core values of globalism (and specifically of the EU in its current form).<sup>48</sup> The world's two newest and youngest leaders, Sebastian Kurz in Austria and Jacinda Arden in New Zealand, owe their elevations at least in part to an anti-immigration stance. Of course, here in America, Mr. Trump ran a campaign in which his call to arms, "America First," was a clear and deliberate retreat from globalism and back to economic nationalism. It may be worth quoting from Trump's inauguration speech here, when he stated:

From this moment on, it's going to be America First. Every decision on trade, on taxes, on immigration, on foreign affairs, will be made to benefit American workers and American families. We must protect our borders from the ravages of other countries making our products, stealing our companies, and destroying our jobs.

[ . . . ]

We will follow two simple rules: Buy American and hire American. We will seek friendship and goodwill with the nations of the world—but we do so with the understanding that it is the right of all nations to put their own interests

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47. Nick Squires, *Italy's Five Star Movement Drops Its Threat to Ditch the Euro as Election Looms*, TELEGRAPH (Jan. 10, 2018, 4:25 PM), <http://www.telegraph.co.uk/news/2018/01/10/italys-five-star-movement-drops-threat-ditch-euro-election-looms/> [https://perma.cc/LQ4B-29ZW].

48. Gregor Aisch et al., *How Far Is Europe Swinging to the Right?*, N.Y. TIMES (Oct. 23, 2017), <https://www.nytimes.com/interactive/2016/05/22/world/europe/europe-right-wing-austria-hungary.html> [https://perma.cc/DNQ3-VRS5].

first.<sup>49</sup>

This political rhetoric and the resurgent popularity of nationalist policies have translated into practical impacts, particularly in the case of free trade agreements.

The effect is perhaps most dramatic with respect to the series of new free trade agreements that were under negotiation as little as a year ago. The most prominent example is the Trans-Pacific Partnership,<sup>50</sup> or TPP: a trade agreement between twelve countries around the Pacific that has been under negotiation since 2008. After nineteen rounds of negotiations, the final draft agreement was publicized in November 2015 and signed by each of its members on February 4, 2016, at a ceremony in Auckland, New Zealand.<sup>51</sup>

However, the rise in antiglobalist sentiment has rendered its future uncertain. As I'm sure you all know, on 23 January 2017, one of President Trump's first acts was to fulfill his campaign promise and withdraw the U.S. from the agreement.<sup>52</sup> Some signatories, notably Australia and New Zealand, have proposed to continue without U.S. participation; but others, particularly Japan, have expressed the view that the TPP is now "meaningless."<sup>53</sup>

The TPP is not the only proposed free trade agreement to have suffered in this way. Mr. Trump's administration also indicated early on in his term that the U.S. was unwilling to proceed with negotiations for the Transatlantic Trade and Investment Partnership (TTIP),<sup>54</sup> the trade agreement that, after many years of negotiations, was near to being agreed with the EU.

49. President Donald Trump, Inaugural Address (Jan. 20, 2017), <https://www.whitehouse.gov/briefings-statements/the-inaugural-address/> [https://perma.cc/YQM3-7MAX] (remarks as prepared for delivery).

50. Trans-Pacific Partnership, Feb. 4, 2016, <https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text> [https://perma.cc/8F3W-9XBH].

51. *Id.*; *The United States in the Trans-Pacific Partnership*, OFF. U. S. TRADE REPRESENTATIVE (Nov. 12, 2011), <https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2011/november/united-states-trans-pacific-partnership> [https://perma.cc/2GF8-XNTE].

52. *TPP: What Is It and Why Does It Matter?*, BBC NEWS (Jan. 23, 2017), <http://www.bbc.com/news/business-32498715> [https://perma.cc/FB4V-DLPV].

53. *Id.*

54. *See id.*

These shifts in position are not, however, a purely U.S. concern. The TTIP was also proving unpopular in Europe. A number of European Citizen's Initiatives (a type of EU mechanism, introduced by the Lisbon Treaty, aimed at increasing direct democracy within the EU)<sup>55</sup> opposed to the TTIP had been formed and were campaigning for the negotiations to be abandoned. One based in Berlin—called "Stop TTIP!"—started a petition calling for an end to TTIP that attracted over 3.2 million signatures in less than a year,<sup>56</sup> prompting various political leaders across Europe to voice their own concerns.

Similarly, the Comprehensive Economic and Trade Agreement (CETA)<sup>57</sup> between Canada, the EU, and its Member States has suffered difficulties. Negotiations for it began in May 2009 and concluded in August 2014.<sup>58</sup> The final agreement was then published on September 25, 2014.<sup>59</sup> Signature and ratification of the agreement has, however, since been delayed, chiefly by the concerns of a region of Belgium whose consent to CETA is necessary to bring it into force, but whose parliament adopted a resolution opposed to CETA in April 2016.<sup>60</sup> Despite that issue now being resolved, just over a month ago Belgium also sought a ruling from the European Court of Justice on the compatibility of CETA with existing EU law,<sup>61</sup> the outcome of which may result in further delays before CETA becomes fully effective.

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55. Treaty of Lisbon, *supra* note 21.

56. *About Stop TTIP*, STOP TTIP: EUR. INITIATIVE AGAINST TTIP & CETA, <https://stop-ttip.org/about-stop-ttip/> (last visited Feb. 16, 2018) [<https://perma.cc/T8JL-AEK3>].

57. Comprehensive Economic and Trade Agreement, Oct. 30, 2016, O.J. (L 11) 23 (initiative not currently in force).

58. Elfriede Bierbrauer, European Parliament Directorate-Gen. for External Policies, Policy Dep't, Negotiations on the EU-Canada Comprehensive Economic and Trade Agreement (CETA) Concluded (2014), [http://www.europarl.europa.eu/RegData/etudes/IDAN/2014/536410/EXPO\\_IDA%282014%29536410\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/IDAN/2014/536410/EXPO_IDA%282014%29536410_EN.pdf) [<https://perma.cc/5Z6W-GDPQ>].

59. *Id.*

60. Jennifer Rankin, *EU-Canada Free Trade Deal at Risk After Belgian Regional Parliament Vote*, *GUARDIAN* (Oct. 14, 2017, 11:20 AM), <https://www.theguardian.com/business/2016/oct/14/eu-canada-free-trade-deal-ceta-in-jeopardy-belgium-wallonia-parliament-vote> [<https://perma.cc/JQ66-VYXL>].

61. *Belgium Seeks EU Court Opinion on EU-Canada Free Trade Deal*, *CNBC* (Sep. 6, 2017, 8:08 AM), <https://www.cnb.com/2017/09/06/reuters-america-belgium-seeks-eu-court-opinion-on-eu-canada-free-trade-deal.html> [<https://perma.cc/E842-XKNQ>].

Further, it is not only new free trade agreements that have come under attack. Existing free trade agreements are also at risk. As I say that, you will all almost certainly have in mind NAFTA, the North American Free Trade Agreement,<sup>62</sup> in force since 1994, which the Trump Administration has now begun to “renegotiate” with the other parties, Canada and Mexico. It may be that these renegotiations will ultimately lead to agreement on a revised set of terms with which each of the three signatories will be happy. There are some signs that agreement is indeed being reached in certain areas: a trilateral statement released at the conclusion of the fourth round of talks last Tuesday, October 17, indicated that the parties have made progress on competition policy, customs, digital trade, and regulatory practices.<sup>63</sup>

However, a sense of U.S. hostility to the treaty remains, not least in the insistence from the U.S. that the revised NAFTA be subject to reconsideration and renewal every five years. That proposal has been criticized for removing long-term certainty for business and investors that free trade agreements are supposed to provide. It remains unclear whether those issues will be resolved suitably with Canada and Mexico, although it is notable that at a press conference last Tuesday, Chrystia Freeland, the Canadian Foreign Affairs minister, said that she was “preparing for the worst possible outcome.”<sup>64</sup>

The other obvious example of a rejection of an existing free trade agreement is in Brexit—the decision of the UK to leave the European Union.<sup>65</sup> The European Union and its single market is the world’s largest free trade area and customs union, and many have interpreted

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62. North American Free Trade Agreement, *supra* note 13.

63. Press Release, Office of the United States Trade Representative, Trilateral Statement on the Conclusion of the Fourth Round of NAFTA Negotiations (Oct. 17, 2017), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2017/october/trilateral-statement-conclusion> [<https://perma.cc/9A6P-6PEH>].

64. Kathleen Harris, *Freeland Calls U.S. NAFTA Demands ‘Troubling’ and ‘Unconventional,’* CBC NEWS (Oct. 17, 2017, 4:51 PM), <http://www.cbc.ca/news/politics/nafta-freeland-lighthizer-round4-1.4358242> [<https://perma.cc/5MW9-BP8H>].

65. Press Release, Statement by the European Council (Art. 50) on the UK Notification (Mar. 29, 2017, 2:00 PM), <http://www.consilium.europa.eu/en/press/press-releases/2017/03/29/euco-50-statement-uk-notification/> [<https://perma.cc/8WHW-KYTS>].

the UK's vote to leave as a rejection of the internationalist and integrationist philosophy that underpins it.

The uncertain effects of that decision are still being played out in public. The unexpected result caused the then Prime Minister, David Cameron, to resign, leading in due course to a (some would say disastrous) decision by the next Prime Minister, Theresa May, to call an election to increase her mandate, but which succeeded only in eliminating her party's majority in Parliament. The UK is now looking into the possibility of a two-year "implementation" of its departure from the EU so that the UK will not actually fully leave until 2021.<sup>66</sup> And every day seems to bring a new crisis and a new risk to the Prime Minister's parliamentary position. And that is only to describe the domestic effects. As to the negotiations with the EU themselves, they have been described as now being "accelerated."<sup>67</sup> That, however, does not tell one very much, given that a week before it was said that those talks had been "stalled."<sup>68</sup>

Returning to the topic of arbitration, in many respects, these recent moves echo campaigns that we have seen against bilateral investment treaties and, in particular, the dispute resolution mechanisms that they, together with the 1965 ICSID [International Centre for Settlement of International Disputes] Convention,<sup>69</sup> establish. Investor-State Arbitration,<sup>70</sup> often referred to as Investor-State

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66. *Theresa May Wants Two-Year 'Implementation' UK EU Deal*, BBC NEWS (Sept. 22, 2017), <http://www.bbc.com/news/av/uk-politics-41365547/theresa-may-wants-two-year-implementation-uk-eu-deal> [https://perma.cc/UK49-8JYL].

67. John Ryan, *Brussels May Have Agreed to Accelerate the Brexit Negotiations—but Merkel's Priorities Lie Elsewhere*, LONDON SCH. OF ECON. & POL. SCI.: EUR. POL. & POL'Y (Oct. 21, 2017) <http://blogs.lse.ac.uk/euoppblog/2017/10/21/brussels-may-have-agreed-to-accelerate-the-brexit-negotiations-but-merkels-priorities-are-elsewhere/> [https://perma.cc/NLE5-FWWS].

68. Oliver Wright, *EU Dragging Feet to Squeeze Bigger Payment out of Britain*, TIMES (Oct. 17, 2017, 12:01 AM), <https://www.thetimes.co.uk/article/eu-dragging-its-feet-in-talks-to-squeeze-more-cash-out-of-may-smmfhdbxp> [https://perma.cc/4NNT-PE6G].

69. Int'l Ctr. for Settlement of Inv. Disputes [ICSID], Convention, Regulation and Rules, *opened for signature* Mar. 18, 1965, <https://icsid.worldbank.org/en/Documents/icsiddocs/ICSID%20Convention%20English.pdf> [https://perma.cc/6DEG-7YWQ] (entered into force Oct. 4, 1966) (amended and effective Apr. 10, 2006).

70. *Investor-State Dispute Settlement: The Arbitration Game*, ECONOMIST (Oct. 11, 2014), <https://www.economist.com/news/finance-and-economics/21623756-governments-are-souring-treaties-protect-foreign-investors-arbitration> [https://perma.cc/3GC3-VNE6].

Dispute Settlement, or ISDS, has come under sustained attack from certain quarters, particularly from certain NGOs [nongovernmental organizations], over the last few years. It is criticized for being an undemocratic, secret court system which hides the activities of big business and prevents the proper, transparent regulation of industry. Focusing upon cases such as Phillip Morris' challenge to tobacco legislation in Australia<sup>71</sup> and Vattenfall's challenge to regulation of the nuclear industry in Germany,<sup>72</sup> critics also charge that ISDS and the bilateral investment treaty system in general improperly restrict the ability of governments to take decisions and set policy in a way that is in the best interests of their citizens by giving large foreign investors the ability effectively to hold governments to ransom over any changes that would have an impact on those investors' businesses.

These criticisms of ISDS are also founded in a form of antiglobalist sentiment. This issue has emerged in Europe too, with NGOs [nongovernmental organizations] and others joining together to speak out prominently against any and all proposals to continue or expand ISDS. The debate on TTIP made that very clear.

#### *IV. An End to Globalism?*

So do these recent developments mean an end to globalism? There are certainly plenty of commentators to be found who will say so. I am, however, considerably more skeptical. Globalism as a philosophy and a phenomenon has brought great benefits to the world throughout the last half-century, and I do not see any realistic prospect of it being reversed now.

There are several reasons for this. The first and most important to my mind is that this apparent retreat from globalism is not a

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71. *Tobacco Plain Packaging—Investor-State Arbitration*, AUSTRALIAN GOV'T: ATT'Y-GEN'S DEP'T, <https://www.ag.gov.au/Internationalrelations/InternationalLaw/Pages/Tobaccoplainpackaging.aspx> (last visited Feb. 16, 2018) [<https://perma.cc/KM6A-CFQE>].

72. NATHALIE BERNASCONI-OSTERWALDER & RHEA TAMARA HOFFMANN, INT'L INST. FOR SUSTAINABLE DEV., THE GERMAN NUCLEAR PHASE-OUT PUT TO THE TEST IN INTERNATIONAL INVESTMENT ARBITRATION? BACKGROUND TO THE NEW DISPUTE *VATTENFALL V. GERMANY (II)* (June 2012), <http://www.iisd.org/library/german-nuclear-phase-out-put-test-international-investment-arbitration-background-new> [<https://perma.cc/6N37-ADZH>].

worldwide problem. We must be careful not to equate the surprising political events in the U.S. and Europe with an overall global trend. It does not appear to be the case that the remainder of the world is losing faith in free trade and free trade agreements. Bearing in mind that it is in that remainder that most of the world's developing, and so fastest growing, economies are to be found, that is a significant point. And the new global economic superpowers such as China and India are ready to fill the gap where the U.S. seems reluctant to go.

Secondly, even within the U.S. and Europe, the trend against globalism is frequently exaggerated. I mentioned before the TPP and the TTIP. It remains the case, as far as I am aware, that the U.S. has withdrawn from the TPP and does not intend to reenter it. However, in June of this year it was reported the U.S. Secretary of Commerce Wilbur Ross had indicated to German officials that President Trump was receptive to resuming talks on the TTIP,<sup>73</sup> albeit potentially with changes to the terms under discussion.

For all of his campaign talk, President Trump's administration also appears genuinely to be engaging in the renegotiation of NAFTA that it commenced. The suggestion that the Trump administration is rejecting globalism in all its forms therefore seems misplaced. Similarly in the UK, the statements and approach of the current government are not consistent with the idea that it has rejected international free trade. The UK government is currently engaged in discussions with representatives of the EU to try to establish a continuing form of free trade agreement, albeit one that is very different from the agreement that exists today.

One of the main refrains repeated by the more "pro-Brexit" members of the government is that Brexit will allow the UK once again to seek out and agree to its own free trade deals<sup>74</sup>—a power that is currently reserved exclusively to the EU for so long as the UK

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73. John Brinkley, *Commerce Secretary Ross Wants to Restart TTIP Talks. Good Luck with That.*, FORBES (June 6, 2017, 3:38 PM), <https://www.forbes.com/sites/johnbrinkley/2017/06/06/commerce-secretary-ross-wants-to-restart-ttip-talks-good-luck-with-that/#161e446a3c7a> [https://perma.cc/9P29-JPJS].

74. *David Davis' Opening Statement from the Queen's Speech Debate 'Brexit and Foreign Affairs.'*, GOV.UK (June 26, 2017), <https://www.gov.uk/government/news/david-davis-opening-statement-from-the-queens-speech-debate-brexit-and-foreign-affairs> [https://perma.cc/UDL2-CQ9D].

remains a Member State—and frequent announcements are made by the government of its intention to engage with particular countries immediately once the Brexit process is finalized.

Indeed, among the suggestions raised by at least one former U.S. State Department official is that the UK could look to form a new free trade bloc with the U.S., Canada, and other states, or possibly join NAFTA<sup>75</sup> (perhaps thereby changing it to the North Atlantic Free Trade Agreement, to maintain the acronym). The UK Prime Minister, Mrs. May, has not been shy in expressing her appetite for a deal with the U.S.,<sup>76</sup> so I expect she would be open to such an arrangement.

It is difficult, given those public statements, to claim that Brexit, at least in the way that it is being implemented, is solely a nationalistic and anti-globalist step. And on the general political front, although it is undeniable that nationalist movements are gaining popularity throughout Europe, and that in some cases that may be a cause for concern for several reasons, none of the parties that openly oppose globalism has yet obtained a substantial foothold, let alone won a majority.

I would, therefore, add a note of caution to all of the discussion about receding globalism. There have been a number of political events that have come as a surprise and a shock to many in the West, and the media have been quick to pick up on them. We should be careful, however, not to read into those events a narrative that is not justified, and certainly should not allow our policies and decision-making to be unduly guided by what appears to remain (for now) a minority position.

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75. *Britain Could Join NAFTA If Brexit Trade Deal Fails: Telegraph Newspaper*, REUTERS (Oct. 10, 2017, 6:57 AM) <https://www.reuters.com/article/us-britain-eu-nafta/britain-could-join-nafta-if-brexit-trade-deal-fails-telegraph-newspaper-idUSKBN1CF18K> [<https://perma.cc/H4DQ-5XFX>].

76. *PM Meeting with President Trump: 20 September 2017*, GOV.UK (Sept. 21, 2017), <https://www.gov.uk/government/news/pm-meeting-with-president-trump-20-september-2017> [<https://perma.cc/XX5G-PG9A>].

*V. How Does a Decline in Globalism Affect International Dispute Resolution?*

This takes me to my third question: What impact do these recent events have on dispute resolution? We have heard about the impact on transnational commercial dispute resolution and ISDS this morning, and we will hear about international commercial arbitration this afternoon. I do not want to cover that ground again, so I will be brief in adding my own view to those that have been and will be shared. It does seem to me, however, that the impact will vary depending upon the form of dispute resolution we consider.

*A. State–State Dispute Resolution*

Starting first with State-to-State dispute resolution, it may be that this is one of the areas in which we will see the most change.

State-to-State disputes include any disputes that are referred for resolution under the rules of the WTO, or under NAFTA. They may also include disputes as to the interpretation or application of bilateral investment treaties, although those are less common.

If, therefore, as a result of recent nationalist movements we see significant changes to these treaties, this may well affect the way in which State–State dispute resolution is conducted. The other notable effect is that, if we do see a retreat from the principles of open markets into a degree of protectionism around the world, this may also generate a greater number of disputes that require resolution. The recent story of the punitive tariffs imposed by the U.S. on Canadian aircraft manufacturer Bombardier following a complaint from U.S. manufacturer Boeing about Bombardier's trade practices<sup>77</sup> is a neat illustration of the kind of issues which might see conflict between different nations as more nationalist interests take prominence.

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77. INT'L TRADE ADMIN., UNITED STATES DEP'T OF COMMERCE, FACT SHEET: COMMERCE PRELIMINARILY FINDS COUNTERVAILABLE SUBSIDIZATION OF IMPORTS OF 100- TO 150-SEAT LARGE CIVIL AIRCRAFT FROM CANADA 1 (2017), <https://enforcement.trade.gov/download/factsheets/factsheet-canada-large-civil-aircraft-cvd-prelim-092617.pdf> [<https://perma.cc/P3MX-443B>].

### B. ISDS

Secondly, considering ISDS, the key question appears to be whether a move away from globalism will result in a move away from investor–state arbitration, and a return to the previous methods of resolving disputes: domestic court proceedings, or diplomatic efforts between the host country and the home country of the investor.

I think this is highly doubtful. The existence of effective and independent investor–state dispute resolution is an important factor for companies in determining where to invest. In a study conducted for Hogan Lovells LLP and discussed at the Investment Treaty Forum at the British Institution of International and Comparative Law in London in May 2015, 20% of senior business managers said that they would not consider investing overseas without the protection of an investment treaty of some form; and a further 60% said that the existence of such protection was a “very important” consideration.<sup>78</sup> A study by the Netherlands Bureau for Economic Policy [Analysis] showed that “ratified BITs increase on average bilateral FDI stocks by 35% compared to [those] of country pairs not having a treaty.”<sup>79</sup>

Unless each of those companies simply ceases to make overseas investments, there will continue to be demand for effective investor–state dispute resolution mechanisms, and the countries that put in place the most effective mechanisms should correspondingly receive more investment. Indeed, it may well be that as protectionist policies globally increase, along with a potential rise in resource nationalism

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78. JULIANNE HUGHES-JENNETT ET AL., ECONOMIST INTELLIGENCE UNIT, RISK AND RETURN: FOREIGN DIRECT INVESTMENT AND THE RULE OF LAW 43 (2015), [https://www.bicl.org/documents/625\\_d4\\_fdi\\_main\\_report.pdf?showdocument=1](https://www.bicl.org/documents/625_d4_fdi_main_report.pdf?showdocument=1) [<https://perma.cc/98JE-PU8Y>].

79. ARJAN LEJOUR & MARIA SALFI, NETHERLANDS BUREAU FOR ECONOMIC POLICY ANALYSIS, THE REGIONAL IMPACT OF BILATERAL INVESTMENT TREATIES ON FOREIGN DIRECT INVESTMENT 28 (2015), <https://www.cpb.nl/sites/default/files/publicaties/download/cpb-discussion-paper-298-regional-impact-bilateral-investment-treaties-foreign-direct-investment.pdf> [<https://perma.cc/5H95-UTUD>]. BIT stands for bilateral investment treaty, and FDI stands for foreign direct investment. *See id.*

that may follow on the heels of such protectionism, the need for investment protections will grow stronger.<sup>80</sup>

But will ISDS change shape? This, it seems to me, is a much more likely outcome. The criticisms that have been levied at ISDS are not often well-founded, but a valid point can be made about the transparency of existing investment arbitration procedures and the extent to which they have an impact on government policy.

The question must be how the current system can evolve to counter the growing political and social mistrust toward BITs and ISDS.<sup>81</sup> This was addressed in the TPP and TTIP papers in different ways.

The TPP, conscious of some of the perceived controversies surrounding ISDS, stuck with a traditional investor–state arbitration model, but included certain mandatory features to try to limit perceived abuses of the system. Those features included:

- (1) Express provisions guaranteeing the transparency of proceedings, and allowing the possibility for interested groups to file *amicus curiae* briefs (in the same way that they would be able to do before a national court).
- (2) An express right for the State to regulate markets to protect public welfare, including areas of health and the environment, and express carve-outs providing that certain areas of public policy were excluded from potential ISDS challenge.
- (3) Procedural safeguards, such as a procedure for expedited or summary review of frivolous claims, time limits for filing claims, express prohibitions on conducting parallel

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80. See Sylvia Noury, Elie Kleiman & Leilah Bruton, *Resource Nationalism in Africa—the Next Wave of Investor Claims* in FRESHFIELDS BRUCKHAUS DERINGER, INTERNATIONAL ARBITRATION: 10 TRENDS IN 2017 at 20, 20–21 (Feb. 1, 2017), [http://knowledge.freshfields.com/en/Global/r/1810/international\\_arbitration\\_10\\_trends\\_in\\_2017](http://knowledge.freshfields.com/en/Global/r/1810/international_arbitration_10_trends_in_2017) [<https://perma.cc/5LT4-H9Y9>].

81. Costanza Nicolosi, *International Investment Law: In Between Traditional Boundaries of the Law—Where From and Where To?*, 3 EDINBURGH STUDENT L. REV. 95, 101 (2017).

proceedings, and provisions for the signatory states to give binding joint interpretations of the treaty's terms.<sup>82</sup>

The TTIP proposed something altogether more innovative: the creation of a permanent investment court, which would see the establishment of a panel of fifteen permanent judges, who would sit in divisions of three to hear each case brought by an investor against a State.<sup>83</sup> Procedural rules for each case would initially be determined by the relevant division, although with the suggestion that permanent procedural rules might over time be established.<sup>84</sup> The TTIP also proposed the creation of an appeal court, consisting of six appellate judges that again would sit in divisions of three.<sup>85</sup>

Similar proposals for the establishment of a permanent dispute settlement tribunal were included in the final form of CETA.<sup>86</sup> The EU has further developed the idea and is now proposing the establishment of a permanent multilateral investment court empowered to hear disputes over investments between any investors and states that have accepted its jurisdiction over their bilateral investment treaties. The EU has posed this as a clear move away from the “old-style system” of ISDS and is framing it as being “for investment dispute settlement what the World Trade Organization is for trade dispute settlement, thus upholding a multilateral rules-based system.”<sup>87</sup> It offers a system which responds to some of the criticisms of the current ISDS, for example, “double-hatting”: that is, when a private lawyer is on one day a supposedly neutral arbitrator and on the other an advocate dedicated to promoting an argument which

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82. Trans-Pacific Partnership, *supra* note 50.

83. Transatlantic Trade and Investment Partnership ch. II, art. 9, ¶¶ 2, 6 (tabled for discussion Nov. 12, 2015), [http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc\\_153955.pdf](http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc_153955.pdf) [<https://perma.cc/HL9R-4NFD>]

84. *Id.* ch. II, art. 9, ¶ 10.

85. *Id.* ch. II, art. 10, ¶¶ 2, 8.

86. Comprehensive Economic and Trade Agreement, *supra* note 57.

87. EUROPEAN COMMISSION, A MULTILATERAL INVESTMENT COURT: A NEW SYSTEM FOR RESOLVING DISPUTES BETWEEN FOREIGN INVESTORS AND STATES IN A FAIR AND EFFICIENT WAY 1–2 (2017), [http://trade.ec.europa.eu/doclib/docs/2017/september/tradoc\\_156042.pdf](http://trade.ec.europa.eu/doclib/docs/2017/september/tradoc_156042.pdf) [<https://perma.cc/HV8L-JEHS>].

could be inconsistent with a decision he in his role as arbitrator in the other case could be called upon to make.

It may therefore be that the coming months and years will see a move away from the investor–state arbitration model with which we as practitioners have become familiar. The precise form of the new model that will replace it is, however, unclear. Permanent investment courts appear currently to be *en vogue*, but the features of such proposed courts remain to be discussed, and it is clear that they would have problems of their own. Rules as to the appointment processes for judges, what qualifications they need to possess, the length of their terms, how they will be remunerated, whether they could sit in judgment on cases involving their home nation, and myriad other issues would need to be resolved in a way which still inspired the confidence of states and investors in the fairness of the overall result. Questions that have long followed the ISDS process, for example, about the nature of an ISDS decision and whether systems of precedent exist or should be adopted, would also be brought again to the fore. These are all matters on which I await further information with interest.

### *C. Commercial Dispute Resolution*

Turning finally to international commercial disputes, I will make the *potentially bold* observation that international trade is going to continue between private parties unless it is actively prohibited, for example, by the imposition of sanctions prohibiting certain dealings. Because the trade will continue, disputes will continue to arise. The question then is what forum will be preferred for resolving disputes that arise?

The answer depends on the extent of the changes that any shift away from globalism in a particular country may bring. There is an argument that not much will change. The key drivers for parties in choosing a forum for resolving their disputes are generally a stable legal system with which they are familiar, and an ability to take judgments obtained in that legal system and enforce them wherever in the world they need to be enforced. The enforcement of court

judgments around the world is the subject of a number of treaties on mutual recognition and enforcement of judgments, but none of those treaties appear yet to have attracted the ire of any anti-globalist movement.

Even in the case of Brexit, where the position of the UK after Brexit with respect to the EU Judgments Regulation<sup>88</sup> (requiring each Member State to recognize and enforce judgments given by the courts of another Member State) remains uncertain, other mechanisms for the enforcement of judgments between the UK and other EU countries exist. Those either predate the EU, still exist and will likely be adopted if no alternative arrangements are agreed between the EU and the UK in their exit negotiations, or alternatively, like the Hague Convention on Choice of Court Agreements,<sup>89</sup> they are new treaties that can readily be implemented. Parties' decisions to refer their disputes to a particular court may therefore be entirely unaffected by nationalist concerns.

However, it is important also to recognize that perception is just as important as the reality in this respect. It may be that, faced with the option of court proceedings in a country which has recently adopted nationalist or protectionist measures, a party will decide that the safer course is to avoid those courts altogether and instead move their disputes to arbitration. No one, to my knowledge, has proposed that the New York Convention should be abandoned, and so arbitral awards should remain as enforceable as they are today.<sup>90</sup> It may therefore be that the practice of international commercial arbitration actually benefits from any shift towards more nationalist policies.

That raises the related question of whether the international arbitration chosen will be the same as it is today. There, the position is less certain. In principle, again, the factors that make a particular

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88. Commission Regulation 1215/2012, 2015 O.J. (L 351) 1.

89. Hague Conference on Private Int'l Law, *Convention on Choice of Court Agreements* (June 30, 2005), <https://assets.hcch.net/docs/510bc238-7318-47ed-9ed5-e0972510d98b.pdf> [<https://perma.cc/RZ7P-VU3J>].

90. Ben Davidson, *Trump, Brexit and Protectionism: Navigating Cross-Border Disputes and International Arbitration in a More Connected World*, CORRS CHAMBERS WESTGARTH (June 15, 2016), <http://www.corrs.com.au/thinking/insights/trump-brexit-and-protectionism-navigating-cross-border-disputes-and-international-arbitration-in-a-more-connected-world/> [<https://perma.cc/CW5U-NPJX>].

country or city desirable as a seat of arbitration now will not necessarily change with any nationalist movements. Taking the example of London following Brexit, in 2015, during its Centenary conference, The Chartered Institute of Arbitrators published a list of ten features necessary to make a safe, effective, and, above all, successful seat for arbitration.<sup>91</sup> These were drawn up after a detailed consultation process with experienced arbitrators and arbitration lawyers and covered the applicable local law, the quality of the local judiciary, the legal expertise of local practitioners, rights under local law to representation, geographical accessibility and safety, the quality of the local facilities, and enforceability of awards issued.<sup>92</sup>

Of these attributes, most would not appear to be affected by any general shift by a country away from globalism. The only factor that might foreseeably change is accessibility, to the extent that a more nationalist, protectionist approach within a country leads to the imposition of more stringent visa requirements or practice restrictions. These are issues that should not arise, however, if the relevant country ensures that it maintains sensible rules in these areas.

However, users and practitioners of arbitration in Europe and the U.S. need to tread carefully. Recent years have seen an increase in capacity for international arbitration disputes to be determined outside of the traditional seat in the West, as a result of the emergence of national dispute resolution centers to replace or supplement regional centers. For example, the Indian Finance Minister and Minister of Corporate Affairs Arun Jaitley suggested at an August 2016 conference on international arbitration in the BRICS countries that it is "extremely important that we develop a [dispute resolution] mechanism as far as the BRICS nations are concerned," citing the reasons for this as including "a new wave of protectionism in the developed economies."<sup>93</sup> Indeed, existing national centers

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91. CHARTERED INST. OF ARBITRATION, CIARB LONDON CENTENARY PRINCIPLES (2015), <http://www.ciarb.org/docs/default-source/ciarbdocuments/london/the-principles.pdf?sfvrsn=4> [<https://perma.cc/2282-RJZL>].

92. *Id.*

93. *Own Arbitration Tool Must for BRICS*, HINDU (Aug. 27, 2016, 11:01 PM),

outside Europe (Singapore and Hong Kong, for example) will likely be incentivized to improve and step up their competition with all prominent European seats even further, if there is any perception that the European center is not holding. Such competition and improvement, from a global perspective, and particularly from that of the parties to international disputes, is positive.

#### CONCLUSION

I therefore conclude with these points, for your further consideration:

- (1) International trade will continue;
- (2) There will be disputes, and there will be a need to resolve them;
- (3) The reason why international arbitration started will hold good: the need for an independent objective method of dispute resolution without politicization or the use of force;
- (4) But will it be the same system as the present method of arbitration? It seems to me that there are too many criticisms, and the responses to them have come too late for this to be possible. For example, the double-hatting criticism I referred to earlier could have been met at an earlier stage by a commitment in the arbitral community to avoid such situations or to give clear guidance to manage them. Some arbitrators and legal firms have taken such positions voluntarily, but others have not. Similarly, there may be intellectually powerful arguments in relation to other criticisms leveled against the current system, but they have not gelled;

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<http://www.thehindu.com/business/Economy/%E2%80%98Own-arbitration-tool-must-for-BRICS%E2%80%99/article14593297.ece> [https://perma.cc/N7EW-TDEU]; see also *New Wave of Protectionism in Developed Economies After Global Slowdown*, HINDU: BUSINESSLINE (Aug. 27, 2016), <http://www.thehindubusinessline.com/economy/new-wave-of-protectionism-in-developed-economies-after-global-slowdown-jaitley/article9040578.ece> [https://perma.cc/CC97-PX5M].

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- (5) The question then is what will the changes be? Will an investment court not bring its own problems? For example, how would you choose the judges? Will it be said that the judges are all in effect appointed by states and that the viewpoint of investors is therefore not taken into account? Will the cost of appeals and the time they will take outweigh the advantages of this system? These are urgent questions which have yet to be satisfactorily answered. Until they have been given sober and detailed consideration, it is difficult to predict what shape our future dispute resolution mechanisms will take.

