


ORIGINAL ARTICLE

INTERNATIONAL LEGAL THEORY

Hayek's dream: International investment law and the denigration of politics

David Schneiderman* 

University of Toronto, 84 Queen's Park Toronto M5S 2C5, Ontario, Canada
E-mail: david.schneiderman@utoronto.ca

Abstract

This article argues that the operational logic of international investment law, in part, is to tame states by legally requiring that they behave as if they were profit-seeking enterprises. This is suggested by a small set of awards, arising out of contractual disputes, that work a binary between normal contractual behaviour and sovereign acts of public authority behaviour. Non-contractual behaviour is deemed 'political' and likely to give rise to liability under investment law strictures. This complements well Hayek's approach to the rule of law, where, outside of their 'framework' functions, states are expected to behave 'in the same manner as any private person'. In an age of ever-increasing disparity, this renders it more difficult for states and citizens to take up measures that Polanyi associates with the protective counter movements, shielding citizens from the deleterious effects of free markets.

1. Introduction

Does international economic law inhibit the production of measures for societal self-protection? Karl Polanyi issued early warning signals in the mid-twentieth century. 'Market society', Polanyi declared, creates the 'delusion' that economic rationality can be a universal rule for all of human society.¹ It has the effect of 'paralyzing our social imagination by more or less unconsciously fostering the prejudice of economic determinism', Polanyi complained.² In the early twenty-first century, Wendy Brown similarly laments the hollowing out of liberal democracy and the suppression of radical democratic imaginaries. Her target was 'neoliberal reason'. This is a body of thought that promotes privatization and practices of 'governance' rather than the institutions and practices associated with democracy and politics. Persons and states, she writes, are 'construed on the model of the contemporary firm'.³ What Brown labels 'neoliberal statism' dictates that state agents behave in ways indistinguishable from the behaviour of private firms.⁴

*I am grateful to the Social Science and Humanities Research Council (SSHRC) for a grant in support, to Jean-Christophe Bedard Rubin for research assistance and Lien Shi for footnote help, to Jonathan Bonnitcha and Zoe Williams for helpful exchanges, and to audiences at the Transnational Legal Center and the Universities of Liverpool and Gothenburg for comments.

¹Market economy thus created a new type of society. The economic or productive system was entrusted to a self-acting device. An institutional mechanism controlled the resources of nature as well as the human beings in their everyday activities . . . ' from K. Polanyi, 'Economics and Freedom to Shape our Social Destiny', in G. Resta and M. Catanzariti (eds.), *For A New West* (2014), 33, at 35.

²K. Polanyi, 'Our Obsolete Market Mentality', in G. Dalton (ed.), *Primitive, Archaic and Modern Economies: Essays of Karl Polanyi* (1968), 59, at 71, 73. When speaking of market society, it is not entirely clear that Polanyi has in mind political institutions when he writes of the 'whole of society' as being subordinated to markets; see Polanyi, *supra* note 1, at 217.

³W. Brown, *Undoing the Demos: Neoliberalism's Stealth Revolution* (2015), 22.

⁴*Ibid.*, at 27; P. Mirowski, *Never Let a Serious Crisis Go to Waste: How Neoliberalism Survived the Financial Meltdown* (2013), 58; P. Dardot and C. Laval, *Ce Cauchement qui n'en finit pas: Comment le néolibéralisme défait la démocratie* (2015), 53.

Polanyi is more famously known for having described a ‘double movement’ in *The Great Transformation* that responded to the social dislocation and suffering caused by the construction of markets in the late nineteenth and early twentieth centuries.⁵ Social suffering precipitated the second leg of Polanyi’s double movement, namely, social planning. This countermovement would enhance ‘social protection . . . of those most affected by the deleterious action of the market . . . using protective legislation, restrictive associations, and other instruments of intervention’.⁶ I will argue that international investment law renders more difficult the taking up of new measures for societal self-protection. By reason of investment law’s edicts, in cases where states are liable for damages pursuant to treaty for breach of contractual promises under a variety of standards of protection, states are expected to mimic outcomes of private actors in the marketplace. Behaviour that exhibits other motivations is pejoratively labelled ‘political’ and is more likely to attract an award of damages. Public policy is expected to function merely as an adjunct to the exigencies of markets, an approach to law associated with neoliberal legality.⁷ Investment law realizes, in short, Hayek’s dream.⁸

This penchant for reducing state functions to behaviour that mimics private actors is a feature of Friederich Hayek’s thinking about the rule of law. According to Hayek’s account, taken up in Section 2, state action should be limited to facilitating private market activities. If states are to do more, they can do so only on terms similar to those available to private actors.⁹ In Hayek’s formulation, this is because states are in no better position than private individuals to determine the appropriate ends of society.¹⁰ His view is premised, in other words, on the incapacity of the political branches to identify anything resembling the public interest. Section 3 turns to a discussion of sovereign immunity doctrine and international law for the diplomatic protection of aliens, sources that have helped to frame discussions in international investment law, and that roughly resemble Hayek’s formulation about the proper role of states. Subsequently, in Section 4, I take up a handful of investment disputes having to do with contractual breaches under varying standards that reveal a Hayekian mindset. By distinguishing sharply between sovereign acts of public authority, which are more likely to attract liability under an investment treaty, and acts of a public authority that resemble those of private market actors, which are less likely to give rise to liability, they adopt a Hayekian frame. The question is whether ‘recalibration’ of investment law generates a sufficient retreat from Hayekian strictures, something I take up in Section 5.¹¹

In the next section, I aim to fill out the content of Hayek’s view of the proper role of the state, one that aims to confine public interventions to those that mimic the actions of private actors.

2. Hayekian frameworks

Neoliberal legality is hardly a coherent body of uniform thinking. Others have pointed out that neoliberal thought is a ‘messy hybrid’ that has moved through various stages and which is ‘doomed to coexist with its unloved others’, namely, the state.¹² Not having adequately worked

⁵K. Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time* (1944), 138.

⁶*Ibid.*, at 138-9.

⁷K. Rittich, *Recharacterizing Restructuring: Law, Distribution and Gender in Market Reform* (2002), 131.

⁸This also is referred to elsewhere in this article as a Hayekian frame or mindset, following M. Koskenniemi, ‘Constitutionalism as Mindset: Reflections on Kantian Themes About International Law and Globalization’, (2007) 8 *Theoretical Inquiries in Law* 9.

⁹F. A. Hayek, *The Constitution of Liberty* (1960), 223.

¹⁰F. A. Hayek, *The Road to Serfdom* (1944), 60.

¹¹See J. Bonnitcha and Z. P. Williams, ‘State Liability for “Politically” Motivated Conduct in the Investment Treaty Regime’, (2020) 33 *Leiden Journal of International Law* 77, for a comparable discussion. We disagree, however, about which disputes, in their words, are ‘politically’ motivated.

¹²J. Peck, *Constructions of Neoliberal Reason* (2010), 7; J. Peck and A. Tickell, ‘Neoliberalizing Space’, (2002) 34 *Antipode* 380.

out a coherent relationship with the state, neoliberal thought seems perpetually in flux, if not in crisis, never being able to live up to its rhetorically unachievable premises.¹³ Despite this variability in neoliberal thought, I want to take up economic theorist Friedrich Hayek as an exemplary figure and tease out connections between his work and neoliberal legality.

Hayek found state planning anathema to individual liberty and the rule of law. In *The Road to Serfdom* (1944), published the same year as Polanyi's *The Great Transformation*, Hayek condemned macroeconomic steering as a form of substantive justice that undermines competition and spontaneous social ordering.¹⁴ Polanyi, by contrast, was confident that 'history's rudder was set firmly' in the direction of more state intervention¹⁵ – the economic system would no longer 'lay down the law to society'.¹⁶ It may be that Polanyi was right for much of the twentieth century and that Hayek has been in the ascendance as of late in so far as neoliberal legality has taken hold in the rules and institutions of international economic law.¹⁷

This is because the miserly view of the state, associated with regime shifts which Jessop labels 'roll-back' and 'roll-out' and 'roll-back' neoliberalism,¹⁸ is entirely congenial with the version of the rule of law elaborated in Hayek's *The Constitution of Liberty*. In the interests of satisfying the generality and equality elements of 'the rule of law', Hayek wrote, states should be 'limited in the same manner as any private person'.¹⁹ There will, therefore, be no objection to states 'engaging in all sorts of activities' so long as they do so 'on the same terms as citizens'.²⁰ The rule of law requires, Hayek writes, 'the enforcement of general rules, laid down irrespective of the particular case, and equally applicable to all'.²¹ This is not to say that states cannot also enact coercive laws. They can perform a range of 'wholly legitimate' activities²² addressing subjects like crimes, factory, sanitary or health legislation. Or they might engage in 'service activities' such as the provision of education, roads, land registries, all of which provide a 'favorable framework for individual decisions'.²³ Outside of enforcing necessary laws upon others, states must be made to behave as if they were private actors competing in the marketplace. The state must, he writes, 'in all other respects . . . operate on the same terms as everybody else'.²⁴ This is a version of 'roll-out' neoliberalism in so far as state institutions are expected to be restructured so as to favour the marketization of all aspects of social and political life.²⁵

¹³J. Peck, 'Remaking Laissez-Faire', (2008) 32 *Progress in Human Geography* 3, at 25; T. Biebricher, *The Political Theory of Neo-Liberalism* (2018), 2.

¹⁴Hayek, *supra* note 10, at 74. This distinction between ends and means resembles Weber's in 'M. Weber', in G. Roth and C. Wittich (eds.), *Economy and Society: An Outline of Interpretive Sociology* (1978), at 657.

¹⁵G. Dale, *Karl Polanyi: The Limits of the Market* (2010), 204; S. Frerichs, 'Re-Embedding Neo-Liberal Constitutionalism: A Polanyian Case for an Economic Sociology of Law', in C. Joerges and J. Falke (eds.), *Karl Polanyi: Globalisation and the Potential of Law in Transnational Market* (2011), 65, at 81.

¹⁶Polanyi, *supra* note 5, 251.

¹⁷A. Lang, *World Trade Law After Neoliberalism: Re-Imagining the Global Economic Order* (2011).

¹⁸B. Jessop, 'From Hegemony to Crisis? The Continuing Ecological Dominance of Neoliberalism', in K. Birch and V. Mykhenko (eds.), *The Rise and Fall of Neoliberalism: The Collapse of an Economic Order?* (2010), 171, at 172–3. This is explained in the next few paragraphs.

¹⁹Hayek, *supra* note 9, at 209–10.

²⁰*Ibid.*, at 223.

²¹*Ibid.*, at 156.

²²F. A. Hayek, *Law, Legislation and Liberty: A New Statement of the Liberal Principles of Justice and Political Economy* (2012), 383.

²³Hayek, *supra* note 9, at 223–34; Hayek, *supra* note 10, at 37–9; *ibid.*, at 384–401.

²⁴Hayek, *supra* note 9, at 223; Hayek reiterates the rule (in his final book): 'in administering these means [the fruits of taxation] it ought not to enjoy any special privileges and should be subject to the same general rules of conduct and potential competition as any other organization' in Hayek, *supra* note 22, at 388.

²⁵Jessop, *supra* note 18, at 173, prefers to distinguish between 'roll-out neoliberalism' and 'neoliberal structural adjustment programmes' which are 'more exogenous and top-down in character'. For the purposes of this discussion, I prefer to subsume such programmes under the rubric of the rolling out version as, at least in the investment law context.

Business firms, Hayek declares, are justified in looking with considerable ‘distrust’ upon all state enterprise: ‘There is great difficulty in ensuring that such enterprise will be conducted on the same terms as private enterprise; and it is only if this condition is satisfied that it not objectionable in principle.’²⁶ For Hayek, state enterprise is not objectionable so long as it is confined to narrow parameters, making government as ‘innocuous as possible’.²⁷ Otherwise, it becomes a ‘danger to liberty’.²⁸ Applying rules equally applicable to all, ‘including those who govern . . . makes it improbable that any oppressive rules will be adopted’.²⁹ Government otherwise is disentitled from preferring its own enterprises so that others can use their ‘mental powers to the full’ and, consequently, make ‘the greatest contribution that [one] is capable of to the community’.³⁰

Hayek might be thought of as addressing in these passages only public enterprise that has yet to be privatized. His account of the rule of law, however, is more ambitious – it applies to all state action. Prohibited are state functions that intervene in the material situation of existing polities. Distributive justice is thereby ruled out of order.³¹ Only maintenance of a status quo of ‘spontaneous ordering’ is permitted. Government ‘should possess no monopoly for a particular service of the kind’ for which it raises revenue. States ‘should discharge these functions in such a manner as not to disturb the much more comprehensive spontaneously ordered efforts of society’.³² The object is to ‘reduce the total of [government] coercion to a minimum’.³³ The aim, as Hayek declared, is the ‘dethronement of politics’.³⁴ It resembles the neoliberal shift associated with the ‘roll-back’ of policies and institutions.³⁵

Law, for Hayek, performs critical functions by facilitating private market transactions and guaranteeing the orderly distribution of private decision-making.³⁶ It does so via a ‘permanent legal framework which enables the individual to plan with a degree of confidence and which reduces human uncertainty as much as possible’.³⁷ Hayek, in this way, appears faithful to the ordoliberal understanding that law performs functions under the direction of the economy, and not the other way around.³⁸ The state ceases to serve public interests but is expected to behave along the lines of imagined private actors. The implication, though not spelled out, is that states have a capacity to discern how market actors behave – that state actors have an ability to mimic private purposes.

But they do not have an ability to pursue anything resembling the common interest. Such pursuits are what Hayek associates with the term ‘planning’.³⁹ This is because states simply do not have the capacity to imagine a public good. Our ‘powers of imagination make it impossible to

²⁶Hayek, *supra* note 9, at 224.

²⁷*Ibid.*, at 21.

²⁸*Ibid.*, at 224.

²⁹*Ibid.*, at 210.

³⁰*Ibid.*, at 134.

³¹P. Dardot and C. Laval, *The New Way of the World: On Neo-Liberal Society* (translated by G. Elliott) (2013), 139.

³²F. A. Hayek, *Studies in Philosophy, Politics and Economic* (1966), 175.

³³F.A. Hayek, *Individualism and Economic Order* (1949), 17.

³⁴Hayek, *supra* note 22, at 462, 481. As suggested in the article’s sub-title, the outcome can be also characterized as the ‘denigration of politics’.

³⁵Jessop, *supra* note 18, at 172–3.

³⁶F. A. Hayek, *supra* note 33, at 110.

³⁷Hayek, *supra* note 9, at 222, 241; Hayek, *supra* note 22, at 473.

³⁸M. Foucault, *The Birth of Biopolitics: Lectures at the College de France, 1978-79* (translated by G. Burchell) (2008), 133; I discuss investment law’s affinities with ordo-liberalism in D. Schneiderman, ‘Constitutional Property Rights and Elision of the Transnational: Foucauldian Misgivings’, (2015) 24 *Social and Legal Studies* 65, at 70–3. For other helpful discussions see N. Tzouvala, ‘The Ordo-Liberal Origins of Modern International Investment Law: Constructing Competition on a Global Scale’, (2020) *Spec. Issue European Yearbook of International Economic Law* 37, at 43–51; L. Rönnelid, *The Emergence of Routine Enforcement of International Investment Law: Effects on Investment Protection and Development* (2018), Ch. 2 sect. 5, Ch. 4, sect. 2.1; Q. Slobodian, *Globalists: The End of Empire and the Birth of Neoliberalism* (2018), 146–81.

³⁹In Hayek, *supra* note 32, at 163, Hayek puts it this way: ‘The conception of the common welfare or of the public good of a free society can therefore never be defined as a sum of known particular results to be achieved, but only as an abstract order

include in our scale of values more than one sector of the needs of the whole society . . . nothing but partial scales of value exist'.⁴⁰ Only individuals are entitled to determine their own proper ends, Hayek maintains, in which case, the state remains only 'one "person" among others'. The state simply is an unreliable steward of social change. Even if it is a more powerful person than others, it will have only a limited view of proper ends, subjects on which many minds will disagree.⁴¹

If Hayek's epistemology is premised upon the inscrutable behaviour of private market actors, it turns out that Hayekian legality requires precisely these sorts of predictions. If states are expected to apply 'non-calculable, immeasurable values', these will be difficult, if not for Hayek impossible, to ascertain. He could not, therefore, entirely escape the trap that he labelled 'constructivism'.⁴² The problem of uncertainty that animates Hayek can, for this reason, never be 'entirely eradicated'.⁴³ Nevertheless, Hayek maintained that only if states are confined to operating upon the 'same terms' as private enterprise can their actions be properly calculable and predictable. If states are expected to operate as if they are private persons, the state is stripped of its capacity of protecting society by mitigating the effects of markets upon citizens. It 'forecloses principled debate' regarding matters of vital concern to democratic publics.⁴⁴ This is a concern that is further addressed in Section 3.

From all that has been said, it would be a mistake to treat Hayek as being preoccupied solely with the privatization of public services. Rather, his prescription is for states to behave as if they were market actors. Privatization is not his exclusive ambition, though such schemes correspond well to it. Not much turns, then, on the distinction between privatization and deregulation. Feigenbaum, Henig and Hamnet, for instance, offer a robust definition of privatization that contemplates measures that run along a continuum that include not only asset sales but contracting out, user fees, and deregulation.⁴⁵ They are all in the service, they argue, of redefining the role of the state. This robust view of privatization captures well Hayek's programmatic ambition of not just reduction, but transformation, of the state.⁴⁶ The dream, in short, is to 'depoliticize' functions that previously were the subject of bargaining. Political deliberation and accountability are displaced in favour of models of 'governance' that require governments to internalize the private preferences of market actors.⁴⁷ No other rationality is to be contemplated, though some measures buffering the markets' most detrimental effects can be envisaged. In the next part, I turn to a discussion of a part of international law that roughly resembles Hayek's portrayal of the state.

3. Sovereign immunity presuppositions

Hayek did not elaborate extensively on international law. He envisaged, for a time, multilevel federation as a mechanism for limiting government to the pursuit of proper ends.⁴⁸ He also mentioned, in his last book, what he described as 'true international law' that which 'would limit the powers of national governments to harm each other'.⁴⁹ It was others – those whom Solobodian

which as a whole is not oriented on any particular concrete ends but provides merely the best chance for any member selected at random successfully to use his knowledge for his purposes.' Hayek would label this a 'catallaxy'.

⁴⁰Hayek, *supra* note 10, at 59.

⁴¹*Ibid.*, at 60; Hayek, *supra* note 22, at 465.

⁴²Slobodian, *supra* note 38, at 212; Hayek's understanding of constructivism is outlined in Hayek, *supra* note 22, at 10. (interpreting 'all regularity to be found in phenomena anthropomorphically, as the result of the design of a thinking mind').

⁴³W. Davies, *The Limits of Neoliberalism: Authority, Sovereignty and the Logic of Competition* (2017), 13.

⁴⁴C. Crouch, *The Strange Non-Death of Neoliberalism* (2011), 92.

⁴⁵H. Feigenbaum, J. Henig and C. Hamnet, *Shrinking the State: The Political Underpinnings of Privatization* (1999), 55.

⁴⁶P. Dardot and C. Laval, *The New Way of the World: On Neo-Liberal Society* (2013), 216.

⁴⁷C. Hay, *Why We Hate Politics* (2007), 82–3.

⁴⁸F. A. Hayek, *Individualism and Economic Order* (1939), 255–72.

⁴⁹Hayek, *supra* note 22, at 482; Biebricher, *supra* note 13, at 62–4.

associates with the ‘Geneva School’, such as E.-U. Petersmann – who would push the Hayekian dream to international levels.⁵⁰

Hayek’s model of the rule of law, nevertheless, nicely complements international law’s state immunity doctrine. State immunity doctrine distinguishes between states acting in their sovereign capacity (*jure imperii*) and states as ‘traders’, participating in private market transactions (*jure gestionis*).⁵¹ When states act in their sovereign capacity, their actions attract immunity under international law. States are not immune from suit under municipal law, however, when they engage in ordinary ‘commercial transactions’.⁵² States become vulnerable to suit precisely when they perform functions deemed beyond basic state functions.

As Robert Wai argues, the doctrine of state immunity is premised upon understandings about the proper role of government – between traditional and novel state functions.⁵³ The ‘greater involvement of states in the commercial economy’, observes Wai, the more likely their liability to suit. Yet this should not render ‘the public interest or purpose . . . any less [legitimate] than with respect to traditional functions of governments’.⁵⁴ Wai ties the doctrine’s presuppositions to a version of neoliberalism, rendering less legitimate, and vulnerable to liability, state intervention in markets.⁵⁵

The international law of diplomatic protection, the principal precursor to the contemporary investment law regime, fills gaps in state immunity doctrine by policing even sovereign acts. The American-Mexican Claims Commission decision in the *Jalapa Railroad* case (1937) exemplifies this gap-filling function.⁵⁶ Legislative authority in the State of Veracruz declared void certain payments owed to Jalapa for the purchase of its title to railroad and electric light equipment. *Amparo* proceedings within Mexico yielded no adequate remedy for the investor.⁵⁷ On appeal, The Mexican Supreme Court found, instead, that the state Governor exceeded his authority in pledging revenue from oil production to pay for the purchase price. The Claims Commission was of the view that the Mexican Supreme Court misapplied Mexican federal constitutional law. The Commission also found that the state legislative decree violated international law in so far as the legislature acted ‘arbitrarily’, engaging in a ‘confiscatory breach of contract’ and a

⁵⁰E.-U. Petersmann, ‘Judging Judges: From “Principal-Agent Theory” to “Constitutional Justice”, Multilevel “Judicial Governance” of Economic Cooperation Among Citizens’, (2008) 11 *Journal of International Economic Law* 829, fn. 7. Alston accuses Petersmann of subsuming the right to trade with human rights, managing to integrate ‘statements which are almost straight out of Hayek’, in P. Alston, ‘Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann’, (2002) 13 *European Journal of International Law* 815, at 826. Petersmann denies this genealogy, claiming that the origins of his account are better understood as influenced by ordoliberal views of law, state, and markets in E. U. Petersmann and A. Steinbach, ‘Neoliberalism, State Capitalism and Ordo-Liberalism: “Institutional Economics” and “Constitutional Choices” in Multilevel Trade Regulation’, (2021) 22 *Journal of World Trade and Investment* 1. Petersmann, however, elides Hayek’s affinities with thinkers associated with Freiburg’s ordo-liberals. On this see M. E. Streit and M. Wohlgenuth, ‘The Market Economy and the State: Hayekian and Ordoliberal Conceptions’, in P. Koslowski (ed.), *The Theory of Capitalism in the German Economic Tradition: History, Ordo-Liberalism, Critical Theory, Solidarism* (2000), 224–69.

⁵¹J. L. Brierly, *The Law of Nations: An Introduction to the International Law of Peace* (1963), 250; R. Higgins, ‘Certain Unresolved Aspects of the Law of State Immunity’, (1982) 29 *Netherlands International Law Review* 265, at 275.

⁵²B. Hess, ‘The International Law Commission’s Draft Convention on the Jurisdictional Immunities of States and Their Property’, (1993) 4 *European Journal of International Law* 269, at 272.

⁵³R. Wai, ‘The Commercial Activity Exception to Sovereign Immunity and the Boundaries of Contemporary International Legalism’, in C. Scott (ed.), *Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation* (2002), 213, at 241.

⁵⁴*Ibid.*, at 227.

⁵⁵*Ibid.*, at 242.

⁵⁶The following two paragraphs draw upon D. Schneiderman, *Resisting Economic Globalization: Critical Theory and International Investment Law* (2013), 59–60 (referencing *Jalapa Railroad and Power Company*, Decision No. 13-E, (1943) 9 *American Mexican Claims Commission, Report to the Secretary of State*, 538).

⁵⁷The investor failed to secure initial relief via *amparo* proceedings but subsequently succeeded in a second *amparo* application.

‘denial of justice’.⁵⁸ This was not an ‘ordinary breach of contract’, the Claims Commission ruled. Rather, the government ‘stepped out of the role of contracting party and sought to escape vital obligations under its contract by exercising its superior governmental power’.⁵⁹

Contemporary international investment law has moved significantly beyond these doctrinal confines. International investment law is concerned not only with ‘sovereign’ acts but extends its reach to state action of any kind (unless treaty text directs otherwise).⁶⁰ The regime is structured in such a way that investment disputes will arise out of any dispute, regulatory or commercial. Breach of simple commercial contracts can give rise to international liability via investment treaty law, for example. Contract rights are susceptible to expropriation claims or contracts can become ‘internationalized’ via an ‘umbrella clause’.⁶¹ The expectation that investors receive ‘fair and equitable treatment’ also elevates contractual commitments to the plane of international liability.⁶² States, moreover, will not have available pleas of sovereign immunity from jurisdiction, even in municipal courts with competence to review arbitral awards.⁶³

The operational logic of the investment regime is not just to complement national law, but to overtake and supplant it with obligations of a higher and stricter order. *Jalapa Railroad* continues to be invoked as persuasive authority by investment treaty tribunals.⁶⁴ This is because the American-Mexican Claims Commission punished Mexico for bringing politics to bear in its relations with private actors. States are expected to behave, just as Hayek declared two decades later, ‘in the same manner as any private person’.

Sovereign immunity doctrine coincidentally bears a resemblance to the constitutional law of the United States. Dormant commerce clause doctrine, which negatives state action impeding the movement of inter-state commerce, distinguishes between ‘market participant’ and market regulation. States have an ability to restrict trade by preferring local citizens and businesses when they participate in the market. ‘Nothing in the purposes animating the Commerce Clause prohibits a State’, the Supreme Court of the United States observed, ‘in the absence of congressional action, from participating in the market and exercising the right to favor its own citizens over others’.⁶⁵ Should a state use its only own funds, for instance, to procure local ‘construction contracts for public projects’, the state is considered a market participant and exempt from the strictures of the dormant commerce clause.⁶⁶

University of Colorado law professor Joseph Sax sought to reverse this order of priority under different constitutional doctrine, looking to what comprises a ‘regulatory taking’ of property under the fifth and fourteenth amendments of the US Constitution. Sax proposed distinguishing between governments performing a ‘private enterprise’ function in contrast to those performing a ‘governing’ function. It is only where economic loss occurs as a result of government exercising

⁵⁸*Jalapa Railroad and Power Company*, *supra* note 56, at 540.

⁵⁹*Ibid.* The jurisdiction of the Claim Commission concerned claims regarding ‘losses or damages suffered by persons or by their properties [sic]’ and government actions ‘resulting in injustice’.

⁶⁰J. Crawford, ‘Treaty and Contract in Investment Arbitration’, (2008) 24 *Arbitration International* 351, at 356 (there is no requirement to ‘prove any particular motive, whether financial or “governmental”’).

⁶¹Here, the question is whether, by virtue of an investment treaty’s umbrella clause, a contract between a private party and the host state can become ‘internationalized’ and become the subject of investor-state arbitration under a BIT because the state is acting in its sovereign capacity rather than as an ordinary party to a contract. See discussion in T. Wälde, ‘The “Umbrella” Clause in Investment Arbitration’, (2005) 6 *Journal of World Investment & Trade* 183. But, as argued in the next section, this binary is very hard to operate.

⁶²*Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, Award, ICSID Case No. ARB/05/22, 24 July 2008; *Impregilo S.p.A. v. Argentine Republic*, Final Award, ICSID Case No. ARB/07/17, 21 June 2011.

⁶³Z. Douglas, *The International Law of Investment Claims* (2009), 116–18.

⁶⁴See *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, Award, ICSID Case No. ARB/97/3, 20 August 2007, para. 7.5.9; *Siemens A.G. v. The Argentine Republic*, Award, ICSID Case No. ARB/02/8, 8 February 2007, paras. 248, 251, 253.

⁶⁵*Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (Sup.Ct. 1976), at 810.

⁶⁶*White v. Massachusetts Council of Construction Employers*, 460 US 204 (Sup.Ct. 1983), at 215.

its enterprise capacity, thereby enhancing its own resource position, that compensation would be required. In its enterprise function, Sax writes, government ‘is very much like those who function in the private sector of the economy’.⁶⁷ In other cases where the government acts ‘merely in its arbitral [or governing] capacity’, by mediating disputes between citizens and groups, no compensation will be owed under the takings rule.⁶⁸

Courts have declined to adopt Sax’s proposal, imposing responsibility for regulatory takings, subject to a series of pliable factors,⁶⁹ irrespective of whether private actors suffer economic loss as a consequence of states behaving as mediator or competitor. One reason for this reluctance may be that courts prefer holding governments to account for a broad range of state action under the takings rule (as in investment law). Ultimately, as Dana and Merrill advise, it is a question of ‘how much goodness we can expect from government,’ the answer to which turns upon one’s own political theory.⁷⁰

4. Investment law predilections

Frederico Ortino has observed a trend line in investment treaty arbitration under the expropriation, FET and umbrella clauses that works a similar distinction between ‘contractual conduct’ and ‘governmental conduct’.⁷¹ States can be absolved of liability if state conduct is ‘contractual and not sovereign in nature’, the *Hamester v. Ghana* tribunal observed.⁷² Ortino complains that this distinction ‘lacks clarity’. It is the ‘institutional character of the actor and [not] the nature of the function being performed’ that should be determinative of liability.⁷³ It is particularly problematic, he adds, ‘in light of the general consensus . . . that a breach of contract may give rise to a breach of an investment treaty’.⁷⁴ He does not, however, offer a means of working through the distinction between legitimate and illegitimate uses of public authority that will trigger state liability under an investment treaty.⁷⁵

Jean Ho points to a number of contract-based FET claims where tribunals have relied upon the distinction, concluding that only breaches *jure imperii* attract liability.⁷⁶ There is, nonetheless, much ‘uncertainty’ in applying this binary. Ho complains that tribunals have not offered much ‘explanation for their chosen classification’.⁷⁷ In two such instances, the first concerning, amongst other infractions, delay in expropriating land for highway construction⁷⁸ and, in the second, the forcible expulsion of company personnel by the Pakistani army,⁷⁹ Ho maintains that it is at least arguable that these were sovereign acts requiring the provision of compensation.⁸⁰ In the former

⁶⁷J. L. Sax, ‘Takings and the Police Power’, (1964) 74 *Yale Law Journal* 36, at 62.

⁶⁸*Ibid.*, at 63; Sax revised his view to exclude compensation when government regulates spillover effects, or negative externalities, as in reducing airport noise. See J. L. Sax, ‘Takings, Private Property and Public Rights’, (1971) 81 *Yale Law Journal* 149, at 184.

⁶⁹See discussion in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, (Sup.Ct. 1977).

⁷⁰D. A. Dana and T. W. Merrill, *Property: Takings* (2002), 56–7.

⁷¹F. Ortino, ‘The Investment Treaty System as Judicial Review’, (2013) 24 *American Review of International Arbitration* 437, at 447.

⁷²*Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, Award, ICSID Case No. ARB/07/24, 18 June 2010, para. 328.

⁷³Ortino, *supra* note 71, at 448.

⁷⁴*Ibid.*, at 449

⁷⁵The question is raised, for instance, but not fully answered in contractual settings, in F. Ortino, *The Origin and Evolution of Investment Treaty Standards* (2019), at 33, 163.

⁷⁶J. Ho, *State Responsibility for Breaches of Investment Contracts* (2018), 127.

⁷⁷*Ibid.*, at 128.

⁷⁸*Toto Costruzioni Generali S.p.A. v. The Republic of Lebanon*, Award, ICSID Case No. ARB/07/12, 7 June 2012.

⁷⁹This was done in a context of continual political volatility and so did not upset legitimate expectations, see *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, Award, ICSID Case No. ARB/03/29, 27 August 2009, paras. 194–5.

⁸⁰Ho, *supra* note 76, at 128–9.

dispute, delays and disruptions in contractual performance were not attributed by the tribunal to state misconduct. In the latter dispute, expulsion was prompted in order ‘to protect’ personnel from ‘potential harm’ caused by disgruntled unpaid local workers hired by the investor.⁸¹ Both tribunals appeared to be of the view that respondent states were doing what states are expected to do, even as they exercised sovereign authority in the context of a contractual relationship. That is, the states behaved in ways that were not novel or unexpectedly disruptive of market relations. They, nevertheless, could just as easily be characterized, as Ho would prefer, as sovereign acts that attract state liability.

In the discussion that follows, I draw on a small set of tribunal awards that work an analogous binary. These are disputes launched for breaches of expropriation, FET, or umbrella clauses that are premised on breaches of contractual commitments. Like others, I view the dichotomy between contractual and sovereign state behaviour as overly simplistic an explanation for what is going on in these disputes.⁸² I suggest that a better explanation for the dichotomy operating in these cases is similar to one that motivated Hayek: that between state behaviour in the service of market logic and behaviour far removed from that expected of profit-seeking market actors. Only the latter attract the pejorative label of ‘political’ and, consequently, liability under investment treaty. In order to substantiate the claim that international investment law punishes states for Hayekian misbehaviour – that the regime will not condone states acting politically – I take up a few disputes, by way of example.⁸³ To be clear, the argument is not that the Hayekian mindset explains every dispute in which tribunals have complained about political behaviour. Instead, it is argued that this sub-set of cases reveal such a tendency. The focus of this section is on how investment arbitration furthers Hayek’s dream by insisting that states behave as if they were private firms.

Biwater is a successful and politically well-connected UK company while Tanzania is, by most measures, one of the poorest countries in the world.⁸⁴ Water and sewerage services in Dar es Salaam, its largest city, are highly unreliable, if not unavailable, for swathes of its rapidly growing urban centre. Under pressure from international financial institutions, Tanzania embarked on a comprehensive programme of structural adjustment in 1986, ‘aimed at dismantling the system of state controls and promoting the private sector’.⁸⁵ An element of the structural reform agenda was the privatization of public utilities, including water services provided by the state entity Dar es Salaam Urban Water and Sewerage Authority (DAWASA).

In the pursuit of this policy path, Biwater Gauff secured a ten-year contract, through its subsidiary City Water, to provide water and sewerage services previously carried out by DAWASA. Biwater significantly underbid in order to secure this concession. It also invested little of its own capital. Instead, the bulk of the funding came from development bank sources and DAWASA itself.⁸⁶ Biwater Gauff invested a ‘modest’ US\$ 8.5 million as working capital, mostly in ‘removable assets’ like computers.⁸⁷

Water rates immediately rose without any appreciable improvement in service, households having to ‘pay twice’ for their water – first to City Water and then again to water vendors at even

⁸¹Bayinder, *supra* note 79, para. 326.

⁸²In addition to Ortino, *supra* note 71, see R. Dolzer and C. Schreuer, *Principles of International Investment Law* (2012), at 154 (the distinction is of ‘unclear validity’).

⁸³Part of this discussion draws upon Schneiderman, *supra* note 56, at 62–9.

⁸⁴The International Development Association and The International Monetary Fund, *Tanzania* (2000), 9, available at www.imf.org/external/np/hipc/2000/tza.pdf.

⁸⁵*Ibid.*, at 5.

⁸⁶World Bank, *Implementation Completion and Results Report*, available at documents1.worldbank.org/curated/en/808481468130177551/pdf/ICR13610P059070e0only0900BOX361525B.pdf, 18.

⁸⁷X. Rice, ‘The Water Margin’, *Guardian*, 16 August 2007, available at www.guardian.co.uk/business/2007/aug/16/imf.internationalaidanddevelopment.

higher rates.⁸⁸ Despite the many incentives provided to City Water, including potentially lucrative plant equipment contracts and a VAT holiday until at least year six, City Water quickly fell into financial difficulty. Though its business plan was deemed ‘acceptable’ to the World Bank,⁸⁹ within the first 12 months, City Water ‘was in breach of many key provisions of the Lease Contract’, admitted Bank President Paul Wolfowitz.⁹⁰

After repeated misbehaviour by the investor, state actors responded by terminating the lease, prompted first by DAWASA’s board of directors and then by cabinet upon a motion tabled by Minister of Water and Livestock Development, Edward Lowassa. Lowassa, candidate for Prime Minister in the upcoming election, publicly censured City Water. ‘Revocation was made’, he declared, ‘following persistent complaints by city residents over the incompetence of the firm’ and non-payment of tariff and rental fees.⁹¹ All of which, in the circumstances, sounds incontrovertible. Minister Lowassa subsequently addressed a meeting of DAWASA staff assuring them that they would hold onto their jobs. This was an event that was described as a ‘political rally’ by the investment tribunal.⁹²

The investor initiated investment arbitration under a 1996 UK-Tanzania BIT, alleging that there had been an expropriation, unreasonable and discriminatory treatment, and a denial of fair and equitable treatment. The theory of the case was that politics had tainted commerce: that the company had been sacrificed at the altar of political expediency rather than on the basis of rational economic calculation. The wager was that investment arbitration’s logic would punish political actors operating under a different rationality than one based on a market model, that is, one having to do with an estimation of the best interests of the residents of Dar es Salaam.

The tribunal found an expropriation of the investment had taken place. This was because the state behaved in ways that departed from ‘normal’ contractual behaviour and this gave rise to state liability under international law.⁹³ For the purposes of its analysis, the tribunal drew on the distinction between circumstances where the state acts ‘merely as a contractual partner’ and those circumstances where it acts ‘*ius imperii*, exercising elements of governmental authority’. For the latter, the tribunal relied upon the French public law idea of ‘*puissance publique*’.⁹⁴ In circumstances where the state intervenes as might a ‘private shareholder’, the state would not be liable under treaty. By contrast, in those circumstances where the state acts on its ‘prerogative of *puissance publique* to perform acts which exceed the normal course of conduct of a State shareholder’, then the state is more likely to be liable.⁹⁵ At the beginning of the breakdown of the relationship, the tribunal acknowledged, ‘the normal contractual process was underway’ but a short while later, the ‘normal course of contractual termination was disrupted’.⁹⁶ Notice to terminate the lease contract itself was not, for this reason, an expropriation as termination had been ‘foreshadowed’. This constituted “‘ordinary behaviour” of a contracting counterparty’.⁹⁷ Instead, it was Minister Lowassa’s press conference of 13 May 2005, announcing termination of the lease contract, which was

⁸⁸R. Greenhill and I. Wekiya, *Turning off the taps: Donor conditionality and water privatisation in Dar es Salaam, Tanzania* (2004), 14.

⁸⁹World Bank, *Project Appraisal Document on a Proposed Credit in the Amount of SDR 45.0 Million (US\$ 61.5 Million Equivalent) to the United Republic of Tanzania for the Dar es Salaam Water Supply and Sanitation Project*, available at documents1.worldbank.org/curated/en/968621468778762476/pdf/25249.pdf.

⁹⁰World Bank, *The United Republic of Tanzania Dar es Salaam Water Supply and Sanitation Project Restructuring*, available at www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2006/02/21/000090341_20060221103939/Rendered/PDF/35322.pdf.

⁹¹‘Government Terminates Firm’s Water Contract’, *The New Humanitarian*, 17 May 2005, available at www.thenewhumanitarian.org/report/54444/tanzania-government-terminates-firms-water-contract.

⁹²*Biwater Gauff v. Tanzania*, *supra* note 62, para. 499.

⁹³*Ibid.*, paras. 487, 460.

⁹⁴*Ibid.*, para. 458.

⁹⁵*Ibid.*, para. 460.

⁹⁶*Ibid.*, paras. 487, 489.

⁹⁷*Ibid.*, para. 492.

'outside the ordinary activity of a contracting counterparty'.⁹⁸ Communicating the cabinet decision on 17 May 2005 via this 'rally' amounted to an act of *puissance publique* by the republic which was unreasonable and 'motivated by political considerations'.⁹⁹ A number of other exercises of public power – the unilateral withdrawal of VAT exemptions, the takeover of management control of the company, and the forced deportation of City Water management – were 'well beyond' the ambit of normal contractual behaviour.¹⁰⁰

Taken together, the cumulative effect of these acts of state, prior to the expiry of the notice of termination, amounted to an expropriation violative of treaty obligations.¹⁰¹ Arbitrator Gary Born, partially dissenting on the question of damages, described this as a 'classic instance of expropriation'.¹⁰² The tribunal also found that there was a denial of FET given these same circumstances, relying on almost identical language.¹⁰³ In support of these findings, the tribunal invoked the adjectives 'normal' or 'ordinary' 16 times in the course of its reasons. The tribunal, however, did not award damages to Biwater Gauff. At the moment when Tanzania departed from the profit-seeking behavioural model, the tribunal determined that the economic value of City Water was 'nil'.

The *Biwater* tribunal, as have others, inquired into whether exercises of state power fell within the realm of *puissance publique*, treating it as a proxy for acts *jus imperii*.¹⁰⁴ This is an elusive concept in French public law associated with the work of French constitutional theorist Maurice Hauriou.¹⁰⁵ In his *Précis Élémentaire de Droit Constitutionnel*, Hauriou describes it as a 'purely political power', which can, in principle, regulate economic liberty.¹⁰⁶ *Puissance publique* generates the requisite equilibrium between public power and individual property.¹⁰⁷ The administrative state, for Hauriou, was not in the service of the economy but in the service of a general interest in individual liberty and social stability. Hauriou admits, in other words, that it is a legitimate exercise of *puissance publique* to participate in the economy when it is for the public good.¹⁰⁸ Hauriou acknowledged that legislative intervention 'is incessant, because circumstances are continually suggesting new ways of using a liberty that are injurious to others'.¹⁰⁹ Hauriou preferred not to distinguish rigidly between government delivery of public services and government performance of economic activities, as the latter had 'profound political consequences'.¹¹⁰ The concept

⁹⁸*Ibid.*, para. 498.

⁹⁹*Ibid.*, paras. 499–500.

¹⁰⁰*Ibid.*, para. 503.

¹⁰¹*Ibid.*, para. 519.

¹⁰²*Ibid.*, Concurring and Dissenting Opinion, para. 3.

¹⁰³*Ibid.*, para. 605.

¹⁰⁴This was also of concern to the tribunal in *Toto v. Lebanon*, *supra* note 78, paras. 146, 236 and in *Impregilo v. Argentina*, *supra* note 62.

¹⁰⁵*Puissance publique* is translated as 'public authority', for which 'there is no equivalent' in the English language, in E. Zoller, *Introduction to Public Law: A Comparative Study* (2008), 249; elsewhere, in an essay collection, it is defined as a 'concept of inherent public executive authority'. A. Broderick, *The French Institutionalists: Maurice Hauriou, George Renard, Joseph T. Delos* (translated by M. Welling) (1970), 358.

¹⁰⁶M. Hauriou, *Précis élémentaire de droit constitutionnel* (1925), 14.

¹⁰⁷*Ibid.*

¹⁰⁸Quoted in J. Rivero, 'Maurice Hauriou et le droit administratif', in G. Marty and A. Brimo (eds.), *La Pensée du Doyen Hauriou et son Influence* (1969), 146. Also see G. Sacriste, 'L'ontologie politique de Maurice Hauriou', (2011) 78 *Droit et Société* 475, at 479.

¹⁰⁹M. Hauriou, 'The Special Guarantees of Individual Rights', in Broderick, *supra* note 105, at 75.

¹¹⁰H. S. Jones, *The French State in Question: Public Law and Political Argument in the Third Republic* (1993), 199; M. Hauriou, *Précis élémentaire de droit administratif* (1930), 57.

works, then, to legitimate state authority, not to narrow its ambit.¹¹¹ The tribunal proceeded seemingly unaware of this fact.¹¹²

The tribunal's reasons in *Biwater Gauff* bring clearly to the surface the systemic rationality of international investment law, which is to punish states who do not behave as if they were private firms. This same rationality was at work in *Impregilo SpA v. Argentine Republic* (2011).¹¹³ The dispute arose out of a concession contract to provide and expand water and sewerage services to residents of Buenos Aires. The value of the concession diminished dramatically as an economic crisis roiled Argentina in 2001. This prompted the adoption of a series of emergency measures, including termination of the 1-to-1 pegging of the Argentine Peso to the US Dollar, a measure that ran afoul of the concession contract. In response to Impregilo's claim that contractual breach rose to the level of a breach of the Argentine-Italy BIT, the tribunal acknowledged that 'only the State as a sovereign can be in violation of its international obligations'.¹¹⁴ Not only did the contract not preclude access to treaty remedies, but Impregilo's allegations of expropriation, denial of fair and equitable treatment, in addition to that of national treatment, went 'beyond mere contractual breaches'.¹¹⁵ The tribunal, however, found it 'unnecessary to express an opinion' on this issue, as Impregilo was not a party to the concession contract but only a principal shareholder in the concessionaire.¹¹⁶

The tribunal in *El Paso v. Argentina*¹¹⁷ was asked to assess financial harms suffered by the Delaware-based company as a consequence of these same emergency measures. El Paso held a financial stake in a number of Argentine companies that provided electrical, natural gas, and gas processing services taken up at the invitation of the Argentine government during the wave of privatization in the 1990s. The investor claimed that Argentina's actions were extraordinary and requested that the investment tribunal consider whether the government and its agencies took measures in the 'normal exercise of regulatory powers'.¹¹⁸ The tribunal accepted the invitation, recharacterizing the question as one of whether the government's measures were 'outside the acceptable margin of change'.¹¹⁹ The tribunal was convinced that the state's behaviour was abnormal. By virtue of the cumulative effects of the state's actions, Argentina was considered to have gone 'too far'.¹²⁰ The state's measures, in the aggregate, amounted to what the tribunal described as a 'creeping' violation of FET.¹²¹

¹¹¹Hauriou also associated the exercise of *puissance publique* with executive power and so subject to the jurisdiction of French administrative courts and not to courts having civil jurisdiction. Jones, *ibid.*, at 199; P. Couzinet, 'La théorie de la Gestion Publique dans l'œuvre de Maurice Hauriou', in G. Marty and A. Brimo (eds.), *La Pensée du Doyen Hauriou et son Influence* (1969), 163.

¹¹²Hauriou, nevertheless, believed that there were limits to legitimate state functions – to the exercise of *puissance publique*. Hauriou, like Hayek, understood the market and politics were separated out. Unlike Hayek, however, his was not a fully developed scheme with which to constrain legislative intervention. Rather it was a proposal intended to 'neutralize antagonistic forces' so as to maintain the necessary equilibrium between societal interests. M. Hauriou, 'An Interpretation of the Principles of Public Law', (1918) 31 *Harvard Law Review* 813, 820.

¹¹³*Impregilo v. Argentine*, *supra* note 62.

¹¹⁴*Ibid.*, para. 177, quoting *Hamster*, *supra* note 72, para. 328; also *Azurix v. The Argentine Republic*, Award, ICSID Case No. ARB/01/12, 14 July 2006, paras. 53, 315.

¹¹⁵*Ibid.*, para. 182.

¹¹⁶Bonnitcha and Williams characterize this award as one where the tribunal avoids assessing whether conduct was politically motivated, *supra* note 11, at 91. The tribunal's reasons, however, are directly on point for the purposes of this argument: liability attaches when states behave in ways not expected of contractual partners.

¹¹⁷*El Paso Energy International Company v. The Argentine Republic*, Decision on Jurisdiction, ICSID Case No. ARB/03/15, 27 April 2006.

¹¹⁸*El Paso Energy International Company v. The Argentine Republic*, Award, ICSID Case No. ARB/03/15, 31 October 2011, para. 390.

¹¹⁹*Ibid.*, para. 402 (emphasis in original).

¹²⁰*Ibid.*, para. 517.

¹²¹*Ibid.*, para. 518.

Some tribunals have resisted the urge to punish states when they decline to behave like business firms. In *Hamester v. Ghana*, the tribunal was asked to find host state liability for the collapse of joint venture agreement with the Ghana Cocoa Board to rehabilitate and modernize an old Ghanaian cocoa processing factory. The question of whether the Board's conduct could be attributed to the state arose as a jurisdictional question for the tribunal. As in *Biwater Gauff*, the tribunal sought 'an act of *puissance publique* which could be attributed to the state', in contrast to a mere contractual claim.¹²² The tribunal accepted that such grounds existed in a variety of acts engaged in by agents of the state (the police and the relevant cabinet minister) and by the Government's export ban.¹²³ However, even if attributable to the state, none of these actions gave rise to a violation of the treaty. The alleged treaty violations, though 'skilfully repackaged, are inextricably linked to the JVA [joint venture agreement] and are in reality contract[ual] claims'.¹²⁴ The 'wholesale elevation' of all contractual claims into treaty claims, the tribunal warned, 'risks undermining the distinction between national legal orders and international law'.¹²⁵

5. Polanyian second movement

To what extent are there tendencies operating in the opposite direction? Can investment treaty arbitration aim in a direction different from its prevailing 'prejudice' in favour of 'economic determinism'?¹²⁶ Polanyi described an initial movement in which states actively constructed markets. Contrary to the prevailing mythos, markets were not spontaneous and unplanned but required deliberate statecraft. The market was the outcome, Polanyi wrote, 'of a conscious and often violent intervention on the part of government which imposed the market organization for non-economic ends'.¹²⁷ The complicity of states in the construction of markets, and the subsequent curtailing of their deleterious effects, are central to both movements described in the Introduction. There remained limits, however, that the market system would declare intolerable, even concerning measures for societal self-protection. Accusations would be made that such measures, if useful, were unnatural and economically harmful,¹²⁸ amounting to a 'road to serfdom', as Hayek famously declared.¹²⁹ A similar initial movement, as that described by Polanyi, has been at work in investment law. States have been complicit in generating the structural and legitimating supports for international investment law.¹³⁰ States, for the meanwhile, remain unreliable stewards for resistance to its expanding tentacles into the host state policy space. Yet states, paradoxically, are also the only viable means of unlocking the legal constraints that they have embraced. How does a countermovement emerge in such circumstances?

Modest proposals for reform have been placed on the table by the United Nations Conference on Trade and Development (UNCTAD) in light of what the UN agency describes as a 'legitimacy crisis' in investment dispute settlement.¹³¹ These include excising or limiting substantive treaty protections, enhancing carve-outs, and establishing new dispute settlement mechanisms modelled on the WTO,¹³² a mechanism that is being touted by the European Union as a new 'investment

¹²²*Ibid.*, para. 283.

¹²³*Ibid.*, para. 291.

¹²⁴*Ibid.*, para. 329.

¹²⁵*Ibid.*, para. 349; also *El Paso v. The Argentine*, *supra* note 117, para. 82.

¹²⁶Polanyi, *supra* note 2, at 73.

¹²⁷Polanyi, *supra* note 5, at 250. 'Laissez faire was planned; planning was not', Polanyi famously proclaimed (*ibid.*, at 147).

¹²⁸K. Polyani, *supra* note 1, at 208.

¹²⁹Hayek, *supra* note 10.

¹³⁰This is a principal message of Schneiderman, *supra* note 56.

¹³¹UNCTAD, *World Investment Report 2015: Reforming International Investment Governance* (2015), 128.

¹³²*Ibid.*, at 134.

court'. This is the same model being promoted by the EU bloc of states at the United Nations Commission on International Trade LAW Working Group III negotiations.¹³³

Proposals to enhance the state's 'right to regulate' have been placed at the top of UNCTAD's agenda for reform. They represent well the cramped possibilities available to states to push back against the regime's constraints on public policy space¹³⁴ José Alvarez describes such proposals as exhibiting a Polanyian logic of 'double movement'. For Alvarez, Polanyi's second movement is characterized by 'greater government regulation'.¹³⁵ Government, however, was already present in the first movement, according to Polanyi's account, generating the conditions for the spread of markets. In the second, protective countermovement, there occurs 'an enormous increase in continuous, centrally organized and controlled interventionism'.¹³⁶ The state, by this time, is 'handing over' of affairs 'to a definite number of concrete institutions the mechanisms of which ruled the day'.¹³⁷ The disaggregation of society into 'economic and political spheres' is nonsensical.¹³⁸ The state, after all, is already there. Thinking otherwise is 'utopian' – a 'singular departure' from societies of the past, complained Polanyi.¹³⁹

If aspiring to such an institutional separation is symptomatic of the investment treaty regime, then it is safe to assume that Polanyi would not have been satisfied with expanding host state policy space under the rubric of 'right to regulate' clauses. What Alvarez labels 'recalibration',¹⁴⁰ loosens up investment treaty obligations with the intention of freeing up more host state regulatory space but it amounts to no 'enormous increase' in state control. Nor does it seem compatible to label as a 'protective countermovement' that which delegates to investment arbitrators (in addition to investors, whom Alvarez describes as 'de facto law makers')¹⁴¹ the authority to distinguish between the abnormal and normal; between treaty-backed private rights and what arbitrators consider to be good public policy. Reliance on private dispute settlement, under these constraints, reinforces the rule of economic rationality.¹⁴² It hardly amounts to what Polanyi had in mind, namely, 'a network of measures and policies ... integrated into powerful institutions designed to check the action of the market'.¹⁴³ Nor does it allow for the sort of freedom Polanyi envisaged, where the 'social

¹³³UNCITRAL, Submission from European Union and its Member States: Possible Reform of Investor-State Dispute Settlement (ISDS), UN Doc. A/CN.9/WG.III/WP.160 (2019).

¹³⁴The 'right to regulate' refers to investment treaty clauses that, typically, are declaratory of a right reserved to states to regulate in the public interest *so long as they do not run afoul* of investment treaty standards of protection. See, for example, 2016, Canada-EU Comprehensive Economic Trade Agreement (CETA), Art. 8.9.1: 'For the purpose of this Chapter, the Parties reaffirm their right to regulate within their territories to achieve legitimate policy objectives, such as the protection of public health, safety, the environment or public morals, social or consumer protection or the promotion and protection of cultural diversity.' See also the 2017, Joint Interpretative Instrument on the Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union and its Member States, available at [eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22017X0114\(01\)&rid=1](http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22017X0114(01)&rid=1).

¹³⁵J. E. Alvarez, 'Is Investor-State Arbitration "Public"?' (2016) IILJ Working Paper 2016/6 (GAL Series), 42; J. E. Alvarez, 'The Once and Future Foreign Investment Regime', in M. H. Arsanjani et al. (eds.), *Looking to the Future: Essays on International Law in Honor of W. Michael Reisman* (2010), 607, at 640.

¹³⁶Polanyi, *supra* note 5, 140.

¹³⁷*Ibid.*, at 211; Dale describes these as 'national institutions, notably government and central banks', Dale, *supra* note 15, at 63. Though this is not all that obvious from the quoted passage.

¹³⁸Polanyi, *ibid.*, at 71; Polanyi, *supra* note 2, at 217.

¹³⁹Polanyi, *supra* note 5, at 141, 71.

¹⁴⁰J. E. Alvarez, 'Why Are We "Re-Calibrating" Our Investment Treaties?', (2010) 4 *World Arbitration & Mediation Review* 143, at 143.

¹⁴¹*Ibid.*, at 154.

¹⁴²This form of legal reasoning is described as a 'curious amalgam of welfare economics, more informal ideas about the type and extent of market failures, sporadic empiricism correlating national legal institutions and legal rules – or the reputations of these institutions – with economic performance to identify "best practices", informal deference to the attitudes of the foreign investor community, a literalism about law's instrumental potential, and professional conventions of interpretive restraint': D. Kennedy, 'The "Rule of Law," Political Choices, and Development Common Sense', in D. M. Trubek and A. Santos (eds.), *The New Law and Economic Development: A Critical Appraisal* (2006), 74, at 142.

¹⁴³Polanyi, *supra* note 5, at 76.

relations of human beings to each other become clear and transparent . . . [where we can] assume responsibility for the social effects of our existence' that take place 'on the other [untransparent] side of the market'.¹⁴⁴ These more ambitious measures are simply ruled out of order.

What Polanyi envisaged as evidence of the countermovement were not legally constrained limits on state action but economic regulation, such as that initiated by the Roosevelt administration in the wake of the Great Depression. It was positive government action – in stabilizing and making markets more accountable by legislative and administrative means via the New Deal institutions – that was paradigmatic of the double movement.¹⁴⁵ While the New Deal did not go so far as to 'substantially redistribute national income', observes a leading historian of the period, the institutional arrangements it inaugurated can be summarized by the word 'security': 'achieving security was the leitmotif of virtually everything the New Deal attempted'.¹⁴⁶ 'While the actual content of property rights might undergo redefinition at the hands of legislation', Polanyi wrote, 'assurance of formal continuity is essential to the functioning of the market system'.¹⁴⁷ In such a case, formal market and property rights was as likely to have been left intact, rather than destabilized, by the countermovement. For Dale, this left in place the preconditions for the subsequent rise of neo-liberalism in the 1980s.¹⁴⁸

What is required, therefore, is something more, along the lines of what Frerichs recommends, that 'reflects rationalities and values of other social spheres'.¹⁴⁹ Such an endeavour calls for institutions that may be 'market breaking', rather than 'market making'.¹⁵⁰ It requires re-equipping the state to perform its 'function as the mediator of exploitation'.¹⁵¹ It is not enough to 'collapse' state authority so that it serves power imbalances already present in private markets.¹⁵² Rather, it is to recognize that state intervention, what Hauriou labels *puissance publique*, requires political capacity to be 'incessant, because circumstances are continually suggesting new ways of using [economic] liberty that are injurious to others'.¹⁵³

There are many possible paths that states and societies might take along these lines. Consider, for example, how Indigenous and local communities may choose to take control of land use or natural resource development. Once having done so, practices that do not resemble orthodox development paradigms become possible. For instance, the people of the Standing Rock Sioux and their supporters have sought to block construction of the Dakota Access Pipeline over their traditional lands and waterways in Minnesota for several years.¹⁵⁴ In another such instance, three First Nations and their supporters in British Columbia are seeking to halt logging of old growth Cedar forests on their lands in Fairy Creek without their consent.¹⁵⁵ To the extent the Indigenous and local communities are successful in halting pipeline construction or forestry practices

¹⁴⁴K. Polanyi, 'On Freedom', in M. Cangiani and C. Thomasberger (eds.), *Economy and Society: Selected Writings* (2018), 15, at 25–7.

¹⁴⁵Dale, *supra* note 15, at 205–6.

¹⁴⁶D. M. Kennedy, *Freedom From Fear: The American people in Depression and War, 1929-1945* (1999), 364–5.

¹⁴⁷Polanyi, *supra* note 5, at 234.

¹⁴⁸Dale, *supra* note 15, at 206.

¹⁴⁹Frerichs, *supra* note 15, at 81.

¹⁵⁰W. Streeck, *Re-Forming Capitalism: Institutional Change in the German Political Economy* (2009), 146; S. Frerichs, 'The Law of Market Society: A Sociology of International Economic Law and Beyond', (2012–2013) 23 *Finnish Yearbook of International Law* 173, 236.

¹⁵¹T. Negri, 'On the Constitution and Financial Capital', (2015) 37 *Theory, Culture & Society* 25, 31.

¹⁵²Davies, *supra* note 43, at 31.

¹⁵³Hauriou, *supra* note 109, at 75

¹⁵⁴E. Gilmer, 'Dakota Access Avoids New Shutdown Order from Federal Court', *Bloomberg Law*, 21 May 2021, available at www.bloomberg.com/news/articles/2021-05-21/dakota-access-avoids-new-shutdown-order-from-federal-court#xj4y7vzkg.

¹⁵⁵A. McKeen, 'Inside the Showdown Over Old-growth Logging: A Tangle of Indigenous Sovereignty, Protesters and B.C.'s Big-money Industry', *The Toronto Star*, 13 June 2021, available at www.thestar.com/news/canada/2021/06/13/inside-the-showdown-over-old-growth-logging-a-tangle-of-indigenous-sovereignty-ambitious-protesters-and-bcs-big-money-industry.html.

destructive of traditional territory or customary practices, they will have adopted strategies that reflect non-market rationality. Proposals, endorsed by G-7 finance ministers, to adopt an international agreement to tax the profits of large multinationals at a minimum of 15 per cent regardless of where they maintain their headquarters, are less disruptive of markets but deviate from neoliberal orthodoxy.¹⁵⁶ Such measures to recoup lost taxes are modest and mostly compatible with the rights of large multinational firms but rub against the idea that maximum profits should be kept in private hands and state redistribution kept to a minimum.¹⁵⁷

In order to begin reconstructing the state along lines that do not serve only the interests of private enterprise, the binary choice Hayek insists upon between the individual and society or between liberalism and communitarianism must be rejected. Each side of this debate need each other to survive, as each contain elements 'intrinsic to each' other. Boltanski and Thévenot recommend searching for a set of 'higher common principles' that will generate agreement among diverse persons about what constitutes the proper ends of positive law.¹⁵⁸ Whatever the content of those higher principles upon which public power can be justified, the idea that the state can serve public purposes needs reviving. We need reminding that government is the 'genuine instrumentality of an inclusive and fraternally associated public'.¹⁵⁹ There should be no expectation that societal consensus is complete or final. Instead, we should expect such settlements to be partial, temporary, and subject to continual revision¹⁶⁰ – precisely the sort of instability associated with democratic politics that investment arbitrators appear to abhor.

6. Conclusion

At bottom, the Hayekian mindset exhibits considerable distrust of government. A similar distrust, I have argued, gets played out in awards issued under the auspices of investment treaty arbitration.¹⁶¹ It is this penchant to constrain governments to the normal behaviour of business firms, in disputes having to do with contractual breaches for a variety of treaty investment standards of protection, that renders measures for societal self-protection difficult to sustain. The consequence of such logic, premised upon economic liberty, 'is bound to produce inequality in many respects', Hayek admits.¹⁶² This sort of liberty will have the demonstrable effect of producing 'manners of living [that] are more successful than others'.¹⁶³ Policy innovations that disrupt contractual expectations and that soften the harshness of markets remain vulnerable to findings of international liability.

It is no coincidence, then, that accompanying the ascendance of neoliberal logic in the Global North is the rise in inequality and precarity that mirrors disparities last seen in the late nineteenth and early twentieth centuries, an era that roughly corresponds to Polanyi's 'double movement'. It will be difficult to sustain, Piketty claims, any greater concentration of income than at present.¹⁶⁴

¹⁵⁶United Kingdom Government, 'G7 Finance Ministers and Central Bank Governors Communiqué', available at www.gov.uk/government/publications/g7-finance-ministers-meeting-june-2021-communication/g7-finance-ministers-and-central-bank-governors-communication.

¹⁵⁷On the compatibility between social and economic rights and markets see J. Whyte, *The Morals of the Market: Human Rights and the Rise of Neoliberalism* (2019), 114.

¹⁵⁸L. Boltanski and L. Thévenot, *On Justification: Economies of Worth* (2006), 28.

¹⁵⁹J. Dewey, *The Public and its Problems* (1980), 109.

¹⁶⁰W. E. Connolly, *The Ethos of Pluralization* (1995).

¹⁶¹Also see discussion in D. Schneiderman, 'Investing in Democracy? Political Process and International Investment Law', (2010) 60 *University of Toronto Law Journal* 909. Van Harten confirms this tendency in his content analysis of almost 250 investment arbitration rulings. Where 'elections or democracy were mentioned by arbitrators', he observes, 'it was often to suggest that politics had contributed to unsound decisions', in G. Van Harten, *Sovereign Choices and Sovereign Constraints: Judicial Restraint in Investment Treaty Arbitration* (2013), 73.

¹⁶²Hayek, *supra* note 9, at 85.

¹⁶³*Ibid.*, at 85.

¹⁶⁴T. Piketty, *Capital in the Twenty-First Century* (2014), 263.

No ‘economy and society’, he writes, ‘can continue functioning indefinitely with such extreme divergence between social groups’.¹⁶⁵ Nor is capacity to improve the conditions for the precarious improving in the Global South. According to Piketty’s data, government receipts in the poorest countries can be attributed to a decline in customs duties from 1980–1990, as mandated by edicts that these states liberalize trade.¹⁶⁶

There are, to be sure, other linkages between Hayekian theorizing and international investment law, including claims about the regime’s ‘spontaneous ordering’¹⁶⁷ and its preoccupation with ensuring constitution-like certainty, security, and predictability for market participants.¹⁶⁸ The spotlight in this article has been on Hayek’s insistence that states function under the same constraints as private firms. This neoliberal logic has had considerable success in disciplining public institutions (local government, universities, public utilities) to behave like business firms but has had equal success in transforming citizens into consumers. Yet, Crouch reminds us, these institutions ‘are doomed to fail this test’ of privatized behaviour. Any organization having ‘multiple goals’, not organized around the single goal of profit maximization, will, by definition, ‘be suspected of inefficiency’.¹⁶⁹ It seems inevitable, then, that investment arbitrators will not be satisfied, when governments seek to justify behaviour that runs afoul of treaty obligations, as being taken in the pursuit of the public interest.

The problem, in part, is that investment treaty arbitration lays down markers that confine the possibility of reviving the idea of the public good. It is productive, as Hayek frankly admits, of precarity and inequality. A cramped and partial view of the state takes hold, one that is blind to the prospect that governments act on behalf of larger public good, however that may be ascertained. It turns out that the Hayekian dream is designed to preclude imagining other possibilities that rub against market rationality. We can, for this reason, share in Hirschman’s lament, that the marketization of social life ‘becomes a reality only under wholly nightmarish political conditions!’.¹⁷⁰

¹⁶⁵*Ibid.*, at 297.

¹⁶⁶*Ibid.*, at 492.

¹⁶⁷J. Pauwelyn, ‘At the Edge of Chaos? Foreign Investment Law as a Complex Adaptive System, How it Emerged and How it Can Be Reformed’, (2014) 29 *ICSID Review - Foreign Investment Law Journal* 263. The claim is forcefully debunked in T. St John, *The Rise of Investor-State Arbitration: Politics, Law, and Unintended Consequences* (2018).

¹⁶⁸T. Wälde and A. Kolo, ‘Environmental Regulation, Investment Protection and “Regulatory Taking”’, (2001) 50 *International and Comparative Law Quarterly* 811, at 847. Also see S. W. Schill, ‘Fair and Equitable Treatment, The Rule of Law, And Comparative Public Law’, in S. W. Schill (ed.), *International Investment Law and Comparative Public Law* (2011), 151, at 179.

¹⁶⁹Crouch, *supra* note 44, at 66–7.

¹⁷⁰A. O. Hirschman, ‘The Concept of Interest: From Euphemism to Tautology’, in A. O. Hirschman, *Rival Views of the Market Society and Other Recent Essays* (1992), 35, at 53.