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The International Investment Regime After the Global Crisis of Neoliberalism: Rupture or Continuity?

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ABSTRACT

This article aims to show that the tools being used to recalibrate the international investment regime, in particular proportionality and corporate social responsibility, constitute continuity rather than rupture with neoliberalism and neoliberal legality. Neoliberalism has been discredited, and few actors suggest a return to self-regulation after the 2008 global economic crisis. This call for regulation, however, finds international economic law scholarship divided between those who claim that standards of review and corporate social responsibility can solve the crisis of neoliberalism, and those who believe that the problem is more profound. In the case of the international investment regime, this article suggests that the current strategy to balance this regime consists only of adjustments to states' regulatory authority, leaving intact the legal techniques that foreign investors use to control local resources. The contractualization of foreign investment relations remains today as important as it was before the 2008 global economic crisis. In this way, this article concludes, the current balancing strategy marginally changes the means and does not change the purpose provided by neoliberalism.

INTRODUCTION: NEOLIBERALISM AS USUAL?

The present status of neoliberalism is the subject of controversy. Some literature describes the period beginning after the global economic crisis of 2008 as postneoliberal or, simply, after neoliberalism.¹ For

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¹ See, e.g., Elmar Altvater, Postneoliberalism or Postcapitalism? The Failure of Neoliberalism in the Financial Market Crisis, 51 DEV. DIALOGUE 73 (2009).
these authors, there has been an important shift from the economic and social policies that dominated the 1980s and 1990s. There is other equally important work, however, that describes our current period as a continuation of neoliberalism. This scholarship recognizes some marginal changes but, as Crouch suggests, these minor adjustments rather reflect the "non-death" of neoliberalism. It is just a marginal adaptation of neoliberalism to the undeniable facts of the global economic crisis and the risks of climate change.

In the field of international economic law, this controversy shapes much of the current academic debate. The dominant literature blames neoliberalism for overlooking private negative externalities and noneconomic issues, such as the environment and human rights. For these authors, international law should recognize the right of states to regulate business activity, in particular, with the purpose of protecting the environment and human rights. This means increasing the pressure on the World Trade Organization (WTO) and the negotiators of investment treaties to acknowledge that state objectives exceed those of free trade and foreign investment protection. But not everybody agrees with this view. Some voices claim that this balancing strategy does not deal with the more profound problems of neoliberalism, such as rising inequality and the excessive power of multinational corporations (MNCs). This critical scholarship calls for reimagining international law institutions or resisting investment arbitration and free trade agreements. This article aims to make a modest contribution to this debate by showing that the current balancing strategy of the international investment regime (IIR) suggests more continuity than rupture with neoliberalism.

First, it is necessary to clarify what I mean by neoliberalism for the purposes of this article. There is abundant literature on neoliberalism, covering issues ranging from the ascendance of corporate power to the homo economicus. These discussions inspire this work, but, for my

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5. In relation with the WTO, see Andrew Lang, World Trade Law After Neoliberalism: Re-Imagining the Global Economic Order 221-71 (2011).


modest objective here, it is enough to refer to neoliberalism as a set of means to achieve certain social and economic purposes. These purposes not only provide answers to social and individual problems but also, and more importantly, frame these problems. Hamlet’s famous “to be or not to be” has been interpreted as a moral paradigm that already sets the background for any answer to his question. Neoliberalism does something similar. Those who choose neoliberalism to frame social problems want to maximize individual material preferences, i.e. their purpose, and think that private authority can do much better than public sovereignty in achieving this goal.

Neoliberal legality is a means to this end. It is a means to enable private control of resources and facilitate private investment, while blocking alternatives such as public experimentation and intervention. Neoliberal legality obviously includes more than the control of resources, but here, I am interested in this part of neoliberal legality: the dominant social and legal practices to grant, exercise, and protect private control of resources, in particular, those resources related to foreign investment. In this particular context, neoliberal legality puts states under market supervision not only by enforcing private property rights but also by imposing on states an internal market discipline. This discipline applies both to what states cannot do and, perhaps more importantly, to what states can do. First, states need to act through contractual legal techniques to tap private energies and promote economic growth. Second, state regulation is subject to the permanent supervision of a number of institutions that share key characteristics. They are autonomous, independent, and isolated from state politics, characteristics that are often summarized in the concept of depoliticization.

The regime that governs foreign investment relations is an example of neoliberal legality. The IIR presently consists of a network of more
than 3,000 bilateral and regional international treaties for the protection of foreign investment. This regime is based on a contractualized view of foreign investment relations; on this view, foreign investments are the results of bargains, and the IIR is the result of a "grand bargain." The treaties that make up this regime also recognize that wealth maximization through private foreign investment is the purpose of foreign investment protection, and they have gradually acknowledged the relevance of this goal not only for foreign investors and host states but also for local populations. With this purpose in mind, international arbitration tribunals can review any state action according to the standards set out in these treaties. In essence, from the arbitrators' point of view, states can regulate; but regulation must be technical, reasonable, and proportionate. Political reasons should not be favored because they could affect privately led wealth maximization.

The objective of this article is to show that the strategy to balance the IIR after the global economic crisis, in particular corporate social responsibility (CSR) and proportionality, does not change the nature of this regime as a means to neoliberal ends. The CSR movement claims that corporations have an incentive to behave in a socially responsible manner for reputational reasons. Although CSR emerged in the 1960s, its use has been widely supported after the global financial crisis as an adequate response to corporate misconduct. Proportionality, on the

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other hand, is a legal doctrine that assists adjudicators in balancing different goals and values, e.g., between investment protection and social and environmental goals. My main argument in this article is that CSR and proportionality make only marginal adjustments to accommodate some form of state regulation. This is because none of these tools reduces the use of contractual techniques, nor changes the transactional paradigm in the relations between foreign investors and host states. These adjustments, rather, extend market supervision over states into new terrain, from any public interference in the individual control of resources to the state regulation of the private use of resources.

This article is organized as follows. Part I describes the struggle for the control of resources between private actors, in particular foreign investors and host states. It introduces the main analytical and legal questions regarding this struggle, which relate to the property-contract interface. This section underscores foreign investors' need for calculability, and the use of contractual techniques to satisfy this need (i.e., the means). Part II focuses on the neoliberal character of international investment law. It consists of three subparts. The first describes the contractualization of foreign investor relations; the second explores the investment awards resulting from the 2001 Argentine crisis as an example of this contractualization; and the third draws some conclusions about the relationship between the property-contract interface and neoliberal legality. Part III examines the post-economic-crisis era. It shows that neither CSR nor proportionality undermines the means of neoliberal legality or the ends of neoliberalism.

The article concludes by suggesting that the future of state and political authority over resources will be marked by our attitudes to wealth maximization. Neoliberal legality may continue to suffer some adjustments, for instance as a result of the demand for state regulation, but this will not be enough to dissolve neoliberalism into a new political and social paradigm. The path to such a paradigmatic change requires framing and answering differently some fundamental social questions, including those related to the use of resources.

I. THE STRUGGLE FOR RESOURCES: STATES, INDIVIDUALS, AND FOREIGN INVESTORS

Very often, the struggle for property rights is described as a struggle for the allocation of resources. With this idea in mind, some authors who promote private forms of property suggest that, once the allocation

process finishes, social peace becomes more attainable. This is possible, these authors claim, because after the establishment of private property individuals gain certainty about the distribution of key resources. But reality indicates something different, as wealth inequality is currently a major problem. The struggle for distribution never ends, in fact, and this is a main liberal argument for a civil government. For Locke, "government has no other end but the preservation of property." In truth, the struggle for resources is analytically and socially even more complicated than this, because property rules define the allocation as well as the use of resources. The organization of resources in the form of private property rights would be socially impossible without granting an actor the authority to coordinate the use of resources. As soon as the self-regulation myth fades—together with fictions such as complete information—any community requires an actor to ensure that private property owners will not annihilate each other and the entire community. The state normally appears in the picture as the actor with underlying authority over every resource, including those allocated privately.

State authority to coordinate property, however, opens up a site of struggle between individuals and the state. The birth of the liberal state brought about an inherent tension between private property and state authority. The state was conceived to protect private property, but its creation came with a high cost for property defenders: the death of natural law and the birth of private law. Thinking about property as an artefact of private law endows states with broad authority to reform the laws and shape the scope of ownership, without affecting the private allocation of the rights. As opposed to allocation, which is clear, the scope of private property rights is malleable, and different property interpretations can expand or reduce the scope of ownership. This has important consequences because, as Cohen notes, sovereignty and private property are correlative concepts. The public authority to define property, then, implies that market-state dynamics can be shaped and reshaped by the state. In the postwar years, Keynesian

21. See RICHARD T. ELY, PROPERTY AND CONTRACT IN THEIR RELATION TO THE DISTRIBUTION OF WEALTH 165 (1914).
policies drew on these insights to reshape market structures while generally respecting the private allocation of resources.\textsuperscript{25}

In part, neoliberalism is a response to this policy of public control of resources, even to the mere possibility of such control. It criticizes state intervention in the use of resources due to its inefficiency and moral inappropriateness.\textsuperscript{26} The policies implemented to redefine the role of the state in the 1980s and 1990s were a mixture of privatizations and large political transformations. The main premise behind these transformations was that economic growth is the best social policy, and that corporations—particularly large MNCs—can coordinate the use of resources more efficiently than can the state, promoting growth and prosperity.\textsuperscript{27} These neoliberal reforms redefined the state in market terms, ensuring that the remaining public functions are exercised in manners compatible with the operation of market actors.\textsuperscript{28}

The private law dimension of neoliberalism shapes public action by promoting legal techniques that block, minimize, or make state intervention excessively costly. These techniques are mainly proprietary and contractual. At the property level, the strategy has been to disseminate a strong view of private property by connecting property rights with economic growth. Governments, in the view of authors like De Soto and North, should not intervene after the creation of private property entitlements—even if they legitimately could—because this would hinder economic prosperity. Kennedy brilliantly describes this strategy, pointing out that there is still no evidence of this connection.\textsuperscript{29}

At the contractual level the strategy is more subtle, and perhaps for this reason more effective from the perspective of individual actors. Since the second half of the 20th century, MNCs have used contractual techniques to ensure their control of foreign resources.\textsuperscript{30} Foreign investors have never trusted property entitlements under domestic law, and have therefore negotiated with states specific legal commitments regarding the use of resources. The most common are tax stabilization clauses. MNCs rely on contracts to impose on states negative duties to block state interventions, supplementing their default scope of ownership according to the applicable legislation.\textsuperscript{31}

\textsuperscript{25} Rodota, supra note 22.
\textsuperscript{26} Foucault, supra note 10, at 101-21.
\textsuperscript{27} Id. at 131.
\textsuperscript{28} Id. at 172, 191, 201.
\textsuperscript{29} David Kennedy, Some Caution About Property Rights as a Recipe for Economic Development, 1 ACCT., ECON., & L. 1, 49 (2011).
\textsuperscript{31} Id.
MNCs have significant incentives to follow these contractual strategies. Calculability is essential to take rational investment decisions.\textsuperscript{32} Host states, however, can change the law after the establishment of a project. The purpose of contracting for property is to ensure the economic viability of the project and the subsequent profit. Foreign investors involved in the production of gold, for instance, have a mining right that entitles them to extract the mineral. This entitlement, however, may not be enough to ensure the long-term economic viability of the project. These foreign investors require that the state does not change tax, environmental, or any other regulations that can make the business less or not profitable.\textsuperscript{33} The utility of contractual techniques is that they can effectively diminish the probability of change.

Contracts governing resources, obviously, have effects well beyond the parties to the agreement. These are not the typical small-scale, everyday contracts with few if any direct implications for third parties. To the contrary, they are highly political deals and affect the entire community, starting—but not ending—with state authority. As Katz has put it, states cannot block the authority of private property owners to decide on the use of resources, but they can alter these rights by legislation narrowing or expanding the potential uses of private property.\textsuperscript{34} This threat to calculability is countered by contractual techniques. State contracts under international law, as we will see next, can create micro-laissez-faire areas in domains as significant as taxation, the environment, and labor standards.\textsuperscript{35} Private law principles, such as \textit{pacta sunt servanda}, once migrated and embedded into public international law, can disarticulate fundamental principles of state authority\textsuperscript{36} in a manner entirely consistent with a neoliberal rationality.\textsuperscript{37}


\textsuperscript{33.} Some examples of these clauses can be found in Andrea Shemberg, \textit{Stabilization Clauses and Human Rights}, (a report prepared for the International Finance Corporation and the United Nations Special Representative to the Secretary General on Business and Human Rights), March 11, 2008.


\textsuperscript{37.} See \textit{FOUCAULT}, supra note 10.
II. NEOLIBERALISM AND THE INTERNATIONAL INVESTMENT REGIME

There has been much academic discussion on the IIR in the last ten years. Most of this discussion fits the needs of practitioners, but there is also important work on substantive questions of this regime. The contractualization of foreign investment relations, however, has not been a concrete topic of analysis so far. The next three subparts study this process by focusing on the legal techniques that deal with foreign investors' control of resources.

As an initial matter, it is important to mention two points relevant to this analysis developed by the literature on investment law. First, an important strand of the literature has noted the colonial, postcolonial, and imperial origin of the IIR. This relates to the globalization of some Western ideas and values tightly connected with the means and ends promoted by neoliberalism. Second, many authors have discussed the legal nature of this regime, emphasizing the public law character of investment arbitration. Some authors have done so to criticize the IIR, but the majority have drawn on ideas from global administrative and constitutional law to save the IIR from its legitimacy crisis by, for instance, incorporating proportionality analysis. The debate regarding the legal nature of the IIR illustrates the neoliberal pedigree of this regime: for those who focus on global administrative and constitutional law, the main subject to be regulated is the host state.


41. For some efforts to recalibrate investment arbitration relying on global administrative and public law, see Santiago Montt, State Liability in Investment Treaty Arbitration: Global Constitutional and Administrative Law in the BIT Generation (2009); International Investment Law and Comparative Public Law (Stephan W. Schill ed., 2010).

42. See Muthucumaraswamy Sornarajah, The Case Against a Regime on International Investment Law, in Regionalism in International Investment Law 475, 493-95 (Leon E. Trakman & Nicola W. Ranieri eds., 2013) (discussing international investment law as a part of global administrative law).
A. The Contractualization of Foreign Investment Relations and the International Investment Regime

According to the principles of public and private international law, the control of resources is a question of domestic law. This presently undisputed premise, at least formally, was contestable at a time when the main justification for private property was found in natural law. This debate ended with the creation of the modern state and the idea of territorial sovereignty, which consolidated the domestic authority to govern the resources located in the national territory. The regulation of private property thus became a civil or common law matter. But despite the effects of the idea of sovereignty, some external restrictions on property protection—based on the natural law ideas of Vitoria and Grotius of the 17th century—continued to be relevant in the international sphere. Viner has gone so far as to claim that one of the key outstanding characteristics of the evolution of international law "was its attempt to build a legal protection for property." Customary international laws of foreign property protection do not impose new property rules on the domestic legal orders. The premise instead is that there is a minimum standard of treatment that states need to respect when regulating the private property rights of foreign investors. The minimum standard prohibits host states from behaving in an egregious, outrageous, shocking, or otherwise extraordinary manner. This standard also includes the prohibition to expropriate property without paying compensation according to international law. The international laws on expropriations impose four requirements for their legality: they must be for a public purpose, not discriminatory, in accord with due process of law, and paid for by a prompt, adequate and effective compensation. Until the 1970s, in addition, the regulation of expropriations according to customary international laws was closely connected with the doctrine of acquired rights, which tribunals applied to specify the scope of foreign investor rights.

43. See Ernst Rabel, The Conflict of Laws: A Comparative Study 7-8, 30 (1958) (describing the rise of the thirteenth century conceptual view that territorial law governs not only persons, but also personal property).
44. See id.
45. See id.
49. Id.
50. Id.
These standards are quite vague and ambiguous, and it was left to tribunals to define notions such as “egregious” conduct and “adequate compensation.” But what emerges from a historical analysis of customary international laws—and in particular the doctrine of acquired rights—is that the scope of foreign investor rights was to be interpreted according to domestic laws, turning these laws into a main denominator of foreign investment relations.52

From the perspective of foreign investors, customary international laws granted protection against host-state misconduct, unfair domestic tribunals, and inadequate compensation. This, however, fell short of ensuring the calculability required by large private projects. Leaving aside the procedural obstacles to launching international claims, foreign investors still had to deal with the operation of domestic laws on the scope of their rights. As explained above, host states can use their regulatory authority to modify the use of resources, narrowing or expanding the scope of foreign investor rights.53 For some time, states were limited by the dominant economic ideas of laissez-faire and, in the postcolonial context, the laws inherited from the former colonial empires.54 This changed in the 1960s and 1970s, however, when developing states mastered legal techniques capable of controlling many aspects of foreign investment according to the interventionist ideas of the time.55 These legal techniques were based on the notion that customary international laws do not promote absolute property rights; or, at least, they had abandoned this idea, together with the courts of most countries, after the economic crisis of 1930.56

Against this background, it was reasonable to see an increasing interest of foreign investors in state contracts. These contracts could provide the certainty that was missing in customary international law. At first, this possibility was highly debatable because it remained unclear whether state breaches of contracts could constitute a violation of international law. To the extent that domestic law governed state

52. See Borchard, supra note 48, at 448; Bin Cheng, The Rationale of Compensation for Expropriation, 44 TRANSACTIONS GROTIUS SOCY 267, 282-83 (1958) (describing the principle of vested rights with regard to state interference in the property of foreigners).

53. See supra Part I.


55. See generally FRED BERGSTEN ET AL., AMERICAN MULTINATIONALS AND AMERICAN INTERESTS 369-99 (1978) (detailing the ascendance of developing host countries and host country relationships with foreign investors).

contracts, some authors argued that these agreements were subject to changes in the same way as private property rights. The focus on domestic laws blurred the fundamental importance of the *pacta sunt servanda* principle: if the host state changed the laws applicable to the contract, many thought that the *pacta sunt servanda* principle was not triggered.\(^57\) From the 1930s until the 1960s, many tribunals favored this rather limited interpretation of the *pacta sunt servanda* principle between individuals and states.\(^58\) This was consistent with Keynesianism and the domestic development of new approaches to administrative contracts. In the domain of foreign investment, in particular, host states relied on ideas such as the public interest to force the renegotiation of many foreign investment contracts, which foreign investors accepted reluctantly.\(^59\)

This changed dramatically in the 1960s and 1970s, when many academics and tribunals began reinvigorating the principle of *pacta sunt servanda* in international law.\(^60\) The emerging view was that contracts, such as concessions, grant rights to foreign investors that states cannot extinguish or modify unilaterally.\(^61\) Annihilating contractual rights through new laws or regulations constituted confiscatory measures equivalent to the abrogation of property rights. The main justification for this position is that the use of state sovereign authority to modify the terms of contracts is a form of arbitrary behavior.\(^62\) This shift in the interpretation of contracts was consistent with the emerging neoliberal and neo-institutional literature. This line of thinking saw contracts as highly efficient tools for coordination, a premise which was influential at the international level where academics were concentrating precisely on foreign investment relations.\(^63\) Their concern was not simply academic: the number of

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61. *Id.*
62. *Id.*
expropriations had reached a historical peak by the start of the 1970s.\textsuperscript{64}

By the 1990s, the focus of the literature had shifted entirely. This can be seen in the strong interest in creating an efficient mechanism to enforce the initial bargain between foreign investor and host state.\textsuperscript{65} This obviously required a different approach to \textit{pacta sunt servanda}. This principle had to become the keystone of the international laws applicable to foreign investment, which in fact it did from the 1990s to the 2000s, thanks to the flourishing of the IIR. As Reisman affirms,

> If there is one constant systemic implication in every application of international investment law, it is \textit{pacta sunt servanda}: it is the maintenance of the belief in all relevant parties that the legitimate expectations of qualified investors based on legal commitments by states are meaningful and will be enforced. No more!\textsuperscript{66}

It is intriguing, in this context, that the implications of the IIR for the interpretation of foreign investor rights have not been the main interest of the literature.\textsuperscript{67} A quick look at investment awards, in fact, shows a process of contractualization that has increased the importance of the \textit{pacta sunt servanda} principle in the reasoning of investment arbitrators. Today arbitrators rarely rely on the acquired rights doctrine; they have replaced acquired rights with legitimate expectations.\textsuperscript{68} Investment tribunals currently protect from host states not only contractual rights but also foreign investor expectations.

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\textsuperscript{64} See Stephen J. Kobrin, \textit{Expropriation as an Attempt to Control Foreign Firms in LDCs: Trends from 1960 to 1979}, 28 INT'L STUD. Q. 329, 329 (1984) (explaining that expropriations “were concentrated during the early 1970s” and that their incidence significantly declined afterward).


\textsuperscript{68} Emmanuel Gaillard, \textit{Chronique des sentences arbitrales—Centre International pour le Règlement des Différends Relatifs aux Investissements (CIRDI)}, REVUE TRIMESTRIELLE LEXIS NEXIS JURIS CLASSEUR 311, 332 (2008) (noting that the “legitimate expectation” of investors at the beginning of the twenty-first century finds its analogue in the notion of the “acquired right” at the beginning of the twentieth century).
emerging from promises and representations.\textsuperscript{69} The legitimate-expectations doctrine focuses on the dealings between foreign investors and host states at the moment of establishment. The \textit{TECMED v Mexico} tribunal was one of the first to apply the doctrine of legitimate expectations in an investment arbitration. The arbitrators considered it their duty to assess the exercise of state action against “the deprivation of economic rights and the legitimate expectations of [those] who suffered such deprivation.”\textsuperscript{70} The investment treaty, “in light of the good faith principle established by international law, requires the Contracting Parties to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment.”\textsuperscript{71}

\textbf{B. A Case of Contractualization: Argentina and the 2001 Economic Crisis}

In the aftermath of the economic crisis of 2001, many foreign investors initiated investment arbitrations against Argentina.\textsuperscript{72} The country was forced to repeal the currency peg of the Argentine peso to the U.S. dollar because of unsustainable social and macroeconomic indicators, and, as a result, many foreign investors involved in the public utility and energy sectors saw their profits reduced substantially. The salaries and savings of Argentines generally were reduced in similar proportions. In the context of the most severe economic crisis ever suffered by Argentina, it was to be expected that everybody in the population—and their property rights—would be affected. But, as opposed to national corporations and individuals, foreign investors had two legal points in their favor. They could rely on their foreign investor rights specified according to the legitimate-expectations doctrine, and they could enforce these rights through investment arbitration.

Foreign investors, who established themselves in Argentina during the 1990s, had been seduced not only by a fast-growing economy, but

\begin{itemize}
  \item \textsuperscript{69} Michele Potestà, \textit{Legitimate Expectations in Investment Treaty Law: Understanding the Roots and the Limits of a Controversial Concept}, 28 ICSID Rev. 88, 88 (2013) (“If one observes the awards given by investment treaty tribunals in the last few years, one will hardly find any example where the concept of ‘legitimate expectations’ has not been invoked by the claimant and, at least to a certain extent, endorsed by the tribunal.”).
  \item \textsuperscript{70} TECMED v. Mexico, ICSID Case No. ARB (AF)/00/02, Award, ¶ 122 (May 29, 2003).
  \item \textsuperscript{71} \textit{Id.} ¶ 154.
\end{itemize}
also by a regulatory framework under which tariffs were calculated in dollars according to the U.S. Producer Price Index (PPI). When this framework was repealed, the first legal issue that emerged was whether this framework was a piece of regulation that Argentina could modify unilaterally, as a result of its sovereign powers, or whether there was a negative duty—created by either a contractual or quasicontractual right—limiting these changes. The decision on the scope of foreign investor rights—or their legitimate expectations, in the investment arbitration jargon—would shape the discussion on the authority of Argentina to pass the challenged measures using concepts such as the proportionality, reasonableness, and necessity of the measures in view of the severe economic crisis. This decision would also frame any debate regarding whether or not Argentina was exempted from complying with its obligations because it had to prioritize the welfare of a society that was at the brink of collapse.

Most of these tribunals found that the foreign investors had a legitimate expectation as to the maintenance of dollar-denominated tariffs. The duty of Argentina not to modify this aspect of the tariff system was not explicitly included in the concession agreements (i.e., it was not a clear contractual right), but the arbitrators found that it clearly emerged from the bidding rules, the memoranda prepared for that purpose, and the general regulatory framework. According to the tribunals, the foreign investors legitimately relied on these promises to make the investment decisions. These promises were, in other words, the source of private calculability. This way of reasoning can be found in the awards rendered in National Grid v. Argentina, BG v. Argentina, Sempra v. Argentina, Enron v. Argentina, LG&E v. Argentina, and CMS v. Argentina.

The rulings of these tribunals confirm the hypothesis of contractualization. Rather than enforcing domestic laws in a nondiscriminatory and even-handed manner, states have the obligation to treat foreign investors according to their legitimate expectations.

74. Cf. Joseph L. Sax, Takings and the Police Power, 74 YALE L.J. 36, 52–53, 60 (1964) (giving examples of when legislatures were exempt from complying with their obligations in light of an "ensuring total or near total destruction of values").
These are not necessarily contractual legal obligations. For investment tribunals, however, the expectations benchmark is imposed by the standard of fair and equitable treatment. The rationale is that foreign investors and states should be treated as parties in a bargain rather than as an individual and the state in a regulatory relationship.

To be sure, this does not mean that states always need to pay compensation. When changing their laws, however, states must take care not to disturb foreign investors' legitimate expectations. These expectations are exactly the ones that Argentina frustrated when it abolished the PPI. Fair and equitable treatment and legitimate expectations can be reduced, therefore, to a broad interpretation of the principle of *pacta sunt servanda*. Argentina could take any general and nondiscriminatory measure, so long as it observed its contractual, quasicontractual, and implicitly assumed duties.

After the tribunals specified foreign investor rights and state duties, sometimes balancing the private and public interests at stake, the next question for the arbitrators was whether Argentina could escape liability by relying either on the exception contained in article 11 of its bilateral investment treaty with the United States or on a state-of-necessity exception under general international law. In most disputes, the arbitrators decided in the negative, given that Argentina had contributed to the crisis. This debate attracted much attention in the literature, which viewed it through the lens of the exceptional or the

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76. CMS v. Argentina, ICSID Case No. ARB/01/8, Annullment Decision, ¶ 89 (Sept. 25, 2007).
77. Int'l Thunderbird Gaming Corp. v. Mexico, UNCITRAL, Award and Separate Opinion of Thomas W. Wälde, ¶ 37 (Jan. 26, 2006).
80. Investment tribunals are quite flexible regarding the basis for legitimate expectations. See Christoph Schreuer, *Fair and Equitable Treatment in Arbitral Practice*, 6 J. WORLD INV. & TRADE 357, 374 (2005).
82. The awards have discussed whether the exception contained in the bilateral investment treaty is a specification of the customary defense of necessity or a self-standing provision. Giorgio Sacerdoti, *The Application of BITs in Time of Economic Crisis: Limits to Their Coverage, Necessity and the Relevance of WTO Law*, in GENERAL INTERESTS OF HOST STATES IN INTERNATIONAL INVESTMENT LAW 3, 11–13 (Giorgio Sacerdoti et al. eds., 2014).
83. *Id.* at 14.
extraordinary. The legal problem, however, could be presented in different terms. State actions may no longer be exceptional—or at least may be less exceptional—if we assume that the fundamental reason for state authority is to prevent private property from destroying other individuals and the community. State coordination of resources and economic activity, depending on the way we frame the question, can be seen as either an exceptional or a normal public function.

C. The Governance of Resources and Neoliberal Legality

The study of the investment disputes arising from the 2001 Argentine crisis shows that the legal interface for governing resources extends from property to contractual techniques. Particular arrangements are not necessarily purely proprietary or contractual, and individuals and the state can create different forms of arrangements along these lines. One way to engage with these diverse legal techniques is to focus on the question of efficiency, the typical Law and Economics analysis. On this analysis, individuals and the state choose proprietary arrangements when they are looking for standardization. They rely on legislation when they prefer circulation to a more detailed scope of the rights. When it comes to specifying rights over resources, however, individuals and states prefer to rely on contractual or quasicontractual techniques. This efficiency analysis can serve to identify the best means, but it can also lead to overlooking some of the reasons for choosing property or contract. Private property rights grant control to owners but also allow an important space for state regulation. Contractual techniques are employed to define the scope of rights for specific projects, but they also serve to fulfil the increasing need for private calculability, which is an imperative for promoting growth according to a neoliberal rationality.

The contractualization of private-public relations, in other words, implies a subversion of the essential premise of private property and public authority. Contractual techniques can shape state behaviour in

84. See generally Jürgen Kurtz, Adjudging the Exceptional at International Investment Law: Security, Public Order and Financial Crisis, 59 INT'L & COMP. L.Q. 325 (2010) (suggesting that a state's enactment of emergency measures to preserve the public order can, at the international level, be viewed as either an exceptional or extraordinary act by the state).
86. Id. at 778–79.
87. Id.
89. Zumbansen, supra note 11, at 193–95.
ways that are unimaginable under a proprietary paradigm. Contracts not only clarify the scope of ownership but also strengthen private property, in particular, if they are interpreted and enforced under an expansive interpretation of *pacta sunt servanda*. Property rules and regulations are the result of a democratic process and remain subject to change; contracts, by contrast, are the outcome of individual bargaining and must be kept and enforced.

### III. CONTRACTUALIZATION AFTER THE 2008 GLOBAL ECONOMIC CRISIS: RUPTURE OR CONTINUITY?

This final section explores where we stand after the 2008 global economic crisis. It argues that this is mostly an era of continuity, not of rupture, at least with respect to the contractualization of foreign investment relations. This legality continues to respond to a particular logic of government, advancing a market rationale for public action modeled on the idea of transaction. What lies outside this rationale is unreasonable and arbitrary because it may impact negatively on private-led economic growth. Nevertheless, something has changed. There is little doubt today that the private sector can get much wrong, having led the entire world into a severe economic crisis in 2008. 90 This means not only that individuals create negative externalities, but also that the market alone cannot deal with these undesired side effects adequately. Suddenly, there is a new need for the state to coordinate private use of resources. 91

The call for a more active state, however, does not say much about the way governments should act in light of everyday corporate challenges. We do not know what works. 92 For instance, we do not know how states should behave given the evidence that foreign investment can negatively impact local communities. The postcrisis era requires recognizing the importance of noneconomic values, such as environmental and human rights concerns, but without losing the focus on *pacta sunt servanda* and foreign investor expectations. The neo-utilitarian purpose can accept contractualization to adapt to the new demands, but clearly not to change radically. What is interesting about the postcrisis era is that the maximization of wealth and noneconomic values have become blended in new and creative ways. Growth and private profit are presently fundamental goals of states because the way to grow continues to be to facilitate private profit. At the same time,

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90. See Altvater, *supra* note 1.
environmental protection and human rights have become important multinational corporate objectives, since these firms cannot continue doing business if there is strong evidence of their involvement with environmental disasters and human rights violations. This new perception of the roles of MNCs and states can only favor contractualization and the equivalence of these two actors.\textsuperscript{93}

Against this background, the governance of foreign investment has incorporated noneconomic goals through two different strategies. The first is CSR. This is a business strategy inspired by the premise that private investment can promote economic growth and respect for the environment and human rights.\textsuperscript{94} The justification is precisely profit, because irresponsible business ends up being unprofitable or missing business opportunities. The second strategy is the use of proportionality in investment arbitration.\textsuperscript{95} The main actors of this regime (i.e. states, foreign investors, lawyers, and arbitrators) realized that the legitimacy crisis of the IIR was putting the entire regime at risk. A transactional model may not always respond satisfactorily when states aim at implementing measures to protect the environment. Schneiderman notes that a reflexivity process began at this moment.\textsuperscript{96} This process triggered the negotiation of new treaties and new arbitral interpretations, according to which it is necessary to balance foreign investor expectations and the right of states to regulate. This recognition does not imply deciding which principle should prevail, either private foreign-led growth or environmental protection; rather, it implies balancing the two using proportionality.\textsuperscript{97}

Before moving on to analyze these postcrisis strategies, it is important to highlight a common thread connecting CSR and proportionality. Both promote transparency and proceduralism. A strong premise of these strategies is to show what is being done, either in expert meetings or in the reasoning of an award, and to foster participation from nongovernmental organizations (NGOs) and other actors in the creation of CSR and the proceedings of investment

\textsuperscript{94} See Miles, supra note 39, at 215–39.
\textsuperscript{95} See Benedict Kingsbury & Stephan W. Schill, Public Law Concepts to Balance Investors' Rights with State Regulatory Actions in the Public Interest—The Concept of Proportionality, in International Investment Law and Comparative Public Law 75, 97 (Stephan W. Schill ed., 2010).
The converse of this procedural openness is that CSR and proportionality conceal normative issues behind a veil of expertise and participation. In the field of foreign investment, these normative issues often relate to the implications of foreign investor rights beyond state regulatory authority, in particular, the consequences that foreign investment has on local communities.

A. Corporate Social Responsibility

As Miles recognizes, the expectations we have for CSR are based on market mechanisms. CSR does not challenge the neoliberal model of private-led growth, and no one who promotes it suggests that states should reconsider their approaches to the governance of resources. On the contrary, by promoting CSR, neoliberal means and ends are reinforced. MNCs want to lose neither business opportunities nor profit. On this view, market actors can after all satisfactorily perform coordination functions. They just need some help from states, in particular, by making some voluntary CSR rules mandatory.

CSR acknowledges some potential negative externalities of private-led growth, and aims to find an acceptable balance between economic and noneconomic values. A number of different actors, including states as well as MNC and NGO experts, participate in this balancing process. These discussions, however, are very different from what we are used to seeing in national legislatures. It is not the democratic process that characterized the twentieth century. First, the corporate sector engages in these discussions as a very strong and active party. Firms do not need lobbies anymore; they can express their views directly. They are also the more powerful party because they can always walk away from negotiations or divest from specific countries. Second, the core of these discussions is not about values and norms. What matters most is expertise, not the wishes and desires of any local population. Experts rely on technical and scientific arguments because they need to appear neutral and objective, detached from political positions. This emphasis on expertise gives another advantage to their findings: in addition to neutrality, they have a global scope of application.

98. See LANG, supra note 5, at 326–46.
100. MILES, supra note 39, at 223–24.
102. MILES, supra note 39, at 287.
While it is true that these expert discussions may be public, most of the population cannot participate or follow them directly. The center of democracy has unquestionably moved away from voting, and presently what can make a larger difference is citizen participation in the regulatory process. But what is sometimes disregarded is that this process has also become global and delocalized. Altogether, expertise and globalization move the center of gravity of this decision-making process too far away from most local communities. CSR has thus become a global site of struggle for rules under the control of experts.

The increasing number of CSR rules can have important effects on the IIR. The United Nations Global Compact or the Principles for Responsible Agricultural Investment can shape interpretation. The existence of these standards can facilitate the consideration of noneconomic values in the context of investment arbitrations. Thus, for instance, CSR rules may influence the existence of foreign investor legitimate expectations in an agriculture project. These rules may include concrete responsible investment standards that foreign investors need to take into consideration when establishing a project.

At the treaty-drafting level, there has been a gradual inclusion of environmental and human rights references in the treaties, consistent with the increasing use of CSR. Having these references in the treaties does improve the outlook for attaining noneconomic goals, but the actual effects will depend on interpretation, in particular, of the balancing techniques.

When analysing these positive effects, however, we should not overlook the pitfalls of CSR. The most important is the reinforcement of neoliberalism and the contractualization of foreign investment relations. In the postcrisis era, market supervision of states expands from public intervention in the use of resources to any measure taken to curb private negative externalities. The market acknowledges its limitations, yet demands tools that mimic what the market would do in a situation of full information and no transaction costs. CSR emerges as a form of “private” legal transplant. In terms of authority, then, as Ferrando

103. See Pierre Rosanvallon, La Contre-Démocratie: La Politique à l'Âge de La Défiance (2006).
105. Nicolás Marcelo Perrone, Responsible Agricultural Investment: Is There a Significant Role for the Law to Promote Sustainability?, COLUM. FDI PERSP., no. 38, 2011 (discussing the use of international guidelines to promote foreign direct investment into countries that need capital and technology to grow while protecting the concerns of the host country).
106. Kennedy, supra note 29, at 40–41.
notes, little changes.\textsuperscript{107} The contemporary IIR may not be fully explicable anymore through nineteenth century imperialism, as Miles suggests, but there is a different hegemony today: MNCs and expert knowledge.

\textit{B. Proportionality}

With respect to proportionality, I argue that its reasoning is only a marginal adjustment to the contractualization of foreign investment relations. Schneiderman notes that proportionality is a Weberian form of rational and formal bureaucratic reasoning.\textsuperscript{108} This means that it is difficult to dissociate it from the goal of facilitating the expansion of capitalistic activities. A legal standard like proportionality allows investment arbitrators to appear neutral and objective. This became necessary once it was clear that arbitral decisions could not continue making claims to the effect that the IIR favours foreign investors or that investment treaties should be interpreted \textit{in dubio pro} investor.\textsuperscript{109} But this should not make us overlook that the goal of proportionality is precisely to adapt neoliberal legality to the reality of the postcrisis era.

Proportionality assumes that neither foreign investor expectations nor host state goals should annihilate the other.\textsuperscript{110} By implementing proportionality, investment tribunals incorporate a tool formally capable of focusing both on the legitimate expectations of foreign investors and on negative externalities. Looking at proportionality \textit{stricto sensu}, we find that state means and state ends are the two crucial factors: i.e., the deprivation of foreign investor rights and the host state’s goals.\textsuperscript{111} Proportionality aims to reach a balance, but this balance is struck in the shadow of the contractualization of foreign investment relations and the legitimate expectations doctrine. This introduces the problems I identified above in the Argentine cases: in particular, the expansive interpretation of foreign investor rights vis-à-vis host state sovereignty.

In addition to foreign investor rights, another factor determining

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\textsuperscript{107} Tomaso Ferrando, \textit{Private Legal Transplant: Multinational Enterprises as Proxies of Legal Homogenisation}, 5 TRANSNAT’L LEGAL THEORY 20, 20 (2014) (discussing the attempts of transnational enterprises to create or modify laws in foreign countries to serve the capitalist mode of production).
\textsuperscript{109} Société Générale de Surveillance S.A. v. Republic of the Phil., ICSID Case No. ARB/02/6, Objections to Jurisdiction, ¶ 116 (Jan. 29, 2004).
\textsuperscript{111} \textit{See} Total S.A. v. Arg. Republic, ICSID Case No. ARB/04/01, Liability, ¶ 123 (Dec. 27, 2010).
proportionality is the assessment of negative externalities and host state goals. The greater the private fault, the more legitimate a public remedy will be. If there is no negative externality, by contrast, the state may need to pay compensation to implement a regulatory change. The determination of these factors depends on an assessment carried out by investment arbitrators and global experts. In the case of the Argentine crisis, for instance, tribunals had to determine—either explicitly or implicitly—whether international organizations and foreign investors contributed to the crisis, in addition to Argentine wrongdoing. In theory, this judgement should be sensitive to the local situation. But local particularities could make a muddle of investment awards. The risk is not only that tribunals might come to different decisions in similar cases; it is also that arbitrators could end up following different normative values in their awards. The investment law literature acknowledges different goals such as environmental protection and human rights, but only from a global perspective in which private-led economic growth remains fundamental.

In this context, bureaucratic judgements resulting from a technical assessment of the circumstances prevail over political decisions. For instance, the Australian and Uruguayan population can decide to implement the plain packaging of tobacco products because they prefer a community free of tobacco, but they need to justify this measure based on scientific evidence. It is not a question of social preferences or vulnerabilities but of market failures and negative externalities. Politics can be done, in short, but only on the fringes of this expert-led process.

As Metzger put it fifty years ago, once foreign investors take control of key resources of an economy, there will be few opportunities to


113. See Christoph Schreuer & Ursula Kriebaum, From Individual to Community Interest in International Investment Law, in FROM BILATERALISM TO COMMUNITY INTEREST: ESSAYS IN HONOUR OF BRUNO SIMMA 1079, 1079–80 (Ulrich Fastenrath et al. eds., 2011).

114. Schneiderman, supra note 99.

115. Philip Morris v. Uruguay, ICSID Case No. ARB/10/7 (pending); and Philip Morris v. Australia, UNCITRAL, PCA Case No. 2012-12. In the dispute against Australia, the tribunal issued an award on jurisdiction and admissibility on December 17, 2015, dismissing the case on jurisdictional grounds.

implement orderly political change.\textsuperscript{117} Not only is neoliberal legality consistent with this claim, it is also constitutive of it. Postcrisis legality is about adjusting details, and proportionality in the context of contractualization is capable of carrying out some adjustments—no more. The description of proportionality provided by Schneiderman fits perfectly into this narrative. Proportionality appears as an ideal form of reasoning to minimize the influence of politics. Investment arbitrators do not need to make any normative decision in favor of foreign investors. They can simply uphold their expectations without making normative arguments because proportionality operates in the shadow of contractualization and global expertise.

**CONCLUSION: NEOLIBERALISM QUITE AS USUAL**

One way to think about neoliberalism is as a lens to frame and answer fundamental economic, social, and political questions. When the neoliberal model entered into a deep legitimacy crisis in 2008, this unsurprisingly revitalized some debates about the role of the state that seemed finished twenty years before. The mainstream critique, however, never questioned wealth maximization as a purpose, or private action as the most efficient means to achieve this purpose. On the contrary, it just centred on private negative externalities and their implications for the environment and human rights. With this situation in mind, this article asked whether this balancing strategy constitutes rupture or continuity with neoliberalism and the neoliberal legality that shapes the role of foreign investors and host states in the governance of resources. I find that the means to grant, exercise, and protect foreign investor control of resources remain substantially the same, corroborating the continuity hypothesis, at least in this field.

The IIR in this way remains a paradigmatic example of neoliberal legality. The contractualization of foreign investment relations provides foreign investors with the calculability required to dedicate their energies to maximizing wealth. After the global economic crisis, most of the discussions about the IIR revolve around regulation and not around private control of resources. Part III showed that there is a general belief in many circles that MNCs' desire for profit can adjust corporate conduct through CSR. If states still need to act to curb private negative externalities, this view claims that these measures should mimic what markets would do if there was complete information. States, in other words, are expected not to disappoint business expectations unless it is

absolutely necessary.

The study of proportionality confirms this view. Part III also showed that only foreign investors have discretion to make genuine decisions regarding resources in both the neoliberal and the postcrisis eras; for host states, it is just politics at the fringes of an expert-led process. This is a chief consequence of contractualization, and proportionality does not change this fundamental ground rule. Only a radical change in our perception of the role of the state would give governments political responsibility for coordinating private economic rights beyond negative externalities and market failures. But today the return of a sovereignty-proprietary paradigm seems distant. The major reason for a return to large state involvement in the economy would be the inability of the MNC sector to deliver the expected levels of growth.

The construction of a real alternative to neoliberalism, in any case, requires more than state involvement in the economy. With regard to the control of resources, at least, it would be necessary to opt for a more pluralistic purpose for world resources. The global and individual obsession with economic growth has much to do with the pervasiveness of neoliberalism. A thick understanding of the social obligations of property owners has not been dismissed because they cannot deliver more equal and fair societies. It has been dismissed because they are considered unsuitable to reach efficient levels of wealth maximization. Along these lines, the real threat to neoliberalism consists of a change of purpose. This would put into crisis not only neoliberal legality but also corporate power and the *homo economicus*. A starting point for any transformation of this kind would require reconsidering fundamental social and political questions. The challenge exceeds the law if we conceive the law as a means to other social and economic purposes. In our current times, then, Hamlet's dilemma would need to be expressed in different terms. The great classic of today might need to begin differently, and borrowing the words of Fromm, I suggest it would read, "To have or to be": that is the question.118