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Deficiencies of International Investment Law – What Chances for "Critical Lawyers" to Civilize Global Value Chains and/or to Transform the Status Quo of the Economic World Order?

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1. Introduction

Rules should be fair, no matter from which perspective (Rawls, 1999). Given that Justitia holds a balance, current international investment law is disturbingly one-sided. It mainly sets out to protect property positions of foreign investors. According to mainstream legal thinking, imposing obligations on transnational corporations (TNC) is only possible by means of the gentle non-binding rules of corporate social responsibility (CSR). As will be documented here, international investment law today has become a body of law for enterprises with hardly any regard for people and planet putting the private gains of few above the common good of many. Conventional approaches to legal questions deal with legal dogmata by detaching the law from its economic and political context. However, since legal norms are the result of societal negotiations, critical jurists have a role in analysing the law and its implementation, given the prevailing social and economic backgrounds. They see more easily that private interests increasingly drive legal doctrines and that social or environmental needs are largely neglected in mainstream legal activities.

In international relations, the political consensus of the states in the United Nations (UN) has now moved beyond the Millennium Development Goals and their ideology of rich countries helping the poor (for a critique see Amin, 2006) within the dominant asymmetrical, fossil-based production and consumption paradigms. Due to acknowledgment of the increasingly pressing environmental and social needs, since 2016 more comprehensive and universal UN Sustainable Development Goals now aim to "transform our world" (United Nations, 2019). In international investment law, such changes are still to come. African states and societies in particular are undergoing economic and social transformations towards a nowadays also questionable modernity, and within decades, a process that took centuries in Europe. There are no more rural areas spared from agricultural or mining investments. So particularly in Africa, critical jurists and scientists need to analyse and point out which legal rules and interpretations on the international, regional, national and local level really serve the interests of the population in Africa.

The introductory Section 1 refers to the findings of ecological science and their scientific imperative for action towards "radical incremental change" (Göpel, 2016). Mere civilizing (bettering, humanizing) a status quo will not do. According to ecologists and interventional sociologists, the current world economic order is unsustainable by its set up, and can be described as an "externalisation society", in which the rich, highly industrialised societies of this world outsource the negative effects of their actions on countries and people to poorer, less "developed"

world regions (Lessenich, 2016, p. 24). However, global value production chains led by TNC are the reality, as is the role in this framework of the Global South[1] to provide natural resources upstream; with negative impacts of resource investments on people and the environment on the one hand and debatable effects for economic development on the other (Campbell, 2012). Mainstream international investment law is still completely unaffected by the scientific imperative to act towards significant change and one-sidedly defines the law just as a mere legal tool to *protect* international investments. Consequently, simple framing or "civilizing" TNC and their production chains by hard law would in itself already be a success. To better understand the current unbalanced and therefore unjust –but changeable– shape of international investment law, Section 2.1 presents the checkered development of investment law as a nearly 100-year exchange of blows and counterblows. Due to the experiences of the author, this paper works with the example of the exploitation of agrarian resources for industrial agriculture in Africa. Section 2.2 argues that uncontrolled foreign investments in agriculture in countries with weak institutions are particularly questionable.

For investments in agriculture *material* property protection of international investments in resources is one objective, *intellectual* property protection for new plant varieties another one. Whereas investment protection of material property has successfully been (over-) installed internationally during the last few decades, the promotion of legal monopolies on plant varieties (seeds) and seed-marketing rules is ongoing. There is no leap-frogging over the much criticised fossil-based industrial agriculture (IAASTD & UNEP, 2009)[2] immediately to a sustainable modernity of ecological agriculture based on climate resilient farmer's seeds. On the contrary, the legal frame protecting intellectual property in laboratory-produced industrial seeds is currently promoted by international development organisations and implemented simultaneously on state, regional and international levels - to the detriment of 500 million of small scale farming units worldwide (Sec-

1 The wording follows post-colonial concepts. While Global South (Third World) countries are often more agrarian basé, dependent economically and politically on the Global North (First World), the Global North has continued to dominate and direct the Global South in international trade and politics.

2 Already in 2008 the International Assessment of Agricultural Science and Technology for Development (IAASTD), an intergovernmental body under the sponsorship of UN and the World Bank that involved more than 400 scientists and 30 governments, recommended a fundamental rethink of agricultural knowledge, science and technology and a focus on the needs of small-scale farmers in diverse ecosystems. The assessment started with the participation of the agribusiness sector. Not liking the findings and conclusions for strategic outlooks, the private sector pulled out. Many of the experts were well installed scientists of a certain age with all the freedom to act truly independently.

tion 3). “Scientivism” (scientist and activist) comes up with first concepts for significant changes and legal tools to de-commodify the world order. There are various options of modernity that can be explored by critical scientists, jurists or politicians to frame current problems. But it is difficult to deconstruct and reverse the default mode of the seemingly overwhelming structural power of an existing status quo. The “great mindshift” (Göpel, 2016) is yet to happen (Section 4). Until then, innovators as well as critical jurists will be on the defensive.

2. Roles for Law to Play Beyond mere Civilizing a Status Quo

2.1 The Anthropocene predicament

For the last 11 000 years of the geological epoch of the Holocene, the relative equilibrium of the Earth system with its high temperatures has fostered human development. However, scientists have noticed that with the Industrial Revolution and the use of fossil fuels since the 18th century, changes were leading the Earth away from that equilibrium. Recently the term Anthropocene has been more and more used to describe the impact of the accelerated accumulation of greenhouse gases on climate and biodiversity, and the irreversible damage caused by the over-consumption of natural resources. It may be that the Anthropocene is indeed a new geological epoch where man/woman made effects are the most significant determinants of geology. Or it may bet that it is more of a pointed narrative or metaphor of the social sciences (Issberner & Léna, 2018). In any case, the planetary ecological boundaries are in focus.

In 1972 the Club of Rome spoke of the "limits to growth"[3]. From 1987 to 2015 the vast, multi-disciplinary International Geosphere-Biosphere Programme (IGBP) studied the phenomenon of global change to develop and impart the understanding necessary to respond. In 2004 IGBP published its landmark report Global Change and the Earth System: A Planet Under Pressure (Steffen et al. 2004), which analysed the anthropogenic changes to the earth system. In 1988 the United Nations set up the Intergovernmental Panel on Climate Change (IPCC) to prepare regularly comprehensive assessment reports about the state of scientific, technical and socio-economic knowledge on climate change, the last Special Report on Climate Change being issued in 2018. This report states that limiting warming to 1.5°C above pre-industrial levels would require "transformative systemic change" (IPPC, 2018, p. 313). The Stockholm Resilience Centre drew up a list of the nine planetary boundaries that would be dangerous to cross. According to them, four of these boundaries have already been crossed: climate change, vegetation cover, biodiversity loss and extinctions, and biogeochemical flows –with phosphorus and nitrogen cycles playing a particularly crucial role (Stockholm Resilience Centre, 2019).

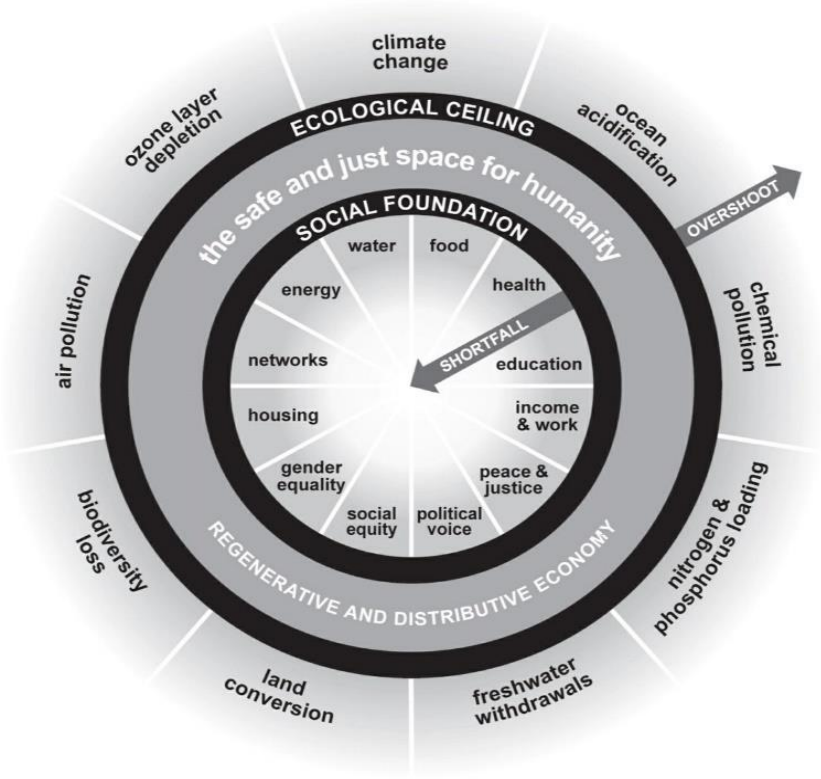
[3] Founded in 1968 the Club of Rome consists of "scientists, economists, businessmen and businesswomen, high level civil servants and former heads of state from around the world". The "mission is to promote understanding of the global challenges facing humanity and to propose solutions through scientific analysis, communication and advocacy" (Club of Rome, 2019). Limits of Growth was their first report.

According to the developmental non-governmental organization Oxfam, in 2018 only 26 people owned as much as the 3.8 billion people who make up the poorest half of humanity (Oxfam, 2019). In 2018, Apple was the largest company by market value of over 900 billion US $ (Statista, 2019). The gross national product per purchasing power of only 28 states was larger than that (according to a list of 187 states composed on the basis of data of the International Monetary Fund by Wikipedia, 2019). One hundred fifty-nine states (including resource rich countries as South Africa or Norway, for example) produce less in year than what is the market value of only one corporation. Whereas some gain great wealth in this world economic order of global corporate-led production networks (wealth that is based on resource- and energy-intensive production modes and everyday consumption styles), others –and that is nearly half of the human population– don't. Concepts like "imperial mode of living" (Brandt & Wissen, 2017) show that the lifestyle of the Global North uses resources, work force and biological sinks of the Global South out of proportion. For example, fields in Argentina provide monoculture high protein soybeans to feed European cattle and pigs in intensive industrial farms[4]. Massive land use and agrochemicals used for cheap European meat consumption causes environmental damages and deforestation, as well as human rights and land grabbing issues in the South. Profits in the global industrial agricultural networks or value chains are slim for countries providing the natural resources upstream. According to Amanor (2014) on average 10 per cent of the value is gained on-farm, whereas 90 per cent of global value added is made off-farm on more upstream inputs (machinery, chemical products) and downstream food and other industries.

In the Anthropocene, new lifestyles, new production, distribution and consumption modes seem to be the challenges ahead; new concepts are needed, for a full world instead of an empty one. Policy advisors to German Government call for "radical incremental change" (Göpel, 2016). Concepts like "economy of sufficiency" (Schneidewind et al., 2013) or the "doughnut economics" (Raworth, 2017) point out economic ways for "the safe and just space for humanity" that avoid overshooting the ecological ceiling to "critical planetary degradation" on the one side of a doughnut and falling short under a social foundation to "critical human deprivation" on the other (Raworth, 2017, p.11).

[4] Soybean agriculture represents the forefront of the great transformation in rural life by agribusiness (Gudynas, 2008). 70 per cent of the protein feed used in the EU is imported. 83 per cent of soy meal in the EU is for concentrate feed for pigs and poultry (FERN 2017, p.7).

Graph 1: Doughnut Economics



Raworth, K. (2017), p. 44, raising a credit to the nine planetary boundaries of the Stockholm Resilience Centre

Does international economic public law reflect such perspectives, ideas and calls?

2.2 Law as a normative science between preservation of power and emancipatory potential for change

Law is politics that has become structure. Over time, various outcomes of societal negotiations have made their way into norms, their interpretation through jurisprudence and implementation practises. Different layers and juxtaposed values thus become the law. Consequently, the law is like a medal with two sides; the more obvious front of the stabilisation of the status quo of power relations, and the less obvious reverse side of the realization of the emancipatory potentials for fundamental changes towards global justice, human rights, sustainable development or "good living" (*buen vivir*).

Whose perspective prevails guides the critical legal analysis. For example, the perspective of the doughnut economics namely, to not overshoot the ecological

ceiling and not to fall short under the social foundation, or the interest of transnational corporations in the broadest possible protection of their material and intellectual property. The analytical toolbox for critical jurists is simple. If transformative systemic change is indeed the task, then law can be assessed on the basis of three issues, whether;

1. the interpretation or implementation of the law stabilizes the status quo of established international economic law (and thus deepens the existent collective denial of current challenges)
2. it "civilizes" the status quo (as mitigating imbalances and finding compromises is an important part of legal professionalism)
3. it paves the way for radical incremental change (leading the way for global justice, de-commodification or other visions for good life for all).

3. International Investment Protection Law – Mission of Corporate Power Accomplished

Bei International economic *public* law encompasses all legal efforts to regulate the world economic order and corporate conduct in such a way that private profit interests and public interests for social justice and environmental protection are ideally in harmony. The main aspects are international trade law and investment law (factor movement) and the law governing monetary and financial order (see for example, the table of contents of the British standard work (Quereshi & Ziegler, 2011). Ultimately, the enforcement of public international law still takes place primarily through incorporation into national law, with its national mechanisms for law enforcement. Apart from reporting to certain international commissions (e.g. country reports to the Human Rights Commission) and "blaming and shaming", there are no purely international implementation mechanisms with executive power. The two exceptions are trade law and the Dispute Settlement Mechanism of the World Trade Organisation and investment law with its Investor State Dispute Settlement (ISDS). These two mechanisms effectively ensure compliance with the three concerns that the private sector wants the international economic order to ensure: free movement of goods, free movement of finance, and the protection of their physical investments and property rights.

This paper focuses on investment law. Foreign investment law is not an established field of law, but a collective term for various subject areas, a conglomerate of regulations at various multilayered and intertwined regulatory levels with the objective to promote TNC or to control transnational corporate behaviour. It is comprised of the national law of a capital-receiving host state, international or regional law, and national law of the home state of transnational corporations. Which aspects are considered important in the different legal arenas depend on the perspective of the observer. Governments and people in the Global South seek development and look for capital, technology transfer, integration into the world economy and prosperity; they seek to avoid any harm (to themselves or to their environment). Investors, on the other hand demand freedom of investment (including free access to land and other resources worldwide) and strive for maximum protection of their private properties and profit expectations (For more detail Diaby-Pentzlin, 2015a, pp. 284 ff.).

From the very beginning, since Europe created its textile industry in the 1750s, capitalism, characterized by mass production, has been globalized. And it was not free trade and investment protection that led to Europe's success, but strategically thinking states and robust regulation to control corporate behaviour that stood at the cradle of wealth and life in dignity for people in Europe (Beckert, 2015, pp. 47 ff.). States rigorously orchestrated tiered tariff protection for unwanted imports, reduced tariffs for needed goods, imposed punitive tariffs for exports of

unprocessed products, weakened patent protection for foreign technologies, banned foreign investments into key industries or introduced investment requirements for joint ventures, and at the same time they established various measures to promote exports of domestic products (like state export credits for certain products or research promotion). All these measures have gradually brought infant industries to international competition and have also contributed to the success of South Korea and China. Ever since international law established freedom and non-discrimination for trade and investment, countries that are now at the lower stages of industrialization have been denied this way of raising their level of industrial development. "Kicking away the ladder – Development Strategy in Historical Perspective" is how South Korean economist Chang titles his book in 2002.

Regardless that public international law has "kicked away" the regulatory means of national foreign trade legislations, mainstream international investment jurists still see the investment-receiving host states as the prime agents to control corporations (foreign or not) for the common good of their people. And there is another aspect. In the wealthy industrialized countries of the Global North, complex law and social checks and balances have evolved over time to control corporate behaviour to serve all of the diverse public interests. In line with the increasing relevance and power of companies over centuries, various bodies of law have emerged; labour law for occupational safety, decent wages and trade unions rights, food safety and other consumer protection law, land, agricultural and environmental law, laws to structure markets such as anti-trust and fair-competition law, tax law and laws for infrastructures; i.e. all the legal norms necessary to built a social market economy, including the respective implementation machineries.

Countries in the Global South, with small (formal) economies could still lack such a complex legal infrastructure. The need to frame large economic units often arises only with the entry of subsidiaries of transnational corporations. However, such countries have typically not had hundreds of years in which laws were organically build up and pluralistic countervailing power structures developed. As a result, the imbalance between large corporate power and small control by state administration and civil society facilitates the abuse of power. Therefore, problems associated with entrepreneurial activities in the Global North are far more extensive and dangerous for the Global South. Especially in the recently decolonized African states, powerful corporations meet weak states and still fragile institutions of government, administration and society. It is true indeed that in the context of investment law, it is the general national legal framework that is crucial for countries seeking foreign investments and sustainable development (as opposed to rules only for free entry, promotion and protection of international in-

vestments) (Cotula, 2016). But the basic assumption of the mainstream investment lawyers is wrong: In many host countries, law and law enforcement do not fulfil the task that is intended for them at the lowest level of the investment law architecture, namely to contain investments in a socially acceptable way.

On the one hand, the lack of rules or weak implementation structures in investment-receiving host countries fail to protect their own citizens from abusive corporate power. On the other hand, weak institutions in host states also threaten the property rights of foreign investors. In the 1950s, the first bilateral investment treaties were out to close such gaps in the national regulatory and legal systems of host states. Then in the 1970s (the heydays of the New International Economic Order) international efforts shifted and aimed to *commit* multinational corporations. In the 1990s, the trend reversed again, and now it has become taboo in the United Nations to obligate corporations. Investment protection was further improved by the spread of international Investor State Dispute Settlement.

Today, three decades after the fall of the Berlin wall and following three decades of neo-liberal economic thinking, international investment law has narrowed an originally broad field to deal with all aspects foreign investments just to the *protection* of foreign *property positions* in a capital-receiving host country[5]. Few still speak, as Sornarajah does in his textbook, of multinational corporations and their obligations towards host nations and their people (Sornarajah, 2010, pp. 144 ff.). International law still denies any possibility to *obligate* corporations. Recently though, there are some interesting jurisdictional efforts to come to grips with corporate power on the *home* state level. The next sub-section shows how the status quo developed, including various efforts of the present days to civilize TNCs.).

3.1 Brief history of negotiations to the status quo of investment law [6]

Safeguarding interests in the common good of host countries or its people may conflict with investor's interests in profits. Today thousands of legally binding (hard-law) bi-lateral treaties (BITs), regional or sectoral agreements create resounding effects to protect foreign property, whereas a myriad of legally non-binding recommendations, principles and guidelines by intergovernmental organisations (soft law) as well as the gentle CSR is supposed to civilize corporate behaviour and to safeguard public interests of the poorest countries in "good quality investments" with more dubious effects. It is astounding that the international

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[5] For example, Dolzer & Schreuer, 2012 label their eminent textbook: *Principles of International Investment Law*, but the content is about standards of investment protection only.

[6] Section 2.1 and 2.2 are largely based on a previous "Wismarer Diskussionspapier" in German on investment law by the author (Diaby-Pentzlin, 2015b).

law of today so easily comes to terms with this imbalanced situation. In the course of time, foreign investment law has reacted differently to the legal gaps in the architecture of the interconnected regulatory levels. The negotiations and evolution of international investment law to its present asymmetrical nature, with the special role of gentle CSR in this system, can be well described as an exchange of blows and counter-blows: four blows by the present corporate winners of the Global North and two and some minor counterblows by the losing Global South.

First blows and counterblow up to 1950s: Resource exploitation, de-colonisation and nascent investment protection

The winners passed the first blow: In the first half of the 20th century, multinational agribusiness, mining and oil companies of industrialized countries made profits in the colonies and areas of influence of their home countries for a long time without any restrictions.

The counterblow of today's losers came in the 1950s with, in some instances, spectacular expropriations in the context of political and economic decolonisation[7].

The second blow; from the perspective of investors, the property protection rules of general customary international law (status of aliens) did not offer sufficient protection[8]. Therefore, attempts were made to uplift simple concession contracts between an investor and a host country from the sphere of national economic law to the level of international public law. Contractual *stability clauses* should "freeze" all law of the host state at the time of the conclusion of the contract also for future times, in order to prevent future *expropriations*. Contractual *internationalization clauses* should furthermore ensure the direct route to international arbitration. The character of such clauses as international law was –and still is– disputed, though.

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[7] For an overview on the history of investments, see Sornarajah, 2012, pp. 19 ff.

[8] On the one hand, investors disapproved of the too deep-set substantive legal protection standards. For example, international customary law does not recognize *indirect expropriation* by frustration of *legitimate profit expectations*, Oscar Chinn case, Britain v. Belgium, Judgment of the Permanent Court of International Justice 1934, retrieved February 24, 2019, from http://www.worldcourts.com/pcij/eng/decisions/1934.12.12_oscar_chinn.htm. On the other hand, the investors had difficulties to enforce the customary international law regarding the status of alien procedure wise. Because international public law applies only between the states. According to the prevailing opinion of general customary public international law, international corporations were and still are not subjects of international law and therefore (without special treaties) can not directly complain against host countries on the international level.

In 1959, the director of Shell Petroleum, lawyer Shawcross, and Abs, director of Deutsche Bank, designed a convention (known as the *Abs-Shawcross Draft Convention on Investment Abroad*) with high standards of investment protection (Newcombe & Paradell, 2009). They formulated an obligation of *fair and equitable treatment* for investments, thus paving the way for the concept of *indirect expropriation*. A *prohibition of discrimination*, and hence the requirement of *equal treatment* with national companies, was intended to criminalize the promotion and favoring of young local industries in host countries. An *umbrella clause* was included, to flank contractual *stability clauses* of the concession and investment contracts between states and companies. Again, the objective was to freeze all legal conditions (taxes, environmental law, etc.) at the time of the conclusion of a concession contract. The only difference now being that, by signing such flanking clauses in an international convention, host states would waive their sovereignty indisputably on the level of international law. In addition, in an Annex to the Abs-Shawcross draft convention, the establishment of investor-state arbitration was outlined.

This design of the former two most important business captains of England and Germany failed as an international convention. However, their business biased rules for the protection of foreign property were included in the first bilateral investment treaty that was signed between Germany and Pakistan in the same year. Even today, more than 3,000 bilateral investment treaties are largely based on this wish list of Shell and Deutsche Bank (for an overview of the established legal dogmatic with examples for all the clauses printed here in italic letters see the standard textbook Dolzer & Schreuer, 2012, pp. 60 ff.).The concept of investor-state dispute settlement was implemented six years later by the World Bank, who established the International Center for Settlement of Investment Disputes (ICSID) in 1965.

Strong second counterblow of the 1960s and 1970s: New International Economic Order against the corporate power of transnational corporations

Efforts for a New International Economic Order (NIEO) delayed such developments towards investment protection in the 1960s and 1970s. After reaching political independence, developing countries aimed at economic independence, too. Latin American and other host countries with a degree of industrialization adopted national technology transfer and investment laws. The Global North assesses investment and transfer of technology as exchange relations according to private law. The main objective in the Global South for regulating transnational corporations, however, was to ensure that foreign investments should bring specific public benefits to the economies of the South (that engaged in catch-up in-

dustrialization) also according to neoliberal thinking. On the one hand, technology, know-how and capital were desirable; on the other hand, it had to be ensured that the strategies adopted in the foreign corporate headquarters did not have a negative impact on the development goals of the host countries. *Performance requirements* should ensure the desired growth and spillover effects. Provisions on *minimum participation of national partner companies*, on using *local content* and on employing local management were intended to lead to greater economic independence and contribute to the general prosperity in the national economies. To minimize negative effects on the national balances of payments, provisions restricted certain payments for patents and licenses, transfer pricing and/or open profit payments to foreign mother corporations (Cabanellas 1984, pp. 51-156).

Novel clauses came up in concessional investment contracts. Especially in the petroleum sector, new forms of contract with exemplary character developed. Concessions (granted by host states to private operators that hold 100 per cent of the asset) transformed to joint venture contracts, with shared assets between the host state and the foreign operator and various forms of profit sharing, and then further to mere service contracts without any equity participation on the part of foreign companies. By excluding foreign capital participation, the state profit share of oil production for OPEC states[9] rose from 2.3 per cent in 1970 to 75 per cent by the mid-1970s.

In order to strengthen the host state's bargaining power with transnational corporations, controlling TNC was also sought on the international level. For the first time, UN resolutions of the 1970s addressed not only home states and host states, but also corporations themselves, in order to oblige them to certain behaviors. As for the substance of such obligations, international resolutions recurred to the various national investment and transfer of technology laws. The United Nations Center for Transnational Corporations (UNCTC) (now the core of the United Nations Conference of Trade and Development –UNCTAD- Investment and Enterprise Division) developed the UNCTC Draft International Code on Transnational Corporations. UNCTAD presented the draft International Code of Conduct on Transfer of Technology and, in 1980, the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices (Fikentscher & Straub, 1982). The developing countries aimed for mandatory rules (hard law) and sought sanctioned implementation on an international level. The draft of the Technology Transfer Code, for example, contained an eighth chapter with regulations for an international institutional machinery, which should monitor compliance with the Code and ensure its enforcement. Following

[9] The cartel Organization of the Petroleum Exporting Countries (OPEC) was founded in 1960.

the presentation of developing countries in Group 77, this body should also carry out jurisdictional functions (Fikentscher et al., 1980, chapter 12).

Third blow of the 1980s, no counterblow: First neoliberal decade ends all efforts for a NIEO and bolsters investment protection

The third blow destroys the approaches of the NIEO and finally bans hard international law as a means for the containment of corporate behaviour. Global North organizations, such as the International Chamber of Commerce in Paris (ICC), started to adopt legally non-binding investment guidelines[10]. In 1976, the OECD adopted the Declaration on International Investment and Multinational Enterprises. These non-binding guidelines contained nothing but "what is as a rule considered a good, rational business practice anyway. Companies that show the willingness to comply will strengthen those political forces that oppose state policies to regulate as many entrepreneurial sectors as possible", suggested an investment guide in 1986 (original German quote in Pentzlin, 1992). ICC, OECD and the International Labor Organization (ILO) working on the principle of tripartite representation (States, Employees, and Employers)[11] pointed the way for future non-binding international recommendations.

Since the 1980s, neo-liberal theory and market fundamentalism dominate economic codes of conduct. In the United Nations, the topic of internationally binding rules for transnational companies is successfully tabooed to this day. Instead, common good interests of poverty reduction or environmental protection are pushed into the sphere of gentle CSR, a worldwide wave of codes of various origins. In addition to soft law codes by public inter-governmental organizations, there are now hundreds of private standards often related to specific sectors of the economy, issued by companies and business associations themselves, non-governmental organizations and trade unions, or collectively by all of them, than referred to as multi-stakeholder initiatives. Just for agricultural investments, the FAO counted –in addition to a large number of general instruments– as many as 16 sector-specific initiatives to be important (FAO/CFS, 2013). In 2014, FAO failed to translate these into a single instrument for responsible agricultural investment.

All these instruments, as well as the United Nations Global Compact of 1999, rely on partnership with the business sector: Instead of binding duties, there are only references to CSR and publication of best practices. The conflict of interests

[10] The ICC issued their investment guidelines already in 1972, the main content being however: investment protection and securing patent and trademark rights.

[11] ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy of 1977.

between the common good and self-interest in profits is obscured. Commercial lawyers in general tend to argue that any type of foreign investment is per se promoting development. In essence, these CSR standards often contain nothing more than what states have agreed to in intergovernmental conventions (such as the International Covenant on Economic, Social and Cultural Rights, for example) and are obliged to implement into their national law. It should not have to be enshrined in directives at all that companies have to comply with core labor standards of the ILO, like the freedom of association and the right to collective bargaining, prohibition of forced labor, non-discrimination on employment and occupation, prohibition of child labor, or that they generally should not violate human rights.

Even if CSR codes may only state obvious basic standards, at occasions (and often by means of development cooperation[12]) some valuable instruments are developed as well. These could guide willing enterprises. However, in most companies such support is not known, as the responsibility for CSR is usually placed into the outward-looking public relation departments instead of the inward-looking controlling or compliance departments.

Fourth blow of 1990s and 2000s: Unbridled investment protection, investor state dispute settlement, and a surge of gentle CSR obligations after the fall of the Berlin Wall

After the third blow annihilated the NIEO and condemned all international efforts to control transnational corporations into the gentle realm of CSR, a last fourth blow further widened the protection and spread investor-state dispute settlements, thus finally marking today's imbalance in investment law.

Deregulation and investment protection have been the unassailable guiding principles since the 1990s. Although up to today there is no comprehensive global investment convention[13], since 1959 bilateral investment treaties (BITs) became a tremendous triumph. Germany leads the field with more than 130 BITs concluded since 1959. The initial first generation of BITs followed the example of

[12] For example, on behalf of the Federal Ministry for Economic Cooperation and Development (BMZ), its governmental implementation agency GIZ is the office of the German network for the UN Global Compact since 2001; according to GIZ the world's largest voluntary initiative for promoting corporate responsibility for sustainability.

[13] Beyond first regulations of the WTO-Trade Related Investment Measures (TRIMs) of 1995, the attempt of the OECD for a Multilateral Agreement on Investment (MAI) failed in 1999; more due to internal differences and the exodus of France than to the violent civil society protests, though.

the Abs-Shawcross draft, adding only the principle of *most-favored-nation treatment*: all benefits given to one treaty partner automatically apply to all partners of all other BITs.

After the fall of the Berlin Wall, a second generation of BITs significantly increased investment protection, in particular through provisions to guarantee "free entry" into a country. Following Anglo-American traditions many BITs include today *pre-establishment* clauses that grant the right to establishment to foreign investors and thus reduce the ability of the host state to regulate admission for today as for future investment policies. The second additions were clauses of unconditional ISDS mechanisms.

In terms of substantive law, second-generation bilateral, regional or sectorial[14] international investment agreements (IIA) codify the concept of *investment* in very broad terms. All transnational economic activities are defined as property positions that could be directly or indirectly expropriated, from true Greenfield investments (like the construction of factories) over mergers and acquisitions or any acquisition of shares in order to start a business to provide services. Furthermore, also intellectual property rights, public concessions and all monetary claims are regarded as property positions subject to direct or indirect expropriation. Thus, any position of economic value becomes *property*[15].

In addition, BIT clauses force host countries to abstain from legislating local content requirements, such as obligations to employ a certain percentage of domestic workers or to reinvest a certain share of the investment's profits into the host state's economy (Dolzer & Schreuer, 2012, pp. 90 ff.). Thus BITs forbid all the obligations that host states codified in the 1960s and 1970s to secure the value of foreign investments for national economies; exactly the kind of obligations that were highly important for the success of the Southeast Asian states (Chang, 2002). Below the radar of the public from the Global North, it were the countries of the Global South that felt the negative effects of BITs and the swiftly rising investor-state arbitrations.

In 1994, the United States, Canada and Mexico created the North American Free Trade Agreement (NAFTA) with a Chapter 11 that comprises investment liberalization, extensive investment protection and investor-state dispute settlement provisions. NAFTA started the trend towards combined trade and investment agreements, so-called comprehensive, mega-regional agreements. With China, Russia and nearly all countries of the world joining the World Trade Organization (WTO[16]), global negotiations demanded more compromises than

[14] Like the Energy Charta of 1994.

[15] For an overview on the established legal dogmatics with examples see the standard textbook Dolzer & Schreuer, 2012, pp. 60 ff.

[16] In 2001, China joined the WTO and Russia in 2012. Otherwise, only small states (such as

Global North countries were prepared to accept[17]. To bypass WTO negotiations, instead, trade and investment facilitation was and ever since is placed into instruments such as the Canadian Free Trade Agreement (CETA), the EU and Japan's Economic Partnership Agreement (in force since February 1st, 2019) or the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), signed without the US[18] in 2018.

Investment protection is hardly any more enforced by home state against host state litigation. Almost all cases take place as investor-state. By the hard law of BITs and IIAs investors are never on the defendant side. That means, while investors may claim damages from host states for violating BITs or other IIA, conversely, in the asymmetric structure of ISDS, states and communities potentially affected by investment activities may never invoke counterclaims to safeguard public interests, let alone direct claims of host states or investment-affected communities. Moreover, investors often are able to turn to ISDS directly, without having to *exhaust local remedies* beforehand. If there are no *fork-in-the-road* clauses in investment agreements (by which the choice of an investor to submit disputes either to a local court or international arbitration is deemed to be final to the exclusion of the other), investors further have the possibility to *shop forums*, sue a host state on the national level and on the international level and wait for the best outcome arbitration (Dolzer & Schreuer, 2012, pp. 232 ff.). According to the ICSID convention, arbitral awards are declared as immediately enforceable and they are to be recognized and executed by the member state without any *ordre public* exception[19].

Arbitration procedures are generally non-public, and there are no compulsory registers to ensure transparency[20]. The judges are neither civil servants of inter-

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Kiribati), failing states (South Sudan, Somalia), disputed states (Western Sahara) or rogue states (Eritrea, North Korea) are neither members nor observers nor in accession negotiations. Thus the WTO is similarly global in shape as the UN.

[17] Negotiations stalled in the WTO since developing countries negotiated in 2001 the Doha Development Agenda that is still waiting to be implemented.

[18] In 2017 Trump came into office. His "America first" approach put the much disputed Transatlantic Trade and Investment Agreement (TTIP) on hold, but not the idea of mega-regional comprehensive agreements as such.

[19] For decisions of other arbitration bodies, such as of the next important arbitration court of the Stockholm Chamber of Commerce, the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards orders to apply the private law enforcement rule of immediate recognition and enforcement. It is worthwhile to note that the execution of the judgments of the public International Court of Justice in accordance with Art. 94 I UN Charter relies on the mere political will of the states.

[20] Most lawsuits reach the ICSID in Washington; the relevant secretariat in the World Bank

governmental organizations nor even employees of the private arbitration tribunals. It is a small circle of business lawyers from internationally operating law firms or academics from the same field. There is no public participation in the processes, only amicus curie briefs are allowed (a kind of expert intervention that is common in the American justice system). Different arbitral decisions may have contradictory reasoning and results. No binding leading cases exist as in the Anglo-Saxon system, nor a systematizing second instance as there are no appeal structures in the system. Scientists close to the system take over the task of systematizing tendencies in interpretations, scientists that, in turn, often appear as arbitrators themselves. A "bonanza" for commercial lawyers (Eberhardt & Olivet, 2012, p. 2).

Arbitral tribunals extend protection standards even further by interpretation of BITs clauses. A fact that pleases the business community. Awards developed the already broad concept of the *fair and equitable treatment* standard (FET) farther by asking whether a host state has frustrated *legitimate expectations* of investors for profits (Dolzer & Schreuer, 2012, pp. 98 ff. and pp. 131 ff.). For example, a host state bans a certain gasoline additive as a carcinogen. A foreign manufacturer seeks for compensation arguing that such public health provisions lessen future profits thus breaching FET or are to be considered as *indirect expropriation*[21]. In the meantime, innumerable arbitration procedures applied *indirect expropriation* or FET to rule-making of host states oriented to the common good. Whether environment, labor, consumer or health protection, whether minimum wage or tax increases, investors can always complain against host countries, if they see their *legitimate expectations* for profit endangered. The political decision-making space of states, the democratic *policy space* of host states is impaired. In addition, for fear of uncertain outcome of proceedings, financially weak states may refrain from common good legislation to avoid potential burdens for the state budget by compensation payments. A *regulatory chill* may result.

The intertwined regulative architecture of investment law holds yet another *insidious contradiction* (Diaby-Pentzlin, 2015b); gentle CSR may formulate soft

publishes documents, judgments and compensation only if both sides agree. The US government has published certain documents on the internet about its procedures. Not recorded in publicly accessible registers are claims that are submitted to other institutionalized tribunals, such as the ICC in Paris, the Arbitration Court of the Stockholm Chamber of Commerce, the London Court of International Arbitration, the International Center for Dispute Resolution of the American Arbitration Association in New York or the International Arbitration Center of the Austrian Federal Economic Chamber in Vienna. Since 2014, certain transparency rules apply for United Nations Commission on International Trade Law (UNCITRAL) proceedings (if the parties do not exclude them).

[21] On different occasions and with different results investors have brought forward arbitrational cases against import restrictions of harmful gasoline additives referring to NAFTA.

duties for host states and corporations. Hard investment law may latch out sanctions for complying with exactly such duties on the grounds of *indirect expropriation*.

Up to the 2010s (without much public opposition in the North and unnoticed by most of their public international law scientists), a community of international commercial lawyers has been able to develop these lopsided standards for investment protection and ISDS. They are highly specialized scientists but also limited to the ever-lasting interest perspective of Abs & Shawcross. Since trade agreements have transformed to comprehensive trade and investment agreements, and especially since NAFTA has touched on the North/North relation between Canada and the US, the situation has changed. The wide-ranging "comprehensive" TTIP between the US and the EU has become an issue for public opinion that is broadly discussed. And international investment law has become an issue again for negotiation in diverse arenas.

Diverse, but weak counterblows of the present decade

Frustrated counterblow: European jurists follow the mainstream

In 2009, the Lisbon Treaty of the European Union installed a timeline to shift the competency for negotiating and concluding BITs and IIAs from the member states to the European Union itself. The European legal community and with them public international law jurists became conscious of the investment law. Art. 21 (2) Lisbon Treaty commits the EU to a responsible world order, economic interests have to be harmonized with environmental protection and poverty eradication in developing countries. Hopes raised for a more common good friendly design of future European IIAs (Berger & Harten, 2012), for legal coherence (in the terminology of constitutional law: *practical concordance*) between private profit interests of investment protection and sustainable development. For a short time, the "wild teenage years" of investor-state proceedings seemed to end and a "twen" period of moderation and ranking to begin[22]. European jurists seemed open to critical arguments against the one-sidedness of BIT clauses and their business-oriented interpretation in ISDS proceedings; critical to an extent, that members of the tight-knit community of investment lawyers worried: "This lenience of mainstream investment law can prove problematic when new epistemic communities, such as EU jurists at present, take an interest in international investment law and,

[22] Unknown oral contribution at the conference *International Investment Agreements - Balancing Sustainable Development and Investment Protection*, Free University of Berlin, October 10-12, 2013.

from consulting the literature, get a distorted view about the general thinking of investment jurists" (Schill, 2011, p. 899). But it weren't the investment regulations that were reformulated to harmonize with human rights provisions of public international law, for example, it were the European jurists[23] and IIA policy makers that have gotten in line with the one-sided mainstream investment law.

However, the European system still struggles with ISDS. Arbitration follows the private commercial law logic to aim at fast judgments between two private parties. The interpretation of inter-state investment agreements however, belongs to the sphere of public law as public interests and rights of third parties are concerned. Neither are ISDSs democratically constituted, nor are the arbiters experienced in weighing conflicting private against public interests for practical concordance (like the judges of national administrative and constitutional courts, who also deal regularly with cases of property expropriation for public purposes). In states with a established rule of law and well functioning legal institutions there is no reason for litigants to bring their cases to a non-public, incoherent, non-constitutional judicature (Van Harten, 2007). The application of public law and the usual balancing of conflicting interests in national constitutional law would unduly be undermined, thereby calling democratic principles into question (Schneiderman, 2008)[24]. In the current re-negotiations of NAFTA to a US, Mexico, Canada Agreement (USMCA), it is Canada that holds the position to drop ISDS, for Canada suffered financially from ISDS cases in the past. In Germany, even the mainstream conservative German Association of Judges repeatedly protested against ISDS (Deutscher Richterbund, 2017). The EU, however, instead of abandoning the idea of a questionable parallel ISDS jurisdiction altogether, goes for improving it by establishing a standing mechanism for the settlement of international investment disputes, with an appeal mechanism and full-time adjudicators. An UNCITRAL[25] Working Group III is tasked with examining reform of investor-state dispute settlement to a permanent multilateral investment court (EU, 2019).

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[23] Investment law conferences are important to create common understanding of how to sharpen the law and its protection tools. In 2014**,** a conference of European investment law circles didn't reflect on binding obligations for TNC nor e.g. counterclaims for communities for sustainable European IIAs. By contrast, the European experts gave in into the mainstream that obligations of TNC could only happen as gentle, non-binding compliance and CSR (Bungenberg et al., 2014).

[24] Since the first judgements against the Canadian government under NAFTA, these Canadian authors sharply criticized the investor-state procedure.

[25] United Nations Commission on International Trade Law.

Weak counterblows of the investment protection community to civilize

Some states have denounced their BITs, like Ecuador in 2014, holding BITS and arbitration centers as an expression of an unjust moral order. In 2012, South Africa has unilaterally terminated BITs with certain European countries to avoid ISDS over its public policies of black economic empowerment. A domestic Promotion and Protection of Investment Act has been passed in 2015 that now grounds investment protection in domestic regulation rather than in the international law of restrictive and out-dated BITs. Other countries revisit their BITs, reexamine the excessive benefits to foreign investors, and pass out new model BITs to modernize. They try to renegotiate their IIAs to safeguard their *policy spaces* with different results (for an overview Singh & Ilge (eds.), 2016).

UNCTAD (game changer organization in times of the NIEO) today advocates for a huge boost in private foreign investment to come up with the capital needed in order to achieve the sustainable development goals (UNCTAD, 2014). As part of the game UNCTAD doesn't question the necessity of BITS and ISDS as such. However, at least UNCTAD strives for "civilizing" towards more social justice and environmental protection. Leaving the underlying logic of one-sided investment protection untouched, the Investment Policy Framework for Sustainable Development of 2015 sets out to provide "guidance for policymakers in the evolution towards a New Generation of investment policies" (UNCTAD, 2015). For every existent substantial or procedural clause in BITs and IIA, UNCTAD collected and commented on the range of possible options, from most investor friendly to most host state friendly. UNCTAD offers technical assistance for BIT negotiations. Whether this justifies the label "third generation BITs" remains to be seen (Singh & Ilge (eds.), 2016).

Counterblows of some potential for significant change

In 2003, an unnoticed subgroup of the former Human Rights Commission issued a draft for Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights. For the first time since the 1970s, this draft spoke again of internationally binding obligations for enterprises. The draft was shelved. However, in 2014 the Human Rights Council of the UN has established an open-ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights to draft a **Legally Binding Instrument (Treaty).** Some members of the Treaty Alliance (a network of more than 1000 NGOs that lobbies for a binding treaty) shy away from directly applicable fundamental rights obligations in international law for corporations and rather focus on the obligation to protect of states

to ensure the rights of individuals are not violated by third parties such as corporations. Others worry more about a norm-free zone where host states are either unable or unwilling to create and enforce fundamental rights obligations within their jurisdictions. They favour directly applicable human rights obligations also for corporations with the potential for millions of court cases (Deva & Bilchitz (eds.), 2015). In October 2018, negotiations on the Zero Draft Legally Binding Instrument took place in Geneva. The EU refrained from intervening and did not sign the conclusions of the negotiations (European Parliament, 2019).

In 2005, the UN created the new mandate of a Special Representative of the UN Secretary-General on Business and Human Rights. In 2011, the UN Human Rights Council has adopted his proposals as UN **Guiding Principles** on Business and Human Rights (UN doc. A/HRC/17/3). The concept of "protect, respect and remedy" today largely determines the content of CSR and bundles critical voices. Interestingly, these guiding principles do not focus on material standards, but on an in-depth due diligence and access to remedies to those affected by human rights violations. Other voluntary instruments, such as in 2012, the UN Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security, and in 2014, the FAO/CFS Principles for Responsible Agricultural Investment, refer to these new standards. Even if the international community has tabooed direct corporate obligation, in a pragmatic way this three-pillar model of voluntary commitment gets as close as possible to a liability of transnational corporations.

The guiding principles emphasise the responsibility of home states to protect the human rights also outside of their territory, they ask for **extraterritorial application of home state laws** and jurisdiction, so that business entities respect human rights all along the global value chains. It seems that at the present time of extreme imbalance there is general public understanding that human rights and certain environmental standards should be respected globally. It is also in the interest of the Global North to create a level playing field for their corporations. In 2011, the EU Commission called on the member states to implement the UN Guiding Principles on Business and Human Rights by so-called National Action Plans. In 2013, Great Britain presented the first NAP. In 2015, GB passed the Modern Slavery Act as a transparency regulation. By contrast, in 2017, France passed her *loi relative au devoir de vigilance des sociétés mères et d'entreprises donneuses d'ordre* (French law on the corporate duty of vigilance). Also in 2017, the Dutch Parliament passed the Child Labor Due Diligence Law for Companies. Since February 2019, there is mentioning in Germany of a draft Sustainable Value Chains Law (*Nachhaltige Wertschöpfungskettengesetz*).

However, laws with exterritorial obligations for human rights compliance in global value chains are ambiguous. For one, first evaluations see little effects on corporate behaviour (Business & Human Rights Resource Centre, 2019 for Great

Britain; SHIFT, 2018, pp. 44 ff. for France). Secondly, commitment of Global North companies to the respect of human rights falls short of structural challenges. It might even lessen global chances for significant transformation of the imperial living modes, if political and legal efforts are satisfied by just civilizing the global production networks.

Interesting developments of the present law happen by court interpretations. Possibly jurisdiction is (yet) less lobbied. There is a growing number of **strategic cases of national jurisdictions** that turn a social problem into a vision of an actionable court case (Kaleck & Saage-Maaß, 2016). Legal arguments are diverse. Coming from corporate law they can tackle the liability privileges given to a corporate group by the doctrines of *separate entities* and *not piercing the Corporate Veil* (a legal entity is only liable for its own actions and not for actions of its subsidiary). But is it really the rationale of the *corporate veil* doctrine to grant huge privileges of non-liability to a parent company for abuses of human rights violations as well? By contrast, a *substance over form* argument could be held against the doctrine, to allow for a *status liability* in a corporate group. The 9th amendment of the German GWB (antitrust law) of 2017 for example, pierced the *Corporate Veil* and introduced such a liability for the corporate group (according to § 81 III GWB).

Tort law has already created an independent duty of care for the parent companies. For example, when damage is caused by a subsidiary, Common Law imposes an obligation on the parent company, if it has some degree of control over the actions of its subsidiary (by proximity to victim, predictability of the damage and reasonableness of the imposition according to Chandler v Cape (PLC 2012, England and Wales Court of Appeal). With similar arguments, the Landgericht München I (Munich Regional Court 10.12.13, NZG 2014) in a civil proceeding against Siemens for corruption outside of Germany created a duty of care for the Group Management Board to establish an effective compliance system.

Contract law is another strand that could be more acceptable to corporate jurists than piercing their much-defended *Corporate Veil*. Publicly promised CSR obligations, referred to in subcontracting, may be contractually binding on third parties.

In general, all court cases encounter major obstacles, both procedural and substantive (e.g. short limitation periods in tort law). In addition to national due diligence laws with extraterritorial application, a binding treaty on business and human rights with special legal remedies for human rights violation by companies could be very helpful in such cases (for a general overview of the liability of companies for human rights violations, see Krajewski et al (eds.), 2018).

Private law cases that create liability of parent companies for their subsidiaries (or of ordering companies for their suppliers) do not solve the structural problems

either. It would be difficult to prove an offence and damages due to illegal influence on legislative processes to structure the world economic order (by excessive lobbying by corporate capture, for example). However, more and more public litigation is concerned with the structural failure of governments and the European Union, with plaintiffs suing for the adoption of rules and measures against global warming to which states have committed themselves in intergovernmental conventions (The Sabin Centre for Climate Change Law, Columbia Law School, 2019 lists hundreds of climate cases).

Bottom line of the blows and counterblows: Global problems still waiting for global solutions

From the point of view of value-oriented lawyers, we still face the unresolved regulatory problem of containing global companies. Global production is nothing new. However, from the beginning of market and industrial capitalism around 1750, to the 1970s, antagonisms, such as between capital and labour, were carried out within a national framework. Global corporations are still dependent (in a subtle and less subtle way) on state power and services such as infrastructure, legal security or the negotiation and implementation of global economic frameworks. Since the 1970s, however, globalised companies have been able to choose in which countries they operate and under what conditions. Those who resist their logic and pressure lose their foreign investors or are unable to attract them in the first place. The ability of entrepreneurs "to utilize a number of states and thus remain free of the demands of all them, is new", as economic historian Beckert sums up in his history of global capitalism (Beckert, 2015, p. 438).

Also public international law underwent a profound change. Under the impression of the Second World War, the values of cooperation, peace and universal justice stood high. Despite huge financial crises, after decades of unbroken neoliberal market ideology, economic utilitarianism now prevails: value-free but interest-biased. Laws that structured social market economies at least at the national level until the 1970s are now lacking at the international level, such as international antitrust or tax law for example. When it comes to decent living for everyone, one of the most vexing human rights issues of our time is how to protect the rights of individuals and communities worldwide in an age of global business-led production networks. There are other legally binding intergovernmental conventions that obligate states to contain corporate behaviour wherever they can get

hold of them (including extraterritorial application of home state law[26]). But international law lacks a clear hierarchy of norms and courts. In general, the increasing specialisation of partial legal systems, human rights, the environment, world trade or foreign investment is leading to conflicts of norms between the functional areas and is giving cause for concern (Thiele, 2008). Since 2010 BITs and IIAs may incorporate the objectives of environment and human rights protection into preambles (to guide the interpretation of their provisions), but the established international investment protection law still relies only on voluntary CSR for businesses to respect human rights and the environment.

There are some efforts to sanction gross standard violations in global productions chains by means of extraterritorial application of new types of *home* state laws and jurisdictions. The underlying order of the fragmented production to the advantage of the Global North and detriment of the Global South and "mother earth" however, still waits for transformations towards a sustainable world economic order that "leaves no one behind" (motto of the SDGs).

3.2 Particularly questionable foreign investments in agriculture

With rising agricultural prices since 2008, private foreign investments of hitherto unknown dimensions get to the most remote rural areas of Africa (Land Matrix, 2019). Unlike production of industrial goods, agricultural production is not concentrated in certain areas and special economic zones. Industrial good businesses usually operate in a more or less uniformly standardized macroeconomic and urban environment. Agricultural enterprises however, are deeply embedded and linked to the ever-unique conditions of rural village life. Agricultural investments anchor in local rural worlds with their special livelihoods, economies and rules, as well as in the standardized formal and global markets. That makes global agricultural corporations more dangerous for local communities than many other investors. The profit-making intent of agribusinesses can endanger the livelihoods of hundreds of thousands of small farmers and lead to political instability and open conflict (Brüntrop et al., 2013, pp. 4 and 7). It is therefore highly controversial whether the model of agro-industrial production by capital import via large

[26] The Committee on Economic, Social and Cultural Rights, for example, published its concluding observations on the sixth *Periodic Report of Germany* on the implementation of the *International Covenant on Economic, Social and Cultural Rights* on October 12, 2018. In this report, the Committee criticizes that "while welcoming the adoption of the German National Action Plan on Business and Human Rights (NAP), the Committee is **concerned** at the **exclusively voluntary nature of the corporate due diligence obligations** set out in the NAP."

companies and foreign investment (with a circle of small contract farmers as outgrowers around them) is able to bring economic development for all. The may-be 20 per cent of the farmers that are involved in such models may overcome poverty, but what about the other 80 per cent that don't receive private funds nor extension services? The stakes are high in terms of possible negative effects, especially if the state supervision and regulation (which is particularly important for the sensitive land sector) does not reach rural areas. Since 2008, foreign investment has reached dimensions that no longer point to overcoming poverty and creating connection, but to hunger, repression and human rights abuses (Cotula, 2013).

Land use rights of local communities are hardly ever registered. A legal tragedy unfolds. On the one hand, many African countries are still in the process of fundamentally transforming local, orally transmitted land rules to the needs of local economies beyond substitution. They are just building up and testing effective institutions of local land (market) management, often in conflict-ridden environments. On the other hand, with the influx of foreign agricultural investments, special legal rules are already more urgent on top of that. Thus, countries that are still struggling to establish any functioning land management systems at the same time have to come to terms with the growing influence of transnational real estate and agricultural companies; transnational corporations that have all the rights of international investment protection, but due to the legal concepts of separate legal entities, can hardly ever be held accountable for the actions of their subsidiaries.

In the reality of our current fierce investor protection, weak land governance may lead to ISDS procedures. In May 2013, a Brussels-based and a Burundian law firm filed an action with ICSID against the State of Burundi for damages on the ground of a BIT concluded 1989 by Burundi and Belgium. This was the first time it has been argued that land acquired by a Belgian was actually "expropriated by land occupation" of those who still lived on the land. The investor has won his case (Houben v. Burundi ICSID Case No. ARB/13/7, 2013-2016).

It threatens powerless local people, displaces smallholder farmers, turns ecosystems into sewers, if African governments or local authorities simply give land away by "contracts" with powerful investors (actually also with small and medium-sized enterprises, for examples of this trend see Ayamga & Laube (2020) that first exert pressure and corruption on authorities and then have local illiterates vote in favor of investor promises for jobs and infrastructure. There are no international procedures to which domestic citizens or local communities can turn. The most important level to regulate corporate behaviour being the national one, there as well, citizens are left in the lurch in countries with a weak rule of law.

For decades, the agricultural sector is judged to be chronically undercapitalised. Current development cooperation (DC) promotes foreign investments also with the objective to boost low productivity and stagnate production in partner

countries. The UN Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security of 2012 beautifully spell out what people-oriented land management respectfully could look like. The guidelines are a reference point for DC. However, firstly these "rules in the books" hardly have any relevance on the ground. The basic assumption of international investment law is wrong: Law of host states doesn't frame foreign investments pro poor. Either legislation that safeguards interests of the poor in land use is lacking altogether, or, if it does exist, pro poor law enforcement hardly reaches remote rural areas (for the example of land management in Ghana, see Diaby-Pentzlin 2015b, pp. 47-68). Secondly, there are these *insidious contradictions* in present international investment law. Any new land, environmental, health, occupational safety or food security rule in host states may violate existing foreign investments *legitimate expectations* and incur compensation payments. Therefore, sanctions by international law could be the result if host states really were to follow the gentle obligations of the voluntary land tenure guidelines. For example, if host states were to introduce new approval standards for large-scale land acquisitions in order to protect the displacement of their smallholders (land tenure clause 3B.6), this could violate *pre-establishment* clauses. Or, if states were to enact certain water-protection rules by putting a cap on groundwater use (land tenure clause 3), this could violate *fair and equitable treatment* by frustrating *legitimate expectations*.

To preserve *policy space* against the *regulatory chill* and to avoid *insidious contradictions*, legal scientists developed a "public interest clause for food security on an international treaty on investment", for BITs, IIA and concession agreements (Häberli & Smith, 2014, p. 222):

"Nothing in this Agreement shall be construed

1. To prevent a Contracting Party from taking measures necessary
   (1) For the protection of its national and local population's food security as defined by relevant international organisations.
   (2) For the conservation of exhaustible natural resources, water, and livestock adversely impacted by the investments carried out by an investor of the other Contracting Party.
   (3) For the fulfilment of a Contracting Party's international obligations relating to human rights as defined in relevant international treaties and standards.

For ensuring the enjoyment of all legitimate claims to land by rightful individual or communal landowners…."

BITs or IIA haven't taken up this civilizing tool yet. Neither has UNCTAD. Some in the secretariat of UNCTAD (beacon of the NIEO) initiated a report on agriculture, calling for a paradigm shift in agriculture in the sense of the IAASTD

Agriculture at a Crossroads report (IAASTD & UNEP, 2009); Wake up before it is too late: Make Agriculture Truly Sustainable Now for Food Security in a Changing Climate (UNCTAD, 2013). However, the UNCTADs investment division does not work in that line. This division treats agricultural investment as any other investment. UNCTAD did not integrate the public interest clause in her tool Investment Policy Framework for Sustainable Development (UNCTAD, 2015) nor any other clauses specifically directed to the sensitive agricultural sector.

4. International Intellectual Property for Plant Varieties and Seed Marketing Rules – Ongoing Neo-colonial Endeavours

It took Europe centuries to transition from medieval subsistence agriculture with feudal obligations to the profit oriented industrial agriculture of global agribusiness today. Up to 2008, in many African countries local land use rules were often still oriented towards moral subsistence agricultures without the Global North concept of "property". If at all, Global North concepts of labour law would be more appropriate for land-based rural livelihoods, where up to not so long ago, "social" motives of reciprocity and redistribution dominated over "economic" motives of material gain and greed (Polanyi, 1944, chapter 4)[27]. While Europe had many centuries to enable intrinsic changes, Africa is hardly allowed a few decades to meet extrinsic demands. From the investors' perspective, national and local law (as the bedrock for the architecture of investment protection) has to offer the concept of *property* and provide its protection. While there still might be legal pluralism of state and local rules, in practice, the notion of *material property* on land has successfully been implanted over the last two decades. Land is transferrable, be it by change of ownership or be it by lease (Diaby-Pentzlin, 2015b, pp. 54 ff.).

Industrial agriculture comes in package: Large scale and ever more mechanised and digitalised production mode; "improved" commercial seeds for a so-called "green revolution"; legal rules that are tailored to the needs of the industry; experts provided by large agro-chemical corporations like Bayer (Monsanto), that dominate global "food security" discourses and, last but not least, the capturing of our minds by funding universities and research.

Of particular interest in the context of investment law are the tailored legal rules: For one, material property rights for free access to and transfer of irrigable land and for two, intellectual property rights for the commercial seeds. The industry labels industrial seeds as "improved varieties". More appropriate would be the term "high-reaction" varieties, as such seeds need massive inputs of water, pesticides and fertilisers. The "scientific" breeding of the often hybrid seeds (high output only of the first generation, no saving for and distribution in the next cycle biologically possible) or genetically modified seeds usually takes place in laboratories with special technology from the Global North (for an overview Banzhaf, 2016, pp. 48 ff.). As the development of one plant variety may cost up to 136 Millions of US $ (ETC Group, 2017, p. 19), agribusiness needs to cash in for that.

[27] Or in other words, integration in a social and supportive environment (Sarr, 2016).

In 1961 without participation of the Global South (at a time were many African states just de-colonised), the International Union for the Protection of New Varieties of Plants was founded in Paris under the French acronym of UPOV[28]. The convention was revised in 1972, 1978 and 1991 responding to the changing needs of agricultural industries. Participating states are obliged to introduce respective private law for intellectual property protection. Today, only seeds that comply with the so-called NDUS standards are registered, that means varieties have to be **n**ew, **d**istinct, **u**niform and **s**table, qualities that are essential for automated industrial production. A monopole-use of up to 25 years (according to the varieties) is granted upon registration. This intellectual property right then can be sold by licence to third persons (for an overview over the highly specialized subject matter see Würtenberger et al. 2015).

In the Global North these private law rights are flanked by public laws of seeds marketing. In total response to the needs of industrial agribusiness, only seeds complying with the NDUS standards (and additionally with *value for cultivation and use*) are certified, catalogued and then allowed to be sold on the market. Incidentally, in the Global North agro-ecological seeds that are produced by open pollination and may show variances (and thus resistances that are wished for) can be instable. They can't, thus, acquire a monopoly by private law, and it would be illegal to sell them by public law. Ecological seed producers often operate in the grey zone of the exceptions given for so called "conservation varieties" being produced in small quantities and for local markets only (Banzhaf, 2016, pp. 101 ff.).

Certain ideas, certain solutions made sense at certain places and certain times. But if continued, will they hold the future? Over the last hundred years, the agricultural productivity indeed grew enormously in the Global North. But so did the loss of biodiversity. Since 1900, 75 per cent of agricultural plant species have disappeared (FAO, 2004). Intensive meat and dairy industries have lead to groundwater pollution by nitrates. More than 20 per cent of the planet's greenhouse gas budget is due to agriculture (Environment Reports Food Matters, 2019). The industrialized agriculture destroys its very own foundations. The discussions in the Global North about agricultural transformation towards more farmer-oriented and ecological ways are heated.

For about 10 years, agribusinesses have been establishing their structures in Africa on a bigger scale. World Bank, USAID and other development organisations finance special seed programmes to introduce the industrial seeds of the industrial food chains (AFSA & GRAIN, 2015). However, most farmers of peas-

[28] L'Union internationale pour la protection des obtentions végétales.

ant food web (ETC Group, 2017 introduced the pronounced denominations "industrial food chain" and "peasant food web") still save, exchange and replant their free "social" farmers seeds that don't function in the "economic" logic of monopoly and licence. Nevertheless, African states are in the process of joining UPOV 91, but on regional levels, without national parliamentary negotiation processes. Regional organizations, to whom African states have transferred certain sovereign rights, deal with the processes. The francophone African Intellectual Property Organization (OAPI) joined UPOV 91 in 2014, the Anglophone African Regional and Intellectual Property Organization (ARIPO) is in the process of joining. There are no negotiations to adapt UPOV 91 to an African agriculture that is still based on farmer's seeds; no negotiations to integrate profit-sharing, consultation and safeguarding clauses for farmers seeds that are required by other international instruments like the FAO International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA) of 2004[29], the Convention on Biological Diversity (CBD) of 1993, or the recent UN Declaration on the Rights of Peasants and Other People Working in Rural Areas of 2018.

There are also manifold clauses in BITs and IIA to obligate signing host states to guarantee intellectual property rights and to join UPOV 91 (GRAIN, 2014 and GRAIN 2016). There might be arguments for African states to accommodate the needs of foreign investors for intellectual property protection by *private law*. However, it is difficult to grasp the reason why African states would opt to criminalise their farmers' seeds by introducing *public* seed marketing rules mirroring the Global North. Again, regional organisations like the Economic Community of West African States (ECOWAS) or the Southern African Development Community (SADC) push the legislation processes, shunning local or national negotiations. In collusion, developing organisations also give their support to regional

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[29] Article 9 of FAO ITPGRFA stipulates:

"9.2 The Contracting Parties agree that the responsibility for realizing Farmers' Rights, as they relate to plant genetic resources for food and agriculture, **rests with national governments.** In accordance with their needs and priorities, each Contracting Party should, as appropriate, and subject to its national legislation, take measures to protect and promote Farmers' Rights, including:

a) protection of traditional knowledge relevant to plant genetic resources for food and agriculture

b) the **right to equitably participate in sharing benefits** arising from the utilization of plant genetic resources for food and agriculture; and

c) the **right to participate in making decisions, at the national level**, on matters related to the conservation and sustainable use of plant genetic resources for food and agriculture

9.3 Nothing in this Article shall be interpreted **to limit any rights that farmers have to save, use, exchange and sell farm-saved seed**/propagating material, subject to national law and as appropriate".

organisations, the main one being the Alliance for a Green Revolution in Africa (AGRA), established in 2006 and funded ever since mainly by the Bill and Melinda Gates foundation (ASFA & GRAIN, 2015, pp. 16 ff.). It seems somewhat cynical: Whereas the Global North timidly shifts towards transformations to agroecology (and thus partly also towards the peasant food web), the Global South implements laws adapted to the needs of the industrial food chain.

In a world where the population depends up to 80 per cent on agriculture (and not to a mere 1 per cent like in the Global North), the private property protection for seeds by regional law-making may be labelled as "inappropriate processes and unbalanced outcomes" (Haugen, 2015); or as violation of procedural human rights for *free prior informed consent* of local communities according to different human rights instruments (for example Art. 9 ITPGRFA, see footnote 27). The African Union (as well funded and influenced by donor perspectives) also promotes "improved seeds". So it is left to networks of NGOs to analyse, criticize and to come up with legal alternatives to safeguard the farmers' seeds system from being taken over by the commercial seeds system (FIAN & Global Convergence of Land and Water Struggles – West Africa, 2018).

5. Outlook: Critical Science for Sovereign Visions

According to ecologists, the twenty-first century presents us with challenges of new dimensions, scale and scope. Less needed are ideologies of the "left" or of the "right", needed more are systemic thinking and holistic approaches to grasp interdependencies. Critical thinking can question certainties from different perspectives and break up common assumptions. Who defines the current problems? Who has the power to put a problem as a problem? Who has money to finance research?

Mainstream social science looks for knowledge ex post, thus running the danger of treating science as an art for art's sake. Legal science deals with law, which in the end is there to guide and determine human and corporate behaviour. Wanting to intervene is, thus, in the "DNA" of jurists. Different from social science, scientific legal analyses, legal policies and law as tools for advocacy and direct intervention in law-making, court decisions or execution are close. Whereas critical jurists value the knowledge of social scientists for holistic views, social scientists could embrace the more interventionist attitude of jurists still some more. In times of need for significant changes, it is important to aim for impact (not just knowledge) using science as a tool to serve society in developing solutions for urgent problems. Both scientific communities need more input by hard sciences specialists in ecological systems in order to overcome ecological illiteracy. Outcomes will be different if modern science does not only link or pair different sciences in an inter-disciplinary way anymore, but instead looks at conflicts in the real world and integrates all stakeholders into the process of research in a "trans-disciplinary" way.

If politics spell out objectives, jurists come up with any tool. It took three decades and the turning of tens of thousand of legal screws to shape the current utilitarian economic world order. This can be unscrewed again. Led by the warnings of science, ecologists and other experts already have presented pathways to implement the value of sustainability broken down to the sectorial transformations of energy, mobility or agricultural systems, often suggesting less globalised and more decentralised ways of production. Critical jurists provide the respective legal tools (for a sustainable European agricultural and food policy for example, see De Schutter[30], 2019). "For every $ 1 consumer pay to Chain retailers, society pays another $ 2 for the Chain's health and environmental damages" (ETC Group, 2017, p. 6). There also are overarching proposals to reform trade, tax and environmental laws to factor in the cost of externalities.

[30] Olivier de Schutter, professor of human rights, served as the United Nations Special Rapporteur on the right to food from 2008 to 2014.

First Nations thinking nudges rights-centered environmental protection with new concepts of property to de-commodify natural resources: Land and water are not to be owned as legal objects, but are defined as legal entities on their own rights. In 2008, Ecuador recognized the constitutional right of Mother Earth. In 2010, Bolivia adopted the Law on the Rights of Mother Earth. More recently, the Parliament of New Zealand granted the country's third-longest river, the Whanganui, the legal rights of a person, after a 140-year campaign by the Whanganui Iwi people (BBC News, 2017).

There is no win-win-win. Significant change demands major societal negotiations to reorganize the present *mal vivir* of imperial modes and global productions networks. Politically, the greatmind shift to value the social as much or even over the economic is still to happen. But there is no need for a blueprint to begin with incremental radical transformations wherever the opportunity shows (Göpel, 2016). The global task to "transform the world" according to the Sustainable Development Goals brings on exciting times for creative researchers, enterprises and activists to work on truly sustainable technologies[31], economic modes and legal tools. In the African Global South critical thinking can inform societal negotiations. Saying "no" to Northern funds and ideas of modernity more often, searching for adapted visions (Sarr, 2016), like the Latin American "post extractivism" (Acosta, 2017), for example. Pursuing economic and food sovereignty like in the times of the NIEO could result in political guidance for an entirely different investment law. An investment law that strives for more than just "do no (or less) harm" to people and planet, and is part of a much more exciting "do good" dimension.

[31] For example, already in 2002 Braungart & McDonough introduced their „cradle to cradle" concept to "remaking the way we make things".

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