UNIVERSITY OF ESSEX
DISSERTATION

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LLM/MA IN: MA Theory and Practice of Human Rights
STUDENT'S NAME: Stephen Rabenlehner
SUPERVISORS'S NAME: Dr Tara van Ho
DISSERTATION TITLE Human Rights abuses as "planned misery"? Exploring foreign investment protection law's colonial roots and how its application is limiting state's possibilities to fulfil their human rights obligations, especially economic, social and cultural rights.

COMMENTS: (PLEASE WRITE BELOW YOUR COMMENTS)

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Name: Stephen Rabenlehner
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Introduction

This thesis seeks to explore the notion of human rights abuses as "planned misery". Legal scholar Susan Marks makes use of this concept as she explores the root problems of human rights abuses.[1] She finds that history is a product of social actions, not an unchangeable entity, and thus can be remade.[2] This is an important insight that the thesis seeks to implement into its approach to the notion of "planned misery", which according to Marks does not necessarily entail deliberately inflicted misery (though it can) but rather refers to "misery that belongs with[in] the logic of particular socio-economic arrangements."[3] The author finds that the foreign investment protection regime can be understood as being part of such a "particular socio-economic arrangement" which eventually causes human rights abuses. This perception is reinforced by investment protection' capacity to obstruct and limit host state's possibilities of (progressively) implementing economic, social and cultural human rights for their citizens. This especially concerns the developing countries of the global South. Their recent history of socio-economic (and political) struggles cannot be completely understood without addressing the wider historical context of colonial exploitation, that laid the foundations for many of these countries' hardships.

This is why the thesis includes a short analysis of the intellectual foundations that helped justify European colonial imperialism: Enlightenment and the ideas of development and infinite progress. These 18th century Enlightenment paradigms, which were racially and culturally biased against non-European societies, are still permeating today's discourses of "development" and the global South in general. To support this claim, the thesis will try to establish some form of "genealogy" of these ideas that have influenced Europe's (and the global North's) discourse of the global South for the last three centuries until today.

Engaging with the historical (and thus colonial) roots of international law, and especially international foreign investment protection, aims at highlighting that these norms were created to fulfil a specific purpose: the establishment and preservation of European (economic) dominance.

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1 Susan Marks, 'Human Rights and Root Causes', *Modern Law Review*, no. Issue 1 (2011): 57–78.

2 Ibid.: 74.

3 Ibid.: 75.

While the focus of this analysis is on the global North's actions, it should not be misconstrued or misinterpreted as a general acquittal of global South leaders' wrongful acts that sometimes facilitated and exacerbated the effects of the colonisers.

Being aware that it is beyond the scope of this thesis to fully engage with all the issues raised (and even less so with those solely implied), it seekst to contribute by outlining how the former colonising countries of Europe largely contributed to the creation of what is known today as the "Third World". This was not a "necessary" or "natural" course of development but happened through material exploitation on the one hand and discursive dominance on the other – always asserting that European insights and culture were the pinnacle of humanity. Echoes of this can still be found in the assertion of "Western-style" models of reshaping of global South countries' economy, agriculture and cultural institutions.

The thesis is structured as follows:

Chapter 1 briefly formulates the methodological approaches used in this thesis.

Chapter 2 will address the ideas of "progress" and "human development" that have been brought forward by (liberal) European thinkers from the 18th century onwards. One might rightfully ask, how this is important in the context of this thesis and what this has got to do with investment law and human rights. The aim of this chapter is to establish that the concepts that have been elaborated during that time and which have been used in order to justify colonial rule, enslavement, land grabbing and so forth, still inform today's discourse even though they have been modified.

Chapter 3 will take a look at the "creation of the Third World". This is important in order to better understand the current situation and difficulties of former colonies. While today's foreign investment is often justified as a necessity in order to help countries from the global South in their "development", capital-exporting states from the global North rarely seem to ask themselves why these countries are in need of development aid in the first place. To better understand this, the first section of this chapter will look at accounts of coercion and material exploitation that the colonies and protectorates had to suffer. The second section will look at how what we know as the "Third World" today has been rendered poor through the discourse that surrounded former colonies after the second World War. This definition of the global South as economically poor laid the foundation for the claim that foreign investment and

privatisations were these countries' best chance of escaping poverty.

Chapter 4 will take a look at foreign investment protection law's colonial roots. This means addressing the role that corporations have had in the colonial venture and exposing how practices established in this context have influenced today's foreign investment protection regime. It will furthermore look at global South resistance to these standards, through the invention and application of the Calve Doctrine and Clause.

Chapter 5 is going to engage with the question of how today's foreign investment protection regime is influencing states' obligations to fulfil their economic, social and cultural rights. Selected cases will be analysed in order to support this claim. The aim is to highlight that the current foreign investment protection regime, with its bilateral investment treaties (BITs) and arbitration system, is set up to clash with the government of developing states that seek to fulfil their economic, social and cultural rights.

The conclusion will conclude this thesis.

1 Methodology

The following is a hermeneutic thesis that mainly draws its analytical approach from three disciplines. These include sociology, Third World Approaches to International Law (TWAIL), and critical discourse analysis (CDA). Why these three disciplines?

Sociological approaches to law challenge the general assumption that the law is objective and free from power relations or (political) interests. On the contrary, some sociological scholars argue that law itself is a socially constructed phenomenon which is "shaped by social conditions, including who makes the law […]."[4] Utilising sociology to look at law can eventually help to look behind its presumed objectivity and help carve out the drivers that have led to their establishment. One of the perspectives that has come out of the sociological approach to law (domestic and international) has been the so-called "social-conflict approach". This approach assumes that there exists a constant inequality when it comes to the distribution of resources in society and that this uneven distribution leads to struggle between the different parties.[5] Based on this assumption, law is seen as resource that is being used by the dominant groups in order to maintain social structures that privilege them and to consolidate the *status quo*.[6] While some sociologists argue that the social-conflict perspective emphasises the fragility of the social structure and disorder,[7] findings of this perspective can in fact become important components in the creation of a more inclusive and therefore more stable social structure.

A critical approach to law which is highlighting international law's inherent power structures and aims at the creation of a more inclusive international legal regime is the Third World Approach to International Law (TWAIL). TWAIL is based upon the premise that international law is not apolitical, as legal positivists would have it, but was essential to the European

4 Charlotte Ku, 'Understanding How Law Functions', ed. Adriana Sinclair, *International Studies Review* 14, no. 1 (2012): 188.

5 Moshe Hirsch, 'The Sociology of International Law: Invitation to Study International Rules in Their Social Context', *The University of Toronto Law Journal* 55, no. 4 (2005): 906.

6 Ibid.

7 George Ritzer and Douglas J. Goodman, *Modern Sociological Theory*, 6th ed (New York: McGraw-Hill, 2004), 119–20; Richard Münch, *Sociological Theory* (Chicago: Nelson-Hall Publishers, 1994), 189–90.

imperial expansion which eventually subordinated, dominated and exploited non-European societies.[8] According to Mutua's seminal article "What is TWAIL?", the discipline is driven by the following three interrelated main objectives.

Firstly, TWAIL engages with international law in order to "deconstruct, understand and unpack the uses of international law as a medium for the creation and perpetuation of a racialized [sic] hierarchy of international norms and institutions that subordinate non-Europeans to Europeans."[9] Secondly, it seeks to establish and work towards an "alternative normative legal edifice for international governance"[10], in order to eventually reconcile those traditionally excluded by international law (its "Others") with its practice.[11] Thirdly, TWAIL also understands itself to be political, as it seeks to harness its scholarship and policy to eradicate the conditions that keep countries from the global South from exploiting their full potential.[12] Despite TWAIL's critique of the current international legal order it does not wish to completely abandon it. Through its engagement with international law in a manner that brings the historical reality of colonialism and its aftermath to the fore, it creates a space in which colonialism's effects can be scrutinised in order to overcome them. Eventually, the aim is to have an international legal order that is egalitarian and truly universal, and not just a "globalised Eurocentric" legal framework. In order to achieve this goal, international law has to accommodate the voices of the global South into its discourse.

The last method that will feature prominently in this thesis is critical discourse analysis (CDA). This approach will be especially important when it comes to analysis of the concepts of development as "human progress" and the modern discourse of development as "alleviation

8 Makau Mutua and Antony Anghie, 'What Is TWAIL?', *Proceedings of the Annual Meeting (American Society of International Law)* 94 (2000): 31.

9 Ibid.

10 Ibid.

11 Luis Eslava and Sundhya Pahuja, 'Beyond the (Post)Colonial: TWAIL and the Everyday Life of International Law', *Verfassung Und Recht in Übersee / Law and Politics in Africa, Asia and Latin America* 45, no. 2 (2012): 195; James Thuo Gathii, 'TWAIL: A Brief History of Its Origins, Its Decentralized Network, and a Tentative Bibliography Special Issue: Third World Approaches to International Law', *Trade, Law and Development*, no. 1 (2011): 43.

12 Mutua and Anghie, 'What Is TWAIL?', 31; Luis Eslava and Sundhya Pahuja, 'Beyond the (Post)Colonial', 195.

of poverty". Like TWAIL, CDA draws from sociological insights[13] when it concerns itself with the study of relationships of dominance, power, control and discrimination in the structures of language.[14] CDA assumes that discourse is constitutive of the social and also socially conditioned.[15] This is why it is looking at the social and political impact that language has and at who is able to actively participate and contribute to discourses.[16] Consequently, it also analyses who is on the receiving end of these effects, without sufficient means to engage in the discourse, and therefore "passive". Since those who are able to participate in and determine the contents of the discourse are in a position of power, CDA looks at the role that discourse can have on the production, re-production, and challenge of this dominance.[17] Dominance, in this context, is to be understood as "the exercise of social power by elites, institutions or groups, that results in social inequality, including political, cultural, class, ethnic, racial, and gender inequality."[18] One can already see the similarities that this approach shares with TWAIL, as both are concerned with the narratives and matters of those usually left out of the creative process – law's and society's "Others" – and both are not shying away from merging their scholarship and research with political aims of social change and inclusion.[19] Given CDA's preoccupation with social dominance and social power, it highlights that power does not only have to take on the form of recourse to force but that it can also be more subtle, as is the case with "cognitive power". Exercising cognitive power generally takes on the form of "persuasion, dissimulation or manupulation, among other strategic ways to *change the mind of others in one's own interest* [original emphasis]."[20] This is where CDA seeks to engage because these actions are dependent on written and spoken words that will often try to conceal the inherent power relations and attempt to make the dominance appear

13 Jan Blommaert and Chris Bulcaen, 'Critical Discourse Analysis', *Annual Review of Anthropology* 29 (2000): 451.

14 Ibid.: 448.

15 Ibid.

16 Ibid.

17 Teun A. van Dijk, 'Principles of Critical Discourse Analysis', *Discourse & Society* 4, no. 2 (1993): 249.

18 Ibid.: 249-50.

19 Ibid.: 252.

20 Ibid.: 254.

"natural".[21] This naturalisation of power structures and dominance has been an ever-present theme and cornerstone in the European justification of the imperial colonialism from the 18th century onwards until the 20th century.

21 van Dijk, 'Principles of Critical Discourse Analysis', 254.

2 A short Genealogy of the concept of Development

This chapter takes a look at 18th and 19th century European intellectuals' development theories and theories of linear historical progress, and traces how they have been turned into conceptions of European supremacy. It is relevant to analyse development theories because "the conception of universal history as the ever-advancing development of human capacities has been fundamental to both the self-understanding of the modern West and its view of its relations to the rest of the world."[22] By doing so this chapter attempts to show that the underlying concepts, which were eventually also used to justify imperial-colonial rule, still have an impact on today's understanding of "development" and international relations in general.

While the main aim here is not to generally discredit the Enlightenment, an effort will be made to draw attention to Enlightenment's "Others" and its interaction with Europe's imperial ambitions. Engaging with this school of thought's underbelly will eventually bring forth prominent figures of the Enlightenment era who asserted that it was the European's duty to lift the allegedly "savage" people of the newly conquered colonies up.

Early Christianity's renunciation of the then-prevalent circular understanding of history[23] rendered possible a linear view of history, which was the necessary base for the advent and following dominance of the ideology of progress that took hold by the end of the 17th century.[24] Despite the fact that "development" (and growth) has been an integral part in the Western tradition, it has been accompanied by a sense of a limit and ensuing decline. In Greek tradition, the limit of growth was assured by the ensuing decay and due to its circular understanding of history, there was an expected return of the same. Early Christianity's turn towards a linear conception still kept the concept of development in check, as there was an

22 Thomas McCarthy, *Race, Empire, and the Idea of Human Development* (Cambridge: Cambridge University Press, 2009), 1.

23 This understanding was mainly influenced by Aristotle's theory of the cyclical character of nature. He argued that birth, growth and decay were stages in a perpetual series of new beginnings, thus allowing for change and the return of the same to exist at the same time. See Gilbert Rist, *The History of Development: From Western Origins to Global Faith*, 3rd ed (London: Zed, 2010), 31–32.

24 Rist, 34.

ever-present awareness of a necessary decline after the optimum had been reached.[25] These barriers were eventually overcome by the beginning of the 18th century[26] and the concept of development as "human progress" eventually became intrinsically connected with Enlightenment thinking.[27]

Scottish Enlightenment philosopher Adam Smith was one of the first to provide an early model of an elaborated societal development framework.[28] Since his work provided the foundation for subsequent conceptions, it deserves particular attention. Contrary to most of his contemporaries and successors, Smith's analysis of non-European societies was quite tolerant and cautiously avoided assuming European superiority with regards to culture and morals.[29] Surprisingly, Smith did not morally rank societies and did not use his theory to support Europe's colonial expansion.[30] There was, however, a ranking of societies on a socio-economic basis that depicted European commercial societies as most developed.[31] Given that his analysis did not lead him to make moral judgments or pejorative assumptions about the societies that were in an earlier stage of development, political science scholar Pitts argues that his approach to non-European societies was a benign one.[32] Smith's legacy,however, the categories and historical arguments that supported his work, eventually became the blueprint for later theories that justified colonial expansion based on the claim that it was Europe's duty to "civilise" the "backward" societies.

These subsequent 19th century theories of "progress" and (human) development were not as benign as those of the 18th century, exemplified by Smith, in part because of their generally disparaging attitude towards societies that they deemed on a lower stage of development.

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25 Rist, 37.

26 Ibid.

27 Elizabeth A. Pritchard, 'The Way out West: Development and the Rhetoric of Mobility in Postmodern Feminist Theory', *Hypatia* 15, no. 3 (2000): 48.

28 Jennifer Pitts, *A Turn to Empire: The Rise of Imperial Liberalism in Britain and France* (Princeton, NJ: Princeton Unversity Press, 2005), 25.

29 Ibid.

30 Ibid.

31 Ibid.: 26.

32 Ibid.: 25-26.

This attitude was further reinforced by the emergence of “social evolutionism”, which “firmly rooted in the popular imagination the supposed superiority of the West over other societies.”[33] One of the theory’s most important representatives is Herbert Spencer, who coined the phrase “survival of the fittest”.[34]

According to Spencer’s “law of growing complexity”, living organisms, much like social organisms, pass from a homogeneous to a heterogeneous state and from lower and formless to higher, more complex states.[35] Accordingly, he presumed non-European societies to represent the lower stages, while Europeans accounted for the more complex stages of humanity.[36] This combination of social theory with natural science exemplifies another important shift in the development paradigm as it tries to assert that socially created relations of power are in fact to be found in nature itself.[37]

While there were different interpretations as to what the specific stages were that societies had to go through in order to be considered “civilised”, there seemed to be agreement on crucial points. One of these was that societies other than European ones could not possibly develop at the same speed as the former, which gave Europe a clear lead.[38] European countries based their “indisputable lead” on the greater size of production (courtesy of colonial exploitation), its strong emphasis on reason (which was also used to exclude women from the public/political realm) and its scientific and technological discoveries.

According to development scholar Rist, one of social evolutionism’s effects on a theoretical level were that non-European societies were no longer considered for themselves but merely became a reference point for Western society and Western society became the unattainable goal that these countries had to develop towards.[39] Reducing the colonised peoples to points of reference also deprived them of their own history and culture, which J. S. Mill, among

33 Rist, *The History of Development*, 40.

34 Ibid.: 42.

35 Ibid.

36 Ibid.

37 Ibid.: 44.

38 Ibid.: 40.

39 Ibid.: 43.

others, expressed in assertions like the following: “The greater part of the world has, properly speaking, no history […].”[40]

On a political level, the rise of social evolutionism has served as a legitimate justification for the increasing colonial ventures in the 19th century. Hailing from its ostensible position of superiority, Europe styled itself as generous coloniser, “helping” so-called “backward” countries to reach their developmental potential.[41] Violence was an acceptable means to this end, which J.S. Mills notoriously proclaimed as follows: “Despotism is a legitimate mode of government in dealing with barbarians, provided the end be their improvement, and the means justified by actually effecting that end.”[42]

Even critics of European colonialism and imperial conquest like Adam Smith, Jeremy Bentham, Immanuel Kant and the Marquis de Condorcet[43] still understood non-Europeans to be on a lesser stage of development. This led to assumptions of non-Europeans being unable to make full use of their capacities and in need of tutelage, as French intellectual Condorcet highlighted by claiming that “these vast lands […] need only assistance from us to become civilised [and] wait only to find brothers amongst the European nations to become their friends and pupils”.[44] One could actually already conceive of this as a precursor to the modern concept of “development aid”.

Considering the views on development elaborated by former UK prime minister Tony Blair in his 2013 speech “From Dependency to Self-Sufficiency”, one can find a similar theme emerging. According to him “aid will remain important to Africa in certain circumstances [and] we in the developed world must shift our focus to building the capacity of African governments to take their destiny into their own hands, to keep expanding their economies, and to ensure

40 John Stuart Mill, *On Liberty*, ed. David Bromwich and George Kateb (New Haven and London: Yale University Press, 2003), 135.

41 Rist, *The History of Development*, 43.

42 Mill, *On Liberty*, 81.

43 Pitts, *A Turn to Empire*, 5; Rist, *The History of Development*, 39.

44 Jean-Antoine-Nicolas de Caritat Condorcet, *Sketch for a historical picture of the progress of the human mind*, Library of ideas (London: Weidenfeld and Nicolson, 1955), 177.

that the benefits of growth reach all people."[45] While it can be argued that his main concern is to see African governments become more stable and independent[46], the similarities to Condorcet's quote are visible. Like the former, he does not question the fact that it will be thanks to Western support and capacity building that these countries will develop, making the peoples of Africa Europe's "friends" and more importantly, its "pupils". This again echoes the prominent 19th century assumption that non-European societies were child-like, incapable of using their full rational capacities, and therefore in need of tutelage by the European colonisers.[47]

While there are many more examples like this that could be analysed, it is beyond this thesis to do so, as this section is mainly concerned with giving the reader a general understanding of how the 18th century concepts of development (and its imperial connotations) are still present today. This causes Rist to proclaim that "'Development co-operation' […] comes in a straight line from the ideology of the Enlightenment".[48]

Why is all of this relevant in the context of foreign investment protection laws? It is important to consider the history of developmental thought because these ideas also informed the generation of international law during the colonial era. Europe's assumption of superiority led to its exclusion of other voices that could have informed international law, and the imposition of standards that were favourable for the colonising countries. A prominent example of this attitude can again be found in J.S. Mill. He argued that "reciprocity, mutual respect for sovereignty, and the law of nations should govern relations among civilized nations, while relations between civilized nations and "barbarians" cannot, properly speaking, be considered political relations."[49]

Even though some of these laws eventually did become "international" law, it can be argued that the supposedly universalism of these laws is a "particularistic" one. Latour describes the

45 Tony Blair and Kate Gross, 'From Dependency to Self-Sufficiency (SSIR)', accessed 11 August 2019, https://ssir.org/articles/entry/from_dependency_to_self_sufficiency.

46 While he is addressing these issues, he is not considering the possible impacts that Britain's colonial rule and British economic interests in the region have had on some of these governments. See Rist (n20): 74.

47 Thomas McCarthy, Race, Empire, and the Idea of Human Development: 76.

48 Rist, The History of Development: 39.

49 Pitts, A Turn to Empire: 143.

phenomenon of a so-called “particular universalism” as “one society extend[ing] to all others the historically constructed values in which it believes.”[50]

3 The Making of the 3rd World

This chapter will challenge assumptions that the current state of global South countries has been an inevitable “natural development” by highlighting some of the external factors that have caused this development and partly continue to do so. Doing so, the analysis will draw from Marks concept and understanding of “planned misery”, outlining how colonialism has created the foundations for a “particular socio-economic arrangement” that promotes “misery”.[51] It will also take a twist on Fanon’s realisation that Europe, due to its exploitation of raw materials in the colonies, is actually a product of the so-called Third World.[52] By implication, this could also mean that the Third World is a product of Europe, if one considered this to be the other side of the same coin.

While it is important to consider external factors that have led to some of the current difficulties that countries from the global South are facing, this thesis is not trying to deny or condone the wrongdoings on the part of global South leadership, that have eventually exacerbated some of these detrimental effects. It is, however, beyond the scope of this analysis, to address these factors as well.

The first section of this chapter is going to look at how material exploitation by the colonising powers has affected the former colonies and left them with an economic disadvantage as soon as they became sovereign states. This disadvantage eventually manifested itself in a limited or no control over natural resources, borders, and accession to contracts, just to mention a few.

The concessions that European corporations have been granted in order to exploit the natural resources of colonies have often been acquired by use of force (“gunboat diplomacy”) or due to the signatories’ lack of understanding and still affect some of these countries today. The

50 Bruno Latour, We Have Never Been Modern (Cambridge, Mass: Harvard University Press, 1993): 105.

51 Marks, ‘Human Rights and Root Causes’, 75.

52 Frantz Fanon, *The Wretched of the Earth*, trans. Constance Farrington (New York: Grove Press, 1963), 102.

raw materials from the colonies consequently fuelled Europe's ascension and growing industry at the expense of the former, discouraging the emergence of national industries.
The second section is going to look at the dynamics of power within the discourse surrounding the Third World. While global North countries have not only dominated this discourse in their own hemisphere, hardly incorporating global South voices, they have also impacted the discourse in the global South, eventually affecting the self-perception of these peoples. The concept of "development" again features prominently in this context but with a different meaning. After the second World War, countries in the global South have become to be known as "underdeveloped" and the term "development" underwent two major changes. On the one hand it became a transitive concept, which meant that it became "an action [that could be] performed by one agent upon another"[53] and alongside this change, it was mainly understood as "reduction of poverty". Consequently, the framing of two thirds of the world as (econonomically) "underdeveloped" also transformed its inhabitants to "poor peoples". Conceiving of poverty as an economic problem and establishing annual per capita income as its new unit of measurement called for economic growth as the problem's solution.

3.1. *The Making of the 3rd World through material Exploitation*

This section is going to give the reader a short overview of the material exploitation that former colonies and other non-European countries have been subjected to. This is important in order to better understand why these countries are considered "less developed", "developing" or "underdeveloped".
While colonialism might have had various effects on those subjected to it and the alleged "civilisation" and development of non-European peoples had been used as a justification at home, it should be highlighted that European powers were aiming at the exploitation of colonial resources in order to generate a massive transfer of wealth from the periphery to the home countries.[54]

53 Rist, *The History of Development*, 73.

54 Toyin Falola, 'Colonial Administrations and the Africans', in The Palgrave Handbook of African Colonial and Postcolonial History, ed. Martin S. Shanguhyia and Toyin Falola (New York: Palgrave Macmillan US, 2018), 93; Alice L. Conklin, 'Colonialism and Human Rights, A Contradiction in Terms? The Case of France and West Africa, 1895-1914', The American Historical Review 103, no. 2 (1998): 420; Kenneth Kalu and Toyin Falola,

Rodney, looking at the reasons for Africa's underdevelopment, constitutes that colonial Africa had been embedded in the international capitalist economy as a provider of surplus value to fuel the mother countries. Echoing Fanon's realisation of Europe being the product of the Third World, he finds that "[i]t meant the development of Europe as part of the same dialectical process in which Africa was underdeveloped."[55]

The agricultural sector played an important role in Africa's colonial exploitation, with some claiming that it was the most important sector in the colonial economic framework. It was an important resource in the quest for sustaining Europe's rapid industrial growth. Foreign firms were able to make considerable profits from the export of exotic agricultural products like peanuts, cocoa, rubber, coffee, palm oil, and timber, with local farmers being unable to market their produce.[56] Farmland for the supply of the local population was reduced in order to increase the production of cash-crops for export, which eventually led to damage inflicted upon the land due to nutrient reduction.[57] Aside from the detrimental effects this policy had on the soil, this system also created " a precarious economic structure dependent exclusively on the export of natural resources – a disease that continues to define Africa's economy up to the present day."[58]

Apart from the agricultural sector, mining also played an important role in the colonial economy. Raw materials that have been exploited included gold, coal, diamonds, tin, copper, manganese, and copper. While the African population was mainly used as cheap labour force, with limited or no possibilities to unionise, foreign companies that were dominating the sector were able to generate massive profits without paying significant amounts of tax.[59]

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eds., Exploitation and Misrule in Colonial and Postcolonial Africa (Cham: Springer International Publishing, 2019), 4.

55 Walter Rodney, *How Europe Underdeveloped Africa*, Rev. ed (Washington, D.C: Howard University Press, 1981), 149.

56 Kalu and Falola, *Exploitation and Misrule in Colonial and Postcolonial Africa*, 5.

57 Falola, 'Colonial Administrations and the Africans', 94.

58 Kalu and Falola, *Exploitation and Misrule in Colonial and Postcolonial Africa*, 6.

59 Ibid.; As a recent report by Oxfam and Tax Justice Network Australia has uncovered, Australian mining companies are found to have transferred AUD $ 1.1 billion out of Africa thanks to tax evasion. This exemplifies a clear continuation of profit maximisation with techniques established during direct colonial rule. See 'Buried

In addition to these grim examples on one-sided benefits, colonial rulers also suppressed the emergence of national industries that could threaten those in the home countries.[60]

One can easily imagine that if trade and the exploitation of natural resources had been administered on equal footing for the European and non-European parties, it could actually have been beneficial for non-European peoples and they could have developed in a way that they might have seen fit, without foreign imposition.

Hari Sharan Chhabra dares to make such an assumption, declaring that "[l]eft to itself, Angola today would have been an economic giant dictating terms to world powers."[61] This statement is supported by the fact that Angola has very fertile soil and tropical climate, which would make it suitable for agricultural undertakings. Despite listing extensive natural resources, among them oil and different minerals, Chhabra comes to the conclusion that having been exposed to colonial rule, "the discovery of these riches was in no way calculated to further native interests […]."[62] While this analysis focuses on Angola, similar examples can be found in other African countries or on other continents that have experienced colonial subjugation. While accounts of different peoples subduing each other can be found throughout history long before colonialism, the colonial venture introduced a novelty: exploitation of one country by another one on a grand scale.[63]

As mentioned earlier, this extraction and transfer of value towards the European colonisers did not only befall Africa but began as early as the Spaniards set foot on the American continent. Due to their horses, gunpowder and the (inadvertent) introduction of smallpox to the continent, the Spaniards had a major advantage and soon exterminated the Aztec and Inca empires. This laid the foundation for forced labour in silver mines on a grand scale and

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Treasure – Aussie Mining Companies Behaving Badly in West Africa', Oxfam Australia, accessed 19 August 2019, https://www.oxfam.org.au/2019/07/buried-treasure/.

60 Kalu and Falola, Exploitation and Misrule in Colonial and Postcolonial Africa: 4; Hari Sharan Chhabra, 'Aftermath of Colonialism', Economic and Political Weekly 11, no. 12 (1976): 451.

61 Hari Sharan Chhabra, 'Aftermath of Colonialism', *Economic and Political Weekly* 11, no. 12 (1976): 451.

62 Chhabra: 451.

63 Irfan Habib, 'Towards a Political Economy of Colonialism', *Social Scientist* 45, no. 3/4 (2017): 9.

the production and transfer of 51,100 metric tons of silver to Spain, between the 1493 and 1700. According to estimates, this made up 81 per cent of the world stock of silver in 1700.[64] Due to the sweeping effects of the drastic and violent decimation of native American population, another major exploitative concept of colonial rule came to fruition: the slave trade. Ironically, the silver obtained from the American continent provided the payment for African slaves that were forcibly transferred over the Atlantic via an Indian detour. This means that in order to pay the collaborative African slave-hunters, colonial powers used cotton textiles which they bought from India with the silver from the Americas – thus, an elaborate global system had been established.[65] Kalu and Falola conclude that "[s]lavery was and perhaps remains the highest form of exploitation" because "Atlantic slave trade devastated Africa for several centuries, setting the stage for a culture of exploitation, brute force, inequality, subservience, and instability […]."[66]

Another significant example of the effects caused by material exploitation due to colonialism is the case of India. With the previous paragraph outlining India's payment in silver, one might assume that India actually profited from the global trading network established by Europe's colonial expansion. It did so only in part. India was the largest recipient of silver outside of Europe until these payments immediately ended due to the British expanding their presence and eventually taking over the country after the Battle of Plassey in 1757.[67] Subsequently, India, who claimed the global top spot as cotton exporter until the end of the 18th century and whose share in the world manufacturing output had been estimated at almost 20 per cent in 1800, also fell victim to the economic drain of colonialism. Its global share fell to approximately 8 per cent in 1860 and to meagre 1.4 per cent in 1913.[68] While India's global share was decreasing, British global share increased and further facilitated British industrialisation, thanks to its manufactured products that allowed for a seizure of the markets. Unable to compete with British production, India's textile sector eventually de-

64 Ibid.

65 Ibid.: 10.

66 Kalu and Falola, Exploitation and Misrule in Colonial and Postcolonial Africa: 2.

67 Habib, 'Towards a Political Economy of Colonialism': 12.

68 Aditya Mukherjee, 'Empire: How Colonial India Made Modern Britain', *Economic and Political Weekly* 45, no. 50 (2010): 78.

industrialised. The British East India Company even boasted in a petition to the British Parliament that "this Company has in various ways, encouraged and assisted by our great manufacturing ingenuity and skill, succeeded in converting India from a manufacturing country into a country exporting raw produce."[69] These developments wreaked havoc on millions of Indians whose livelihood depended on their work in textile industry. Many of them, with numbers in the millions, were forced to serve as cheap labour force in slave-like conditions in order to work labour intensive plantations and build infrastructures like roads and railways in British colonies.[70]

These few samples of colonialism's economic exploitation are not exhaustive and might very well have taken different forms in regions that this outline did not touch upon. The main aim of this section was to show what the unfettered assumptions of European superiority, as described in the previous chapter, have lead to and that the foundation for what has become to be known as the Third World has been laid by colonialism.

While some[71] argue that colonial expansion also had its benefits like the end of despotic rule and the introduction of things like railways, schools, the rule of law and the like, one might answer with post-colonial writer Césaire. In his "Discourse on colonialism", he argues that all of these putative benefits seem to omit all the human suffering, displacements, cultural damage and collective trauma caused in order for these "benefits" to be introduced. To people who want him to see the positive impact of Europe's expansion, he answers: "*I* am talking about societies drained of their essence, cultures trampled underfoot, institutions undermined, lands confiscated, religions smashed, magnificent artistic creations destroyed, extraordinary *possibilities* wiped out [original emphasis]."[72]

It has become clear that colonial rule aimed at advancing European economic interests by exploiting the colonies' natural resources, creating new markets for Europe's thriving industries and to provide revenues. This agenda disrupted the native ways of life and developmental processes and created the foundation for a socio-economic environment that would make self-reliant development basically impossible and foster misery.

69 Habib, 'Towards a Political Economy of Colonialism': 12.

70 Ibid.

71 See e.g.: Alice L. Conklin, 'Colonialism and Human Rights, A Contradiction in Terms?'

72 Aimé Césaire and Robin D. G. Kelley, *Discourse on Colonialism* (New York: Monthly Review Press, 2000): 43.

Being very well aware of the material exploitation that colonialism caused and that Europe's fledging industries and its societies had benefited immensely from it, Fanon took to criticise the smug portrayal of "help" in the form of "development aid" and the like. He declares that "when we hear the head of a European state declare with his hand on his heart that he must come to the aid of the poor underdeveloped peoples, we do not tremble with gratitude"[73] and explains it should rather be considered a "just reparation" that will be paid to the countries that have been subjected to colonialism. As a consequence of his understanding, he does not want these countries to understand aid as a generous and charitable gesture by the European countries and stresses the point that colonised peoples are rightly entitled to it and that it is the colonisers' duty to pay. Eventually, he rejects the concept of "development" that Europe propagated from the 18th century onwards and refuses to "catch up" with anyone, calling for new concepts that do not rely on European influence and conditions but still allow for a respectful coexistence.

One could argue that what Fanon has put forward in his "Wretched of the Earth" is, among many other things, a challenge to the dominant discourse concerning the misery in global South countries and how to encounter it. The following section is going to outline how the global North's post-WWII discourse has made poverty the distinctive feature of the Third World.

3.2. The discursive rendering of the 3rd World as poor

While the previous section focused on the material conditions that have facilitated the birth of what has been referred to as the Third World, this section will address the discursive conditions that made this possible. By doing so, it will explain how the term "Third World" came about and how the regions associated with it have been portrayed as poor and in need of the global North's help in order to escape their misery. Such an inquiry is important in order to obtain a better understanding of the context in which foreign investment protection has been operating in since WWII. The previously expounded concept of development and the aftermath of the colonial exploitation will also feature throughout this analysis.

73 Fanon, The Wretched of the Earth: 102.

After the former European colonies obtained their independence, some of the emerging governments failed to undo the governance structures that had been established by the colonisers and thus denied real political change for the majority of the people. This meant that the political independence rather bestowed the instruments of power and exploitation, put in place and abandoned by the European colonial officers, on the new leaders. So for many exploitation did not end, as rulers took to more violent forms of control in order to contain the citizens that demanded actual change.[74] Kalu and Falola conclude that it was this failure to provide real change and social transformation "that [caused] Africa [to be] […] associated with several disparaging labels that currently dominate discourse on the continent in the international arena— poverty, underdevelopment, diseases, corruption, and foreign aid."[75] While the focus in their analysis is on Africa, similar cases of local elites using the exploitative structures established by colonialism can be found throughout former colonies. Their analysis also points to another relevant issue, namely the association of African countries (again, other countries subjected to colonial rule may be substituted) with underdevelopment, poverty and foreign aid. Poverty has become one of the main features for most of the former colonies, which after WWII collectively became known as the "Third World".

While many might have a vague understanding of what the term "Third World" refers to, few might now how it came into existence. Unsurprisingly, the concept of development played a role in this ranking, though an implicit one. The main criteria for the distinction of the First and the Second Worlds was considered to be the economic framework. The First World, formed by the United States of America and Western and Central European countries, committed itself to partly regulated market capitalism. The Second World, on the other hand, rejected this model and instead relied on a governmental-regulated market, also known as socialist planning. The Union of Soviet Socialist Republics (USSR) has been associated with this socio-economic approach.[76] These two world, however, did not encompass all of the globe. In fact, they did not even contain its majority, as both combined only comprised a third of the global population. The rest, which French anti-colonial writer Sauvy called the "ignored,

74 Kalu and Falola, Exploitation and Misrule in Colonial and Postcolonial Africa: 12-13.

75 Kalu and Falola, *Exploitation and Misrule in Colonial and Postcolonial Africa*: 13.

76 Vijay Prashad, The Darker Nations: A People's History of the Third World, A New Press People's History (New York: New Press, 2007): 7.

exploited, scorned […]"[77], constituted the Third World. Sauvy used this term as a reference to the French Third Estate. Prior to the French Revolution in 1789, the monarchy's counsellors were divided into the First Estate, representing the clergy, and the Second Estate, representing the aristocracy, and the Third Estate, comprised of the bourgeoisie.[78] During the Revolution, the Third Estate claimed the name of the National Assembly, inviting the popular masses to be its sovereign.[79] Sauvy saw the Third World as possessing the political potential to create unity and leave its mark on world affairs.

Focussing on the element of poverty, anthropologist Escobar observes that it was only after WWII that poverty on a global scale was discovered.[80] Before the war broke out, the treatment and conception of poverty in the global South was quite different inasmuch as the concern with poverty in colonial times was not a substantial one. Colonial administrators assumed that "even if 'natives' could be somewhat enlightened by the presence of the colonizer [sic], not much could be done about their poverty because their economic development was pointless" as their "capacity for science and technology, the basis for economic progress, was seen as nil."[81] While poverty in the former colonies only emerged as a global concern after WWII, it has of course existed previously and also well before Europe's colonial expansion. Rahnema, however, points out that the social relations of those considered "poor" and the rest of the society were of a different kind before the societies of the Third World experienced colonial exploitation and the imposition of colonial governance structures. Without a view to idealise traditional and native approaches to poverty, he finds that they better integrated the poor in the social network and that they were considered to be a part of society and not an issue that one had to get rid of. Contrary to what one might assume, they were considered to be somewhat respectable members of society who just happened to be in danger of losing or had already lost their abode. Being an integral part of communities, they were generally also provided for by the latter, making external or

77 Alfred Sauvy, 'Document: Trois Mondes, Une Planète', Vingtième Siècle. Revue d'histoire, no. 12 (1986): 81–83.

78 Vijay Prashad, *The Darker Nations*: 11.

79 Ibid.

80 Arturo Escobar, Encountering Development: The Making and Unmaking of the Third World (Princeton, N.J: Princeton University Press, 2012): 22.

81 Ibid.

institutionalised assistance obsolete except for cases of general catastrophes (e.g. natural disasters like floods, or other disasters like famine or war).[82] Both Escobar and Rahnema conclude that the breakdown of these community ties and self-reliant ways of communal organisation by the introduction of the market economy deprived millions of people from access to essential resources like land or water and thus marked the beginning of modern mass poverty. With social bonds dissolving, the impoverished were eventually contingent on external institutional assistance.[83]

Within the logic of market economy, the poor were those that lacked the money and material possessions of the rich and the poor countries thus were those that had not attained the wealth of countries that were economically more advanced. Once again, the European development-paradigm had been applied, with the western and central European countries and the U.S.A. exemplifying the pinnacle of development that other countries had to catch up on. This time, however, those deemed less developed were not “barbaric” and in need of a “civilising process”, on the contrary, they were now part of the same sphere.[84] Being part of the same framework allowed them to hope that they could eventually catch up, if they played by the established rules. Having redefined development in economical terms, economic growth seemed the only reasonable means to counteract this situation, with annual per capita income being the ideal yardstick. This caused the perception of the global scale of poverty to become a comparative statistical operation, which had been inaugurated in 1940.[85]

This approach, again excluded the historical causes for the newly discovered poverty and took the state of affairs from the moment former colonies gained independence as starting point point of the observations. With the newly independent countries embedded in the economic development paradigm, and the assumption that the rules for the internal, self-dynamising process of development were the same for everyone, historical explanations for

82 Majid Rahnema, ‘Global Poverty : A Pauperizing Myth’, Working Paper (Intercultural Institute of Montreal, Montreal, QC, CA, 1991), 14-15.

83 Ibid.; Escobar, Encountering Development: 22.

84 Rist, The History of Development: 74.

85 Ibid.; Escobar, Encountering Development: 23.

why some countries were “more developed” were effectively omitted.[86] Rodley points out this omission when he states that “statistics which show that Africa today is underdeveloped are the statistics representing the state of affairs at the end of colonialism.”[87]

Another tool that helped shape the discourse surrounding global South countries in economic and ahistorical terms was the World Bank’s 1948 proclamation that countries whose annual per capita income did not exceed $100 were to be considered poor.[88] Again, this yardstick by itself can only reveal so much. Again, Rodney’s above-mentioned statement that what this figure does show is the result of decades and even centuries of colonial governance and exploitation serves as a reminder to question the seemingly ahistorical data. As already established in the previous section, colonialism was an economic venture that was tailored only to the benefits of the colonisers and aimed at furthering their own development. Rodney describes at length how those subjected to colonial rule were forced to work under dire conditions for free or such low wages that only a minimum investment of European capital was required in order to generate a high yield in profits.[89] With colonial corporations controlling the prices for the raw materials as well as the prices for the imported goods from the metropoles and passing on the costs of reduced prices on the global market on to the peasants, they kept their earnings ever so meagre. With the little they have had left, taxes had to be paid, which the colonial masters collected in an attempt to keep the colonies self-sufficient.[90] Those that were not in need of paid labour because they could sustain

86 Rist, The History of Development: 74; With the European countries and the U.S.A representing the highest attainable standards of economic development and knowing that much of their economic development was in one way or another fuelled by the economic exploitation of colonies and the slave trade, one could come to the simple conclusion that there simply are not enough resources and countries left to be exploited in order for all the “underdeveloped” countries to take the same route of “development”. For that reason alone it is necessary for these countries to find ways different than those well-trodden routes of the global North. Fanon alludes to this when he remarks that “if we want humanity to advance a step further, if we want to bring it up to a different level than that which Europe has shown it, then we must invent and we must make discoveries.” Fanon (n 52): 315.

87 Rodney, How Europe Underdeveloped Africa: 206.

88 Escobar, Encountering Development: 24.

89 Rodney: 157.

90 Ibid.: 157-159.

themselves with their land and the selling of live stock,[91] must of course appear "poor" when measured with a monetary yardstick.

Once the majority of the world had been declared poor and little thought had been given to the historical relations that caused the global North to be economically more developed, new discourses and practices dealing with this problem were brought into existence.[92] Economic development and economic assistance for Third World countries has become one of the most prominent and pervasive practices in that context. In his seminal "Encountering Development" Escobar outlines the first ever economic mission by the International Bank for Reconstruction and Development to Colombia, whose intent it was to formulate a comprehensive program for the country's development. The report is another example of how the omnipresent discourse of "progress", proposing a Western-style restructuring of the country as the only solution for their predicament while portraying these required changes as universally applicable and implicitly inevitable. His assessment of the report was that it proposed strategies that were mainly means for providing access to countries' resources and maintaining a hold on them.[93] The development discourse, with its basic premise of modernisation as the necessary tool for the overcoming of archaic relations, declared industrialisation and urbanisation as inevitable steps on the route to modernisation. No social, political and cultural costs were deemed too high in the name of their alleged progress. Thus the use of private capital, foreign as well as domestic, was considered to be essential in order to provide for the profound need of capital that was needed for the modernisation process. Having classified the countries that were to be developed as being "trapped in a 'vicious circle' of poverty and lack of capital",[94] domestic savings could only provide so much capital. Therefore it was considered that the bulk of the necessary capital had to be foreign, with "governments and international organizations [sic]

91 Karin Pallaver, 'Paying in Cents, Paying in Rupees: Colonial Currencies, Labour Relations, and the Payment of Wages in Early Colonial Kenya', in Colonialism, Institutional Change and Shifts in Global Labour Relations, ed. Karin Hofmeester and Pim de Zwart (Amsterdam University Press, 2018): 309-10.

92 Escobar, Encountering Development: 24.

93 Ibid.: 24-26.

94 Ibid.: 40.

tak[ing] an active role in promoting and orchestrating the necessary efforts to overcome general backwardness and economic underdevelopment."[95]

While more on the discourse surrounding the so-called Third World could be said, especially about another major talking point like the "population problem",[96] the effects of the discourse on those subject to it or their resistance against it, it would be beyond the scope of this thesis to do so. The intent of this section was to outline how the designation "Third World" came about, the importance of poverty in the discursive creation of the Third World and some of the shortcomings of the discourse with regards to the historical conditions that allowed for two thirds of the world being considered "poor" in the first place. It is thus important to be aware that

> "Inequality, poverty, and underdevelopment do not come about because of inherent cosmic imbalances or (only a) lack of efficiency in governance among some peoples but because of the continuation or imposition of rules and ideologies ensuring that affluent states maintain their dominance over others."[97]

With the post-WWII discourse including the former colonies in the same sphere as the former colonisers, only "lagging a bit behind", development was looked at as an internal and self-generating process, that could, however, be assisted from the outside. With economic growth considered the only "logical" solution to the economic backwardness of the global South, foreign investment was became imperative.

The following section is going to take a look at foreign investment and its protection framework during the colonial era in an attempt to show its involvement in the "creation" of the Third World.

4 Foreign Investment Protection Law's colonial Roots

This chapter will take a look at the colonial roots of today's foreign investment protection framework. While it is often postulated that the emergence of the field of foreign investment

95 Ibid.

96 See e.g. Escobar, *Encountering Development*: 35-39; Prashad, *The Darker Nations*: 8-9.

97 John Linarelli, Margot E. Salomon, and Muthucumaraswamy Sornarajah, The Misery of International Law: Confrontations with Injustice in the Global Economy (Oxford University Press, 2018): 79.

protection law is a rather recent and treaty-based phenomenon that started with the signing of the first Bilateral Investment Treaty (BIT) between Germany and Pakistan in 1959,[98] this chapter argues that practices of foreign investment protection can be traced back to the European colonial expansion in the 17th century.[99] It is important to consider the history of foreign investment protection as it allows for a better understanding of its objectives and standards, especially the international minimum standard (IMS) and international dispute settlement mechanisms. In addition, this investigation can also help explain why some companies from the global North hold assets in the global South, how they have attained them and why the export of capital has for a very long time been a one-way street, namely from the global North to the global South.

The first section of this chapter will draw from Anghie's concept of the "colonial encounter"[100] and its importance for the creation of international legal relations that were not only inter-European. According to his analysis, the colonial encounter was crucial for Europe's understanding of sovereignty and the necessary criteria for statehood.[101] In addition, the section is going to outline how European companies, driven by the ideas of progress and development, were investing in the newly acquired territories. Once new territories, and especially ports, had been acquired, the colonisers would not subject themselves to the local legal systems but instead insisted on the application of their own laws, as they were deemed "more civilised". Equipped with a more superior arsenal of military weapons, these colonial corporations and subsequently the states themselves were often able to coerce natives into concession agreements, a practice that also came to be known as "gunboat diplomacy".

The second section is going to take a look at the global South's reaction to the imposed regime of international minimum standards. These standards, which were mostly proposed by the majority of global North countries, would seek to circumvent domestic jurisdiction when it came to investment disputes settlements. The countries of South America were proposing a

98 Kate Miles, The Origins of International Investment Law: Empire, Environment and the Safeguarding of Capital, Cambridge Studies in International and Comparative Law (Cambridge: Cambridge University Press, 2013): 19.

99 Ibid.: 2.

100 Antony Anghie, Imperialism, Sovereignty, and the Making of International Law, Cambridge Studies in International and Comparative Law 37 (Cambridge: Cambridge University Press, 2005): 6.

101 Ibid.

mechanisms that would grant foreign investors the same rights as domestic investors, which was considered to be an egalitarian approach. These mechanisms became to be known as the Calvo Doctrine and the Calvo Clause and their origins and subsequent rediscovery by other global South countries will be outlined in this section.

Dealing with the colonial history foreign investment protection and addressing alternative approaches to foreign investment protection are important in order to better assess if the rules regulating the protection of foreign investment can legitimately be called "international" or if they actually are a form of a "particularistic universality" as explained in a previous chapter.

4.1. Foreign Investment Protection Law and the Colonial Nexus

This section is first going to take a look at the foreign investment protection within the colonial framework, highlighting how the intermingling of corporate and state interests provided companies with military and diplomatic power that facilitated access to non-European countries in order to open them up for easier trade with the home countries.

In her in-depth analysis of foreign investment protection law's history "The Origins of International Investment Law", Kate Miles claims that international investment law's origins are "deeply embedded within the global expansion of European trading and investment activities that occurred during the seventeenth to early twentieth centuries."[102]

Outlining the framework that allowed for international investment law to emerge in Europe, Miles finds that its origins can be found in reciprocal arrangements between European states. Being of relatively equal bargaining power, they tried to establish minimum standards of treatment for the nationals that were investing in other countries on the continent that were based on reciprocity.[103] One of these methods used to regulate and facilitate foreign investment and assure adequate treatment of nationals by other states were the so-called "friendship, commerce, and navigation treaties", which have also been considered the intellectual forebears of today's bilateral investment treaties (BITs).[104] The use of these treaties started in the 18th century and they generally entailed the granting of commercial

102 Miles, The Origins of International Investment Law: 2.

103 Ibid.: 21.

104 M. Sornarajah, The International Law on Foreign Investment, 3rd ed (Cambridge: Cambridge University Press, 2010): 180.

privileges by both parties, and also dealt with the treatment of the state parties' nationals.[105] Some of the commercial privileges granted by these treaties included the protection of an individual's property and themselves, freedom of movement, the granting of rights to trade and national treatment.[106] These treaties thus created a network based on reciprocity, whose purpose it was to protect foreign capital.

While this system was accepted between European powers, the discovery of continents and countries that were deemed "uncivilised" changed this concept fundamentally, as the application of force and coercion had been considered a legitimate means in relations with non-Europeans.[107] Miles calls treaties that were concluded in this manner "unequal treaties"[108], while Anghie refers to them as "capitulation treaties".[109] The main aim of these treaties was to open up new territories for European and North American trade and investment, regardless of consent or desire. While the language of such treaties tried to maintain an aura of legality and neutrality, the fact that they were a product of force and that they were often unilaterally imposed in order to secure benefits for traders, states, and investors, remained secondary.[110] Anghie explains that this attitude had to do with the legal positivism of the time, which on the one hand thought of non-Europeans as being outside the scope of law and on the other hand could not disregard the treaties entered into by European countries and non-European countries. European countries relied on these treaties in order to expand their empires, if only for the simple fact that they wanted to avoid disputes over colonial territories amongst themselves.[111] Faced with this problem, positivist managed to neglect the non-European signatories to the treaties despite identifying and giving effect to their intent, seemingly at the same time. This was possible by adhering to the positivist practice of focusing on the letter of the law while excluding the circumstances that created it.

105 Miles, The Origins of International Investment Law: 24; Sornarajah, The International Law on Foreign Investment: 180-81.

106 Miles, The Origins of International Investment Law: 24.

107 Ibid.

108 Ibid.

109 Anghie, Imperialism, Sovereignty, and the Making of International Law: 85.

110 Miles, The Origins of International Investment Law: 25-26; Anghie, Imperialism, Sovereignty, and the Making of International Law: 72-73.

111 Anghie, Imperialism, Sovereignty, and the Making of International Law: 71.

As a consequence of this approach, the violence inflicted upon non-Europeans and their resistance to it was seemingly ignored by the legal positivists of the time.[112]

These enforced arrangements created non-reciprocal rights like travel prerogatives for the foreign traders, the granting of concessions to foreign companies and even governance powers, exemplified in the establishment of extraterritorial jurisdiction. This meant that European nationals doing business in non-European territories, along with their property, remained under the jurisdiction of their home countries and local jurisdiction was thereby blatantly circumvented.[113] This rejection of local laws was once more justified by a European understanding of progress. It was assumed that the local laws were not developed enough to deal with the matter and thus inferior to the colonial powers' bodies of law.[114] Having had the security of imperial protection, the need for an external system of foreign investment protection that was not only an extension of European norms was nonexistent.

Concessions were another important tool in the context of imperial foreign investment. They were usually "concluded between a host state and an individual or company and allowed that individual to engage in an activity that had previously been the sole realm of the state."[115] These instruments generally dealt with the extraction of raw materials or the construction but also with public utilities, like railways. Before states officially took part in the expansion of the economic and subsequently geographical network, companies like the British East Indian Company and the Dutch East India Company were in the vanguard. Declared to be extensions of the Crown and thus having acquired elements of legal personality, they were capable of asserting sovereign rights over natives, make peace and war with them and coin money.[116]

Thanks to the concessions, the ones holding them were granted extensive rights like jurisdictional control over areas of land or natural resources for long periods of time, in exchange for royalty fees whose rates were fixed.[117] As a consequence, the concessionaires

112 Anghie: 72.

113 Miles, The Origins of International Investment Law: 26.

114 Sūryaprasāda Suvedī, International Investment Law: Reconciling Policy and Principle (Oxford: Hart, 2008): 7.

115 Miles, The Origins of International Investment Law: 28.

116 Anghie, Imperialism, Sovereignty, and the Making of International Law: 68.

117 Sornarajah, The International Law on Foreign Investment: 38.

were able to acquire sovereign powers generally held by a state.[118] Concession agreements were often established pursuant to unequal treaties and thus frequently involved the application of coercive means by global North countries in order to obtain favourable terms for their nationals. This trend was increasing as the intra-European competition for access to new territories and raw materials gained momentum. The concessions that were acquired in this way were then protected by either military force or diplomatic pressure.[119] Europe's expansion of trade possibilities and foreign investment had therefore been connected to its imperialist and colonial ventures from the outset.

How did European countries justify these actions?

As mentioned above, one way of legitimising these actions was the legal positivist approach, which held that despite the violence and coercion used to gain access to resources via concessions or unequal treaties, the letter of the thus established law had to be respected. It was in these interactions with non-European peoples, the so-called "colonial encounter", that the international law used by European countries met its Other and thus actually took shape in the process of its application.[120] The granting of concessions by non-European peoples can provide a suitable example of the inconsistencies and fractures within the emerging international legal framework. On the one hand they were denied legal status within international law, because they were not "civilised states", but on the other hand they were assumed to be able to dispose of their natural resources via a treaty with European states. If they lacked the legal status to do so, one might wonder how they were able to consent in a meaningful manner to the concession treaties.[121] It seems like this obvious legal gap mattered not so much, since the concessions could always be acquired or defended by superior military strength and the treaties that were concluded in such a manner also served another

118 Miles, The Origins of International Investment Law: 28; A similar problem can be found in modern foreign investment arbitrations, which allow private entities to restrict or challenge a government's exercise of public authority, thus enabling them to wield powers generally held by a state. This will be further addressed in Chapter 5.

119 Miles, *The Origins of International Investment Law*: 28.

120 This view contests the notion that European international law was already complete and merely extended to non-European peoples. See Anghie, Imperialism, Sovereignty, and the Making of International Law: 6-10; Miles, The Origins of International Investment Law: 29.

121 Anghie, Imperialism, Sovereignty, and the Making of International Law: 71, 219.

purpose: avoiding intra-European fights over non-European possessions.[122] While treaties were considered to be one possibility of bringing non-Europeans into the sphere of international law, though not fully, other methods included colonisation, recognition as a state, and protectorate agreements.[123] Colonialism simply subjected the colonised to European sovereign control, therefore erasing the non-European peoples sovereignty and allowing Europeans to exploit resources at their leisure. Recognition as a state or a member of "the family of nations" was the exception and granted to states like Japan or former Siam.[124] Protectorate agreements allowed European states to exercise extensive control over non-European states without having to officialy assume sovereignty over them.[125] Three out of these four ways of integration into the European version of international law included either forceful or diplomatic submission of non-Europeans, or both, for which the imperial apparatus provided the necessary tools. This also included the extension of European trade and investment rules to other parts of the world. Use of force and manipulation of law doctrines in order to acquire economic advantages and commercial benefits were part of international investment law's formation. According to Miles "it is of fundamental importance to the shape and character of international investment law that the context in which its principles were developed was one of exploitation and imperialism."[126] This had the effect that the laws governing international investment heavily favoured the capital-exporting countries and eventually only focussed on the protection of the investor and less so on the host countries or their population. Having been excluded from the protective measures of international investment law, the host countries were unable to call upon it in cases where they had suffered damage by the investor.[127] The preferential treatment of the investor over host countries and their people and their inability to call upon international investment law in cases of harm caused to them by the investor are problems that still haunt the discipline today. Examining international investment law's history in light of European colonialism also brought

122 Ibid.: 69-70.

123 Ibid.: 67.

124 Ibid.

125 Ibid.: 87.

126 Miles, The Origins of International Investment Law: 32.

127 Miles, The Origins of International Investment Law: 32.

the alignment of state interests and those of private investors to the fore, exemplified by companies like the British East India Trading Company or the Dutch East India Trading Company.[128]

Having looked at some of the historical aspects of international investment law, it might seem as if Europe was the only continent that was concerned with regulating commercial relations and brought these ideas to non-European countries. This, however, is not accurate, as pre-colonial trading systems and regulations have existed in Asia, Africa and the Middle East and Miles argues that the spread of Europe's version would indeed not have been possible without pre-existing systems.[129] While non-Europeans certainly tried to resist the imposition of European laws that, while seemingly neutral, favoured only the latter, they eventually were subdued by Europe's military strength.[130] The acts of resistance, however, showed a clear rejection of these principles and raise the question of how "international" these laws actually were and continue to be. Keeping the history of their dissemination in mind, one might rather refer to them as "globalised European laws".

Resistance to international investment norms that favoured the investor to the detriment of the host country and its population did continue and found another expression in the now famous Calvo Doctrine and Calvo Principle. These legal instruments challenged the notion that foreign investors should be afforded a higher standard of protection than domestic investors. The region that first comprehensibly formulated and championed these principles was South America. The next section will deal with the history the Calvo Doctrine and Clause and its challenge of the international minimum standard.

4.2. The Calvo Doctrine and Clause

128 This is also an issue that is relevant in today's foreign investment protection, as will be detailed in Chapter 5.

129 Sornarajah, The International Law on Foreign Investment: 19; Miles, The Origins of International Investment Law: 22.

130 Anghie, Imperialism, Sovereignty, and the Making of International Law: 72.

The Calvo Doctrine and Clause emerged out of legal disputes between European and North American investors and South American host states.[131] These disputes mainly concerned the security and treatment of foreign investors and their assets by the authorities of the host state. To better understand how the disputes came about, the diplomatic protection of aliens and its influence on the foreign investment protection laws of the 19th century should be considered. Diplomatic protection of aliens initially concerned itself with the protection of nationals that were living in countries where diplomatic missions were assigned to and subsequently also concerned itself with their property.[132] Attached to the diplomatic protection was an understanding that an international minimum standard regarding the treatment of aliens, including companies, and their property existed.[133] This right to protect their own nationals abroad through diplomatic protection was generally asserted by capital-exporting countries, based on the argument that "it was their duty to extend the protection of international law to citizens wherever they might be."[134] The principle was subsequently extended to cover the protection of foreign investments and the investments made by aliens as well.[135]

In cases where these rules were breached, it was argued that the home state had a right to intervene, seek redress and compensation, as the injury to the alien was considered an injury to its state.[136] While diplomatic protection sought to provide justice in cases where it was not attainable from local remedies, abuse of this doctrine was not uncommon amongst foreign investors. This occasionally led to the intervention of states, sometimes with the use of force, that was based on nothing more than questionable evidence provided by their nationals. In some cases they did not even make use of the domestic judicial system.[137] By nature, this

131 Sornarajah, The International Law on Foreign Investment: 20; This was due to the fact that the majority of investments in the rest of the world still occurred within the colonial context, making the law of the colonising countries the only applicable law.

132 Ibid.: 18.

133 Miles, The Origins of International Investment Law: 47.

134 Donald R. Shea, The Calvo Clause. A Problem of Inter-American and International Law and Diplomacy (Minneapolis: University of Minnesota Press, 1955): 11.

135 Sornarajah, The International Law on Foreign Investment: 18.

136 Miles, The Origins of International Investment Law: 47; Shea, The Calvo Clause: 11.

137 Shea, The Calvo Clause: 12.

system of diplomatic protection favoured European countries and North America, which were economically and military advanced enough to impose these rules on other states.[138]

The diplomatic protection of aliens also sought to establish an international minimum standard of treatment for aliens, which became another contested legal area between the capital-exporting states and the host states. Given the fact that an internationally negotiated treaty on that subject matter did not exist, one had to draw on other sources of international law, like customary international law, in order to identify these standards.[139] Since the capital exporting states, with the United States being on the forefront, were the ones arguing that foreign investors should be treated according to an international minimum standard, their practice had to be relied upon in order to determine these standards.[140] Other sources of international law, like general principles, or the subsidiary sources also supported the practice of investor states, because the writings and case-law at the time were based upon the very behaviour of investor states.[141] It is thus not surprising to find that the norms thus established, for the better part based on US domestic legal standards[142], were rather favourable for the investor. As a consequence, this meant that whenever it was agreed upon to rely on international law or international minimum standards to conduct foreign investment disputes, the law made by investor countries was being applied.[143] The minimum standard that capital-exporting states thereby created was sometimes difficult to fulfil for the host states and ended up being a higher than the host countries afforded their own nationals.[144]

From the second half of the 19th century, Latin American countries were objecting to the principle of diplomatic protection, international minimum standards and the laws established by the investor states, concealed as international law. They argued that states should not be obliged to offer higher standards of legal protection to foreign investors than those offered to

138 Miles, The Origins of International Investment Law: 48.

139 Suvedī, International Investment Law: 10.

140 Ibid.

141 Suvedī, International Investment Law: 10.

142 Sornarajah, The International Law on Foreign Investment: 36.

143 Suvedī, International Investment Law: 10.

144 Sornarajah, The International Law on Foreign Investment: 122.

their own nationals.[145] They insisted on the need for equality of treatment and that, as long as they were not discriminating against foreign investors, they were not in breach of customary international law. They supported this notion with reference to the economic and legal frailty of the newly independent countries, which made it harder for them to conform with standards of treatment that economically developed countries demanded for their nationals.[146] This position came to be known as the Calvo Doctrine, named after its spiritual father, the Argentinian diplomat and jurist, Carlos Calvo.[147]

Calvo's theoretical approach was based on the rule of sovereignty, generally accepted among European states and the US, and the equality among states, through which he sought to protect countries from interference by other states via the use (and abuse) of the diplomatic protection of aliens. The other principle he formulated was the absolute equality of foreigners and nationals, which implicated that aliens could not be afforded better treatment than nationals and thus had to file claims with local authorities, instead of external tribunals.[148] As a consequence, this also meant that foreigners who were to settle in Latin American countries were able to enjoy the same rights and protections under domestic laws as the citizens of that state.[149] Montt emphasises the point that the granting of positive rights constituted a major improvement at the time and a promotion of human rights.[150]

Ultimately, the goal of the Calvo Doctrine was to minimise and eventually dispose of the omnipresent threat of intervention by foreign states whenever an investment or trade dispute

145 Miles, The Origins of International Investment Law: 50; Suvedī, International Investment Law: 14.

146 Suvedī, International Investment Law: 14.

147 Suvedī, International Investment Law: 14; Shea, The Calvo Clause: 16; Anghie, Imperialism, Sovereignty, and the Making of International Law: 209; Santiago Montt, however, argues that the Clause and Doctrine "were not even created by their namesake […]" and cites Venezuelan jurist Andrés Bello as the real author. See Santiago Montt, State Liability in Investment Treaty Arbitration: Global Constitutional and Administrative Law in the BIT Generation, Studies in International Law, v. 26 (Oxford: Hart Publishing, 2009): 33; 41.

148 Shea, The Calvo Clause: 19; Miles, The Origins of International Investment Law: 50; Suvedī, International Investment Law: 14; M Sornarajah, Resistance and Change in the International Law on Foreign Investment. (Cambridge: Cambridge University Press, 2015): 33.

149 Montt, State Liability in Investment Treaty Arbitration: 39.

150 Ibid.

arose.[151] While the Calvo Doctrine was clearly designed to combat the abusive use of diplomatic protection, it did not aim at opposing foreign investors and their investments in general. It also did not intend to thwart international claims that were based on the host country's breach of established international rules concerning the treatment of aliens or such cases that were based on denial of justice.[152] South American countries mainly sought to shape international laws in a way that would also incorporate their interests by including these provisions into treaties, constitutions, or municipal law.[153] Despite their efforts, the enunciated norms failed to make a lasting impact on international law due to opposition from Europe and the US, who felt that these norms were not in their economical or political interest.[154]

The Calvo Clause exemplified another attempt by South American countries to circumvent the abuse of diplomatic protection of aliens.[155] It took the form of a contractual provision that required foreigners to subject themselves to the local judicial process and means of remedy, and to waive their right to call upon their home countries for diplomatic protection.[156] Montt highlights that despite shared objectives, the Calvo Clause is "not a mere byproduct of the Doctrine", as it did not operate unilaterally and went further than the Doctrine by trying to forbid diplomatic protection in general, even in cases of denial of justice.[157] The Clause's bilateralism was exemplified by the fact that the investors voluntarily surrendered their right to diplomatic protection and it based the legitimacy of this provision on the freedom of contract.[158] The validity of the clause was questioned on the grounds that foreign investors might have been forced to accept it as a condition for doing business, thus making it

151 Miles, The Origins of International Investment Law: 51.

152 Montt, State Liability in Investment Treaty Arbitration: 40.

153 Shea, The Calvo Clause: 21; Miles, The Origins of International Investment Law: 51.

154 Miles, The Origins of International Investment Law: 51.

155 As was the case with the Calvo Doctrine, Montt also finds that the Clause has not been invented by its namesake but was first found in a Peruvian decree issued 22 years before Calvo's first enunciation of the concept. See Montt, *State Liability in Investment Treaty Arbitration*: 46.

156 Shea, The Calvo Clause: 28; Miles, The Origins of International Investment Law: 51; Montt, State Liability in Investment Treaty Arbitration: 45; Frank Griffith Dawson, 'International Law, National Tribunals and the Rights of Aliens: The Latin American Experience', Vanderbilt Law Review 21, no. Issue 5 (1 January 1967): 722-23.

157 Montt, State Liability in Investment Treaty Arbitration: 45-46.

158 Shea, The Calvo Clause: 28; Montt, State Liability in Investment Treaty Arbitration: 45-46.

involuntary, and on the grounds that it was not the individual's right to waive the sovereign's power of diplomatic protection.[159] The inability of an individual to waive the right to diplomatic protection was based on the Vatelian understanding that an injury to a national is an injury to her home state, which gives the state a right to intervene, irrespective of the individual's contractual waiver.[160]

This chapter outlined a short history of the history of foreign investment protection, underlining the fact that what has emerged as the bilateral investment treaty regime since the 1960s is the tip of the discipline's iceberg. While the capital-exporting countries have been dominating this area of international law as well, it is important to be aware that legal resistance existed (and still exists) and that the Calvo Doctrine and Clause were one of the most elaborate tools in that regard. Looking at the history of foreign investment protection and the Calvo Doctrine and Clause inevitabley raises questions about the creation of international law and what we refer to as international law today. Given the fact that Latin American countries, as well as African and Asian countries, once independent, countries like China, Russia and Turkey[161] supported the principle of national treatment and that we now see the proliferation of external investment dispute settlement tribunals, shows that it is not only the majority of countries that establish international rules but that there clearly are other factors involved in the process as well. The colonial legacy definitely provided an advantage for the former colonisers, as they could enforce their vision of international law via superior military strength or, once the colonies were independent, via economic means.

The fact that countries from the global South were denied domestic jurisdiction over investment disputes also has implications on their human rights obligations. Given that, thanks to investor-state investment arbitrations, the former have acquired a means to limit the state's exercise of public authority. This means that they are now able to demand compensation in cases where a state operates in the public interest but by doing so, decreases the (expected) return of an investment. States have very limited possibilities of

159 Anghie, *Imperialism, Sovereignty, and the Making of International Law*, 209; Miles, *The Origins of International Investment Law*, 51.

160 Shea, *The Calvo Clause*, 45; Dawson, 'International Law, National Tribunals and the Rights of Aliens', 723.

161 Sornarajah, *The International Law on Foreign Investment*, 37; Montt, *State Liability in Investment Treaty Arbitration*, 53.

intervention in this process as the investors do not have to exhaust local remedies first and there is no appeal mechanism available. How this effects the socio-economic human rights obligations of countries from the global South will be addressed in the next chapter.

5 Economic iberalism and Foreign Investment Protection

This chapter attempts to use what has been established and outlined throughout the thesis and implement it into he analysis of today's international foreign investment regime and its influence on state's human rights obligations. The analysis of investment protection's impact on human rights will mainly focus on countries from the global South.

Drawing from the title of the thesis that refers to human rights abuses as "planned misery", this chapter is going to look at how the overarching framework of economic liberalism, which asserted itself globally by the early 1980s, has created an environment that favoured economic growth over socio-economic development. Economic liberalism, also referred to as neo-liberalism, assumes that "all human activity is always already a commodity and the best way (leading to the greatest satisfaction possible) is to organize these activities through a market."[162] As a consequence of this approach, things that have not been considered to be commodities before, were now being treated as such.[163] Neoliberal policies, which apply this theory to the social realm, can also be found in the Structural Adjustment Programs (SAPs) of the World Bank. SAPs are relevant in the context of "planned misery" because they "were supposed to lead to a reduction of debt by structurally adjusting […] economies so that they would export more and attract more foreign investment".[164] In effect, this meant a reduction of government spending, the liberalisation of the economy, devaluation and increased privatisations.[165] In order for global South countries to receive aid and assistance from

162 George Caffentzis, 'Neoliberalism in Africa: Apocalyptic Failures and Business as Usual Practices', Alternatives: Turkish Journal of International Relations 1, no. 3 (2002): 89.

163 Examples include child-bearing, health care decisions like organ organ transplantations, voting etc. See Caffentzis, 'Neoliberalism in Africa': 89–90.

164 Caffentzis, 'Neoliberalism in Africa': 92.

165 Anghie, *Imperialism, Sovereignty, and the Making of International Law*, 259; Daria Davitti, 'On the Meanings of International Investment Law and International Human Rights Law: The Alternative Narrative of Due Diligence', *Human Rights Law Review*, no. Issue 3 (2012): 428.

institutions like the World Bank or the International Monetary Fund (IMF), and given the lack of other funding, they were left with little choice but to accept these structural adjustments.[166] These plans contained policies like the user-fee clause, which obliged states to charge fees for the receipt of health care, education or so-called water services,[167] which effectively undermined and conflicted with the state's obligation to ensure its citizens' right to health and education.[168]

A possible explanation for the ensuing neglect of economic, social and cultural rights can be found in the transfer of power from the state to private economic actors.[169] This transfer limited the state, which ultimately is the entity upon which human rights obligations are imposed, in its competence to further implement human rights that might have been considered detrimental to further investments.[170] It is therefore apparent that the implementation of human rights, which is also considered to be part of development, has economic implications.[171] It requires resources and hence the economic policies of the state or international institutions also impact human rights.[172]

What is striking, though, is the fact that much of the economic liberalisation and the subsequent power transfer has happened in the name of development. This kind of development, however, mainly focused on economic criteria (measured in GDP growth) and consequently neglected local needs and actualities.[173] Unsurprisingly this approach caused

166 Davitti, 'On the Meanings of International Investment Law and International Human Rights Law', 428.

167 Caffentzis, 'Neoliberalism in Africa', 90.

168 Anghie, *Imperialism, Sovereignty, and the Making of International Law*, 260; J. Oloka-Onyango, 'Beyond the Rhetoric: Reinvigorating the Struggle for Economic and Social Rights in Africa', *California Western International Law Journal*, no. Issue 1 (1995): 1–75.

169 Michael Freeman, *Human Rights*, Third edition, Key Concepts (Cambridge: Polity, 2017), 184.

170 Ibid.

171 This is not only true for economic, social and cultural rights but also for civil and political rights. For example, Art. 14 of the International Covenant on Civil and Political Rights (ICCPR), which states that everyone shall be equal before the courts and tribunals, *inter alia* requires extensive training of professionals and the establishment of strong and independent judicial institutions. These requirements will inevitably need governmental funding in order for people to exercise their right.

172 Freeman, *Human Rights*, 183.

173 Attempts to counter these tendencies and to include locals in the planning and implementation of development strategies have been furthered through the so-called "human tights-based approach to development" (HRBA).

detrimental effects like the considerable disadvantage suffered by women and other already disadvantaged groups within the recipient countries, and an omission to provide for basic welfare services to ensure survival.[174]

The following section will take a look at bilateral investment treaties (BITs), which have proliferated in the wake of the market liberalisation in the global South, and have become the preferred tool of capital exporting countries that want to protect their investments. After that follows an outline of what these treaties generally entail, with a particular emphasis on stabilisation clauses.

The subsequent section will take a look at investment arbitration and its impact on human rights. While there are plenty of other aspects of the investment treaty regime that deserve a closer look, starting with the training and choice of the arbitrators, 3rd party access to the arbitration or the lack of appeal mechanisms, this section will mainly focus on arbitration cases. For a possible explanation of the lack of African arbitration cases, the section will examine the theory of "regulatory chill", which assumes that fear of investor-state arbitration might discourage governments from implementing policies and regulations for the public good.

5.1. The Bilateral Investment Treaty Regime and Human Rights

Drawing from the understanding of what constitutes the investment treaty regime laid out in "The Political Economy of the Investment Treaty Regime", this thesis understands it to consist of three components. These are the investment treaties, the institutions and rules governing the arbitration of investment disputes, and the decisions of arbitration tribunals which are applying and thus also interpreting the treaties.[175] While this section is concerning itself with a

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For a further analysis see Paul Gready, 'Rights-Based Approaches to Development: What Is the Value-Added?', *Development in Practice* 18, no. 6 (2008): 735-747; Andrea Cornwall and Celestine Nyamu-Musembi, 'Putting the "Rights-Based Approach" to Development into Perspective', *Third World Quarterly* 25, no. 8 (2004): 1415-1437; Peter Uvin, 'From the Right to Development to the Rights-Based Approach: How "Human Rights" Entered Development', *Development in Practice* 17, no. 4–5 (August 2007): 597–606.

174 Anghie, *Imperialism, Sovereignty, and the Making of International Law*, 259–60.

175 Jonathan Bonnitcha, Lauge N. Skovgaard Poulsen, and Michael Waibel, *The Political Economy of the Investment Treaty Regime* (Oxford University Press, 2017), 3.

general overview of these elements and subsequently focuses on the provisions contained in the treaties, the following section will take a closer look at investment arbitration and its impact on human rights obligations of host states.

Bilateral investment treaties, also known as BITs, are treaties with two or more states party to it and concern themselves with the protection of foreign investment.[176] These kind of treaties are generally signed by a capital exporting state from the global North and a capital importing state from the global South. There are, however, increasing instances of countries from the global South concluding investment protection treaties amongst themselves.[177]

What was the reason for the emergence of these treaties in the first place?

A possible explanation can be found in the dissolution of formal colonialism after WWII and the fact that newly (formally) independent countries sought to change the international legal landscape in a way that would also respect their needs. As has been outlined before, the international law in general, as well as the one dealing with the protection of foreign investment and international commerce, has been dominated by the colonising countries of Europe, as well as the USA. Using the forum of the United Nations, the newly independent countries sought to implement the New International Economic Order (NIEO), which sought to remedy the imbalances of the hitherto existing international economic laws.[178] Given the ensuing legal uncertainty following the challenge of the norms that investor states had advanced as customary laws and the lack of colonial control to remedy these gaps, investor states turned to treaties in order to secure the protection of investments.[179] Sornarajah further highlights that multinational corporations (MNCs) "seek to manufacture at locations where cheap skilled labour as well as cheap resources are readily available"[180] and that home

176 Ibid.

177 Miles, *The Origins of International Investment Law*, 91; Sam Foster Halabi, 'Efficient Contracting between Foreign Investors and Host States: Evidence from Stabilization Clauses', *Northwestern Journal of International Law & Business* 31, no. 2 (Spring 2011): 271.

178 Sornarajah, *The International Law on Foreign Investment*, 173; Halabi, 'Efficient Contracting between Foreign Investors and Host States', 273; Andrew T. Guzman, 'Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties', *Virginia Journal of International Law*, no. 4 (1998 1997): 641.

179 Sornarajah, *The International Law on Foreign Investment*, 173; Sornarajah, *Resistance and Change in International Law*, 191–92.

180 Sornarajah, *The International Law on Foreign Investment*, 174.

countries logically want to protect their MNCs when they enter these countries. The colonial imperialist venture had already created conditions that allowed European corporations to produce at a fraction of the costs and reap massive profits. The control over the investment protection which colonial rule granted, however, had to be replaced and BITs seemed to provide a promising set of tools to do just that.

The failure of the creation of a multilateral agreement on investment protection, like the Multilateral Investment Agreement (MAI) within the Organization for Economic Cooperation and Development (OECD) or attempts at the World Trade Organization (WTO), might just be another reason for the emergence of BITs.[181]

The first modern BIT was signed by West Germany and Pakistan in 1959 and a steady growth in the numbers of these treaties ensued.[182] According to the United Nations Conference on Trade and Development (UNCTAD) there existed just under 400 treaties in 1989, with numbers rising to just over 1000 treaties by 1995, almost 2000 by the year 2000 and more than 3000 by 2016.[183] Sornarajah accredits the proliferation of investment treaties in the 1990s to the spread of economic liberalism, with the United States and international financial institutions like the World Bank and the IMF as its driving forces.[184]

These treaties, different as they might be in detail, share a general pattern that establishes a set of provisions, geared towards the protection of foreign investors and their investments.[185] They generally define what is considered to be an investment and who is considered to be an investor, provide for non-discrimination (including national treatment and most favoured nation treatment), the repatriation of profits, minimum standards of treatment (e.g. “fair and equitable treatment” or “full protection and security”), compensation in cases of direct or

181 Luke Eric Peterson, ‘The Global Governance of Foreign Direct Investment: Madly off in All Directions’, FES Occasional Papers (Geneva: Friedrich-Ebert-Stiftung, 2005), 5; Joseph E. Stiglitz, ‘Regulating Multinational Corporations: Towards Principles of Cross-Border Legal Frameworks in a Globalized World Balancing Rights with Responsibilities’, *American University International Law Review* 23, no. 3 (June 2008): 453.

182 Peterson, ‘The Global Governance of Foreign Direct Investment’, 5.

183 Gus Van Harten, ‘Five Justifications for Investment Treaties: A Critical Discussion’, *Trade, Law and Development*, no. 1 (2010): 25; Bonnitcha, Skovgaard Poulsen, and Waibel, *The Political Economy of the Investment Treaty Regime*, 2.

184 Sornarajah, *The International Law on Foreign Investment*, 174.

185 Peterson, ‘The Global Governance of Foreign Direct Investment’, 7.

indirect expropriation, and methods for dispute settlement.[186] These treaties generally do not provide for rights for the host country apart from the ability to prohibit specific economic activities in general or to act on behalf of the public order, public health, and public morality.[187] Despite the right to take these actions, host states are still obliged to compensate investors for regulatory measures that affect the latter's profits adversely.[188] Given the fact that these compensations can induce high costs for governments, these treaties basically restrict a government's authority and establish a system that creates rights but hardly any responsibilities for investors.[189]

Given the rather detrimental effects on the host countries outlined above, one wonders what justifies this treaty regime. A common argument brought forward in favour of this system is that it provides an effective means for states to attract investment. There are, however, a few problems with the actual use of investment treaties and the underlying logic of this argument. Investors are granted quite a liberal approach by investment treaties when it comes to the choice of the nationality they want to acquire in case they want to bring claims against a host state – a technique also known as "forum-shopping".[190] This means that an investor can gain access to the treaty of a desired country by simply setting up a holding company in that country.[191] Imagine state A entering into an investment contract with state B in hopes of attracting investments by the latter. Considering the liberal wording concerning the nationality of an investor in already existing contracts, investors from state B could just create a holding in state C, which already has concluded an investment treaty with state A, and thus enjoy all the benefits granted by the treaty. A contract between state A and state B would thus become superfluous. Likewise, though based on an expansive jurisdictional ruling,[192] a domestic

186 Suvedī, *International Investment Law*, 84; Peterson, 'The Global Governance of Foreign Direct Investment', 7; Halabi, 'Efficient Contracting between Foreign Investors and Host States', 271.

187 Halabi, 'Efficient Contracting between Foreign Investors and Host States', 271.

188 Stiglitz, 'Regulating Multinational Corporations', 455–56; Halabi, 'Efficient Contracting between Foreign Investors and Host States', 271.

189 Stiglitz, 'Regulating Multinational Corporations', 468; 553–54.

190 Van Harten, 'Five Justifications for Investment Treaties', 28.

191 Ibid.: 28-29.

192 'Tokios Tokeles v. Ukraine Award - 29 April 2004', *World Trade and Arbitration Materials* 16, no. Issue 4 (1 January 2004): 75–128.

business was able to make itself “foreign”, thus enabling it to bring a claim against its own country, by creating a holding company in a state that had already signed a BIT with the home country.[193] The permissive nature of the liberal approach to forum-shopping displayed in these examples clearly defeats the purpose of treaties entered into with the intention to generate investment flows between the parties to the contract.[194]

Another point concerning the supposed purpose of investment treaties as means for attracting foreign investment is the fact that they hardly impose any obligations on the investor’s home country that encourage it to increase its outward investments.[195] Lastly, the fact that most of the investment treaties apply to already existing investments, also challenges the argument that they are supposed to generate new inflows of foreign investment.[196]

Apart from these argumentative challenges to the claim that the conclusion of BITs attracts new investments, empirical studies also showed mixed results concerning the correlation between the signing of BITs and increased investment flows. While some studies found that signing BITs had little to no impact on investment flows[197], one study found that there was a positive correlation between the signing of BITs and inflow of foreign investment.[198] The conflicting evidence of these studies make for a less than convincing case in favour of the argument that the signing of BITs increases the inflow of foreign investment.

These treaties, do, however grant foreign investors the right to have a determining influence on the behaviour of states. Stabilisation clauses are just another instance of the extraordinary status granted to foreign investors and their ability to circumvent democratic and domestic

193 Van Harten, ‘Five Justifications for Investment Treaties’, 29.

194 Ibid.

195 Ibid.

196 Ibid.: 30.

197 Jennifer Tobin and Susan Rose-Ackerman, ‘Foreign Direct Investment and the Business Environment in Developing Countries: The Impact of Bilateral Investment Treaties’, William Davidson Institute Working Papers Series (William Davidson Institute at the University of Michigan, 1 June 2003); Mary Hallward-Driemeier, ‘Do Bilateral Investment Treaties Attract Foreign Direct Investment? Only a Bit…And They Could Bite’, SSRN Scholarly Paper (Rochester, NY: Social Science Research Network, 1 June 2003); United Nations Conference on Trade and Development, Bilateral Investment Treaties in the Mid-1990s (United Nations Publications, 1998).

198 Eric Neumayer and Laura Spess, ‘Do Bilateral Investment Treaties Increase Foreign Direct Investment to Developing Countries?’, *International Finance*, 2004.

judicial processes. They can be defined as “contractual clauses in private contracts between investors and host states that address the issue of changes in law in the host state during the life the project.”[199] While not every investment treaty contains such a clause, they are most common in long-term investments made in the extractive industries and in contracts that concern public infrastructure and essential services.[200] These clauses were initially deployed in order to mitigate risks for investors like nationalisations, arbitrary or discriminating legal measures, but in recent decades, investors have used these clauses in order to guard their assets against costs arising from environmental or social legislation.[201] In order to reduce the perceived risks, so-called “full freezing clauses” render inapplicable any new laws that concern fiscal matters, as well as non-fiscal matters with regards to the investment.[202] “Limited freezing clauses” only apply to a specific set of laws and might for instance exempt an investment from any new labour laws.[203] “Economic equilibrium clauses”, on the other hand, protect an investor against the financial effects of changes in the law. So instead of circumventing the applicability of new laws, an investor can demand financial compensation for simply complying with the law.[204] In all of these instances, investors are basically being provided with a legal basis for resisting compliance with new laws.[205]

The “Shemberg-report” on stabilisation clauses finds that there are regional differences in the application of these instruments.[206] The use of stabilisation clauses has been more frequent in investment contracts concluded with developing countries, with broad full freezing clauses

199 Andrea R. Shemberg, ‘Stabilization Clauses and Human Rights’ (The World Bank, 11 March 2008), 4.

200 Ibid.

201 Ibid.

202 Halabi, ‘Efficient Contracting between Foreign Investors and Host States’, 270; 292.

203 Ibid. 293.

204 Ibid.

205 Ibid.: 291.

206 The report analysed 88 investment treaties, including 12 model treaties, with 11 being from Sub-Sahara Africa; 14 from East Asia and Pacific; 16 from the Middle East and North Africa; 10 from Eastern and Southern Europe, and Central Asia; 19 from Latin America and the Caribbean; 5 from Southeast Asia; and 13 from OECD countries (excluding Turkey, which was included in the group of Eastern and Southern Europe, and Central Asia).

being most common in contracts with Sub-Saharan countries and limited freezing clauses being used in the Middle East and North Africa; Latin America and the Caribbean; Eastern Europe, Southern Europe and Central Asia; South Asia; and Sub-Saharan Africa.[207] Equilibrium clauses, while used in every region of the sampled contracts, were more prevalent in non-OECD countries.[208] Keeping in mind the history of colonial rule and exploitation that many of the non-OECD countries have experienced, it is not too surprising to find them on the receiving end of these restrictive provisions. It seems to be a continuation of the century long exercise of power by investors from the global North, with the support of their home states, over countries from the global South with different means.[209] This situation seems very much reminiscent of the times of the imperial trading companies, which were also granted privileges usually reserved for a sovereign state and could rely on the support of their home state in cases where they were met with resistance.[210] After the disruption of their social structures and being exposed to material exploitation for centuries, former colonies were denied to shape international economic laws in their favour and were subsequently more prone to give into this investment treaty regime.

The contractual provisions contained in these treaties inevitably impact human rights. Human rights advocates have pointed out that the protection of investors is not being balanced with the state's duty to regulate them, in order to protect human rights and with the investor's responsibility to respect these rights.[211] Furthermore, they argue that the payment for an investor's compliance with the host country's laws denies the state its role as legislator and

207 Shemberg, 'Stabilization Clauses and Human Rights', 20–22; Halabi, 'Efficient Contracting between Foreign Investors and Host States', 295.

208 Shemberg, 'Stabilization Clauses and Human Rights', 24; Halabi, 'Efficient Contracting between Foreign Investors and Host States', 297.

209 There are, however, a few notable exceptions, like India, China, and Brazil, for example.

210 Where brute force reigned supreme in those early times, the threat of economic sanctions, the withdrawal of much needed financial aid or other economic measures presumably geared towards development provide for a seemingly subtler threat. See Megan Wells Sheffer, 'Bilateral Investment Treaties: A Friend or Foe to Human Rights', *Denver Journal of International Law and Policy* 39, no. Issue 3 (1 January 2010): 490.

211 Shemberg, 'Stabilization Clauses and Human Rights', 10.

creates a hindrance for the implementation of social and environmental standards. These effects are aggravated in developing countries.[212]

212 Ibid.

5.2. Investment Arbitration and Human Rights

Thanks to investment treaties' inclusion of a provision that gives investors the status of a legal person under international law, they have been enabled to bring their own claims against host countries in cases where they allege that they have not been protected to the extent agreed upon.[213] By accepting the investment treaty regime, states have effectively waived their immunity as a sovereign and have given external arbitration tribunals the right to decide over them.[214] This seems to be another chapter in the long history of the struggle of capital-importing countries for domestic jurisdiction over investment disputes and capital-exporting countries' insistence on an external, allegedly impartial mechanism. In the absence of a multilateral agreement on investment protection, the proliferation of BITs seems to cement the capital-exporting countries' position.

There is no single entity that deals with all the investment disputes. The disputes may be referred to the World Bank's International Centre for the Settlement of Investment Disputes (ICSID), the London Court of International Arbitration (LCIA), the International Chamber of Commerce (ICC) and its International Court of Arbitration, the Permanent Court of Arbitration (PCA), the Arbitration Institute of the Stockholm Chamber of Commerce (SCC) or the UN Commission on International Trade Law (UNCITRAL).[215] ICSID is the only of these institutions that provides publicly available information on the arbitration cases, which makes it harder to monitor the remaining arbitrations' frequency, outcome, and impact on host countries' policies.[216]

Advocates of this system claim that the domestic judicial institutions of developing and transition countries (even those of developed countries) are not efficient enough, provide only inadequate remedies, are corrupt or just unreliable in general.[217] At the same time, they are not taking any supportive actions to help the host countries address these issues but instead

213 Peterson, 'The Global Governance of Foreign Direct Investment', 8.

214 Ibid.

215 Peterson, 'The Global Governance of Foreign Direct Investment', 9–10; Van Harten, 'Five Justifications for Investment Treaties', 20.

216 Peterson, 'The Global Governance of Foreign Direct Investment', 10.

217 Van Harten, 'Five Justifications for Investment Treaties', 33.

enjoy the preferential treatment that they are granted by the investment treaties.[218] If one considers the broad interpretations of treaty provision by arbitrators, contrary outcomes in almost identical cases, and the impossibility of those affected by the investors' conduct to have standing in the arbitration, one might just conclude that the arbitration itself does not live up to the standards it demands from host countries.[219] The fact that third parties hardly have any means to gain access to the arbitration, leaves investors in an exceptionally advantageous position to challenge state measures that are aimed at furthering socio-economic development, like regulations aimed at environmental protection, subsidising fledging local industries, or implementing human rights in general.[220]

There have been several cases that have seen the challenge of regulatory measures taken by the state in order to protect their citizens' human rights (even if not mentioned explicitly in the arbitration hearings).

Metalclad V Mexico[221] was a case that dealt with the US-based Metalclad Corporation, which had purchased a Mexican corporation that had previously operated a hazardous waste treatment site in central Mexico.[222] Despite warnings from Mexico's state environmental officials not to invest in this site and opposition from local and state authorities, and NGOs, Metalclad was determined to follow through on the project.[223] While the federal government had issued the company the required clearances, municipal approval was still pending. After the reception of an additional construction permit, Metalclad began its construction work.[224] The municipal authorities, however, still had not issued the permits but issued an "ecological

218 Ibid.

219 Van Harten, 'Five Justifications for Investment Treaties', 33; Peterson, 'The Global Governance of Foreign Direct Investment', 16.

220 Van Harten, 'Five Justifications for Investment Treaties', 34; Peterson, 'The Global Governance of Foreign Direct Investment', 17.

221 Metalclad Corporation v. United Mexican States, No. ARB(AF)/97/1 (ICSID 30 August 2000).

222 Miles, *The Origins of International Investment Law*, 156; Sara Grusky and Sarah Anderson, 'Challenging Corporate Investor Rule: How the World Bank's Investment Court, Free Trade Agreements, and Bilateral Investment Treaties Have Unleashed a New Era of Corporate Power and What to Do about It.' (Washington, D.C: IPS and Food & Water Watch, 2007), 12.

223 Grusky and Anderson, 'Challenging Corporate Investor Rule', 12.

224 Miles, *The Origins of International Investment Law*, 156.

decree", which declared a large era, including Metalclad's hazardous waste facility, an ecological preserve in order to protect a rare species of cacti – effectively causing a blockage of the project.[225] As a consequence, Metalclad filed a lawsuit under the North American Free Trade Agreement (NAFTA) and the tribunal found that Mexico's prevention of Metalclad's operation of the landfill, due to ecological concerns, constituted an act "tantamount to expropriation".[226] The company was eventually awarded US$16.7 million in compensation.[227] While this case does not mention human rights at all and seems to be focused on environmental issues, Article 12(2)(b) of the International Covenant on Economic, Social, and Cultural Rights (ICESCR) provides that states should take steps in order to achieve "[t]he improvement of all aspects of environmental and industrial hygiene"[228] The re-opening and operation of a waste site that was already known to have contaminated nearby reservoirs[229] cannot be considered to be in the interest of the local communities and their right to a healthy environment. The tribunal's decision was also considered to be controversial, as it extended the meaning of expropriation beyond the hitherto established scope and exposed health and environmental regulations on behalf of the public good to challenges from investors.[230] Another case where investors brought claims against a state as a result of the exercise of its authority for the public good, was *Piero Foresti, Laura de Carli & Others v. The Republic of South Africa*.[231] In this contentious case, a group of European investors filed suit against the South African government in the wake of a law that was geared towards the elimination of historical inequalities.[232] The Mineral and Petroleum Resources Development Act's (MPRDA) purpose was to promote greater participation of South Africa's black citizens in the mining

225 Miles, 157; Grusky and Anderson, 'Challenging Corporate Investor Rule', 12.

226 Miles, *The Origins of International Investment Law*, 157.

227 Ibid.

228 UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3, Art. 12(2)(b).

229 Grusky and Anderson, 'Challenging Corporate Investor Rule', 12.

230 Miles, *The Origins of International Investment Law*, 158.

231 Piero Foresti, Laura de Carli & Others v. The Republic of South Africa, No. ARB(AF)/07/01 (ICSID 4 August 2010).

232 Grusky and Anderson, 'Challenging Corporate Investor Rule', 12.

sector because this sector was still lagging when it came to racial equity.[233] The investors, Italian nationals who held about 80 per cent of South Africa's stone exports, alleged a breach of South Africa's BIT with Italy and its BIT with Belgium and Luxembourg, via their holding in Luxembourg.[234] They claimed that they had been denied fair and equitable treatment due to affirmative action obligations created under the MPRDA, which obligated them to hire black or historically disadvantaged managers and sell 26 per cent of their shareholding to persons from that group.[235] While taken out of context this might seem to be an unfair requirement, one has to keep in mind that due to the historical oppression and systemic exploitation, South African natives have been denied their fair share of the profits that their resource generate for an undue amount of time. Furthermore, Article 1(2) of the ICESCR states that "[a]ll peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law"[236] and Article 25 affirms the "inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources."[237] While this case was ultimately settled outside the arbitration tribunal and the investors were ordered to pay the arbitration costs of EUR400,000, it still sent a disturbing signal to governments who were committed to the inclusion of historically disadvantaged groups and human rights.[238]
In the same vein, there have also been a few cases concerning regulatory measures of host states with regards to privatised water supplies. In *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*[239], a German-British consortium, the investors, were assigned with the upgrade and management of water and sanitation infrastructure in Tanzania. [240] In the course of their action they seemingly underestimated the difficulties that came with the realisation of

233 Ibid.

234 Grusky and Anderson, 'Challenging Corporate Investor Rule', 13; Sheffer, 'Bilateral Investment Treaties', 498.

235 Sheffer, 'Bilateral Investment Treaties', 498.

236 *International Covenant on Economic, Social and Cultural Rights*, Art.1(2).

237 Ibid.: Art. 25.

238 Grusky and Anderson, 'Challenging Corporate Investor Rule', 13; Sheffer, 'Bilateral Investment Treaties', 499.

239 Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania, No. ARB/05/22 (ICSID 24 July 2008).

240 Sheffer, 'Bilateral Investment Treaties', 499.

this project and also excluded the people living in the poorest areas from their service.[241] The difficulties encountered by Biwater eventually led to a deterioration of its services and money owed to the Tanzanian government, which subsequently led to the latter's cancellation of the contract after two years (of an initially planned 10 year tenure).[242] Unsurprisingly, Biwater initiated an arbitration process with ICSID and requested US$20 million, as it alleged an expropriation by the Tanzanian government.[243] While the tribunal agreed on the fact that an expropriation existed, no compensation was awarded due to the investor's poor planning that led to a massive devaluation by the time the contract was terminated.[244]

While the right to water is not contained in the ICESCR as such – though one might argue that it is implicitly included in Articles that refer to natural resources[245] – efforts have been made to include it into the canon of human rights.[246] Other cases that saw investors initiate investment arbitration due to states' attempts to keep the use of water affordable for its citizens or to counteract deteriorating services provided by the investors include, among others: *Urbaser and CABB v. Argentina*,[247] *Vivendi v. Argentina*,[248] and *AWG v. Argentina*.[249] These cases highlight the fact that states, while acting in their natural capacity and trying to secure their citizens' enjoyment of human rights, must always be wary to not disgruntle an investor.

The fear of an impending investment arbitration and a possible loss, which might bring with it large damage awards, is known as "regulatory chill".[250] As a consequence, a state might be generally less inclined to introduce new rules and regulations that are geared towards the

241 Sheffer, 499; Grusky and Anderson, 'Challenging Corporate Investor Rule', 20.

242 Grusky and Anderson, 'Challenging Corporate Investor Rule', 20.

243 Sheffer, 'Bilateral Investment Treaties', 499.

244 Sheffer, 'Bilateral Investment Treaties', 499; "UK water company to sue one of world's poorest countries." Press release of World Development Movement, U.K., December 1, 2005.

245 See *International Covenant on Economic, Social and Cultural Rights*, Art.1(2), Art. 25.

246 UN General Assembly, *The human right to water and sanitation*: *resolution/adopted by the General Assembly*, 3 August 2010, A/RES/64/292.

247 Urbaser and CABB v. Argentina, No. ARB/07/26 (ICSID 8 December 2016).

248 Vivendi v. Argentina, No. ARB/97/3 (ICSID 21 November 2000).

249 AWG v. Argentina (ICSID 9 April 2015).

250 Miles, *The Origins of International Investment Law*, 181.

protection of the environment, or the domestic implementation of human rights.[251] While the extent of regulatory chill varies, depending on the decision makers and the country, there is little evidence that proves that concern about impending arbitrations is internalised in decision-making processes.[252]

The choice of the cases is reflecting the analytical focus of this thesis on the global South. There are, however, also cases against countries from the global North that dealt with claims brought against them pursuant to the implementation of measures that were aimed at the public good.[253] Nevertheless, it is a striking feature that the majority of the (known) claims against states have been made against developing or transition states.[254] These countries are already struggling to fulfil their socio-economic human rights obligations, due to limited access to or enjoyment of their natural resources and the profit it could generate. The magnitude of some of the damages that arbitration tribunals award, thus have a significantly higher impact on their budgets than they might have on an economically more developed country.[255] The way investment treaties have been used in the above mentioned cases seems to diverge from their initial purpose of protecting investors against arbitrary and volatile acts of host states.[256] Now, investment arbitrators that have not been elected or appointed by a democratic process are able to interfere with state regulations, in cases where investors feel that they are not conducive for business.[257] Considering that the investment treaty regime is equipped with "one of the most powerful systems of international adjudication in modern

251 Davitti, 'On the Meanings of International Investment Law and International Human Rights Law', 434.

252 Chester Brown and Kate Miles, eds., *Evolution in Investment Treaty Law and Arbitration* (Cambridge: Cambridge University Press, 2011), 133–40.

253 Methanex Corporation v. United States of America (UNCITRAL 3 August 2005); Ethyl Corporation v. The Government of Canada (UNCITRAL 24 June 1998); S.D. Myers, Inc. v. Government of Canada (UNCITRAL 13 January 2004).

254 Peterson, 'The Global Governance of Foreign Direct Investment', 12; Sheffer, 'Bilateral Investment Treaties', 491–92.

255 Stiglitz, 'Regulating Multinational Corporations', 554.

256 Barnali Choudhury, 'Recapturing Public Power: Is Investment Arbitration's Engagement of the Public Interest Contributing to the Democratic Deficit', *Vanderbilt Journal of Transnational Law*, no. 3 (2008): 782.

257 Ibid.

history"[258] and that it was able to transfer power from states to investors and from domestic courts to international arbitration tribunals, it seems that the creation of a system of economic control that supplanted colonial imperialism, has come full circle. While investors are trying to conserve or possibly expand this system, they are (knowingly or not) also maintaining and aggravating "socio-economic arrangements"[259] that induce the misery of human rights abuses.

6 Conclusion

This thesis attempted to combine several different subject areas, that, on the face of it, do not seem to be related. There are, however, elements that provide for a connection of these seemingly different subjects. The overarching themes that connects the different parts of the thesis have been Europe's colonial imperialism and its intellectual justification through the concepts of development and progress.

Europe's colonial exploitation and control of regions that were not officially under colonial rule were, among other things, also fuelled by economic desires, with corporations the British and Dutch East Indian Companies at the forefront of this trend. An alleged duty to "uplift" the newly discovered peoples and "enlighten" them with European civilisation served as a justification at home and provided the venture with a philanthropic disguise. During this process of supposed civilisation, the forced and sometimes brutal restructuring of societies to better serve the colonisers needs, laid the foundation of what this thesis refers to as "planned misery": "misery that belongs with the logic of particular socio-economic arrangements."[260]

It was also during these times that European regional laws were confronted with entities that it, one the one hand did not consider part of the legal realm, but on the other hand had to include into the legal realm in order to prevent disputes of colonial possessions among European states. The laws governing commercial relations that had thus been created were geared towards the consolidation of European economic hegemony. They disregarded previously existing systems and forced these regulations onto those under their colonial

258 Van Harten, 'Five Justifications for Investment Treaties', 20.

259 Marks, 'Human Rights and Root Causes', 75.

260 Marks, 'Human Rights and Root Causes', 75.

control or used (the threat of) superior military force in order to impose them on countries that were not under their direct control.

Those subjected to this rule fiercely contested it and the countries of South America, which had acquired their sovereignty well before other colonies, brought forward one of the most memorable legal defences: the Calvo Doctrine and Clause. These legal theories sought to end the abuse of diplomatic protection of aliens by foreign investors and claim domestic jurisdiction over arising investment disputes.

With the end of WWII and the ensuing wave of decolonisation, it seemed as if the former colonies were now finally accepted as sovereign states and enabled to shape the international laws that govern them. The newly revived development discourse of the time, now focused on economic development, proved to be a convenient tool in the inhibition of these plans.[261] Given the unsurprisingly poor conditions that most of the newly independent countries were in after decades and centuries of colonial exploitation, the economic development discourse simply ignored the historical circumstances and labelled these countries “poor”. While the newly independent countries’ socio-economic structures had indeed been ruptured in such a way that they were no longer able to fend for themselves, their attempts to countervail these developments via the United Nations was unsuccessful due to global North opposition.

The cure that international financial institutions (dominated by countries from the global North) envisaged was the liberalisation of former colonies’ markets in order to increase foreign investment and privatisations. In the absence of a multilateral agreement on foreign investment protection, bilateral investment treaties became the preferred option. While the positive effect of these treaties on the host countries is contentious, they certainly have provided foreign investors with unprecedented powers. The privileges that these treaties grant investors, including the possibility to challenge regulatory measures taken by the state in favour of the public good, unequally disadvantage developing countries.

261 The sheer dominance of former colonising powers and the US, based on centuries of exploitation, cannot be left unmentioned in this context.

It is this complex system of control that is being asserted on developing states, that the author finds to create the socio-economic conditions for the proliferation of misery in the global South.

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