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## Africa-China Bilateral Investment Treaties: A Critique

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# AFRICA-CHINA BILATERAL INVESTMENT TREATIES: A CRITIQUE

Dr. Uche Ewelukwa Ofodile\*

## SYNOPSIS

*The purpose of this Article is to draw attention to, raise questions about, and generate discussions regarding the emerging norms, legal context, and long-term development-implications of South-South foreign direct investment (“FDI”) and South-South bilateral investment treaties (“BIT”). This Article seeks to refocus the discourse about FDI and BITs on developing countries in their role as exporters of capital and in the context of the much-touted new geography of investment. Can South-South BITs play a positive role in promoting development in sub-Saharan Africa any more than the Africa-North BITs? Is China concluding development-focused BITs with countries in Africa? The Article identifies the BITs between China and countries in Africa, analyzes the main provisions and the development-dimension of these BITs, and examines the extent to which they differ from model BITs used by Western countries.*

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#### INTRODUCTION

Two decades ago, bilateral investment treaties (BITs) were concluded primarily between developed and developing countries.<sup>1</sup> With the changing geography of trade and investment and the resulting increase in South-South economic cooperation, developing countries are increasingly concluding BITs among themselves.<sup>2</sup> In the context of trade between the People's Republic of China (China) and countries in Africa, there has been an increase in the number of BITs and double taxation treaties (DTTs) that China has concluded with countries in Africa.<sup>3</sup> Starting from 1989, when China concluded its first BIT with an African country,<sup>4</sup> the number of China-Africa BITs has grown to 31 as of June 1, 2010.<sup>5</sup> One China-Africa BIT was concluded in the 1980s, 13 in the 1990s, and 16 since the year 2000

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1. Mahnaz Malik, *Recent Developments in Regional and Bilateral Investment Treaties* 4-5, Second Annual Forum of Developing Country Investment Negotiators (Nov. 3-4, 2008), [http://www.iisd.org/pdf/2008/dci\\_recent\\_dev\\_bits.pdf](http://www.iisd.org/pdf/2008/dci_recent_dev_bits.pdf) (observing that, initially, BITs were signed between developed countries and developing countries and that the number of BITs between developing countries has grown over the last few years). For a chronological list of BITs signed prior to September 1994, see RUDOLF DOLZER & MARGRETE STEVENS, *BILATERAL INVESTMENT TREATIES* 267-85 (1995).

2. U.N. CONFERENCE ON TRADE & DEV., *SOUTH-SOUTH COOPERATION IN INTERNATIONAL INVESTMENT ARRANGEMENTS*, at 1, U.N. Doc. UNCTAD/ITE/IIT/2005/3, U.N. Sales No. E.05II.D.26 (2005) [hereinafter UNCTAD 2005].

3. For a list of China's BITs, along with their signing and implementation dates, see UNCTAD, *Bilateral Investment Treaties Signed by China* (June 1, 2012), [http://unctad.org/Sections/dite\\_pccb/docs/bits\\_china.pdf](http://unctad.org/Sections/dite_pccb/docs/bits_china.pdf). UNCTAD maintains a database of approximately 1,800 available BITs and allows the user to search all available BITs signed by one country, or to find a specific BIT negotiated between two countries. See UNCTAD, *Investment Instruments Online: Bilateral Investment Treaties*, [http://www.unctadxi.org/templates/doc-search\\_\\_\\_779.aspx](http://www.unctadxi.org/templates/doc-search___779.aspx).

4. DOLZER & STEVENS, *supra* note 1, at 291-93 (demonstrating that China signed a BIT with Ghana on October 12, 1989, marking the first such treaty between China and an African nation).

5. See Chinese BITs, *supra* note 3.

(See Annexes 1, 2, 3, and 4). Although BITs are arguably the most important legal instruments for the governance of global foreign direct investment (FDI) flows, little attention has been given to the growing number of BITs concluded between developing countries in the context of widening and deepening South-South economic cooperation. Thus, while African leaders celebrate Beijing's renewed interest in the continent,<sup>6</sup> few appear to be paying attention to the legal instruments that form the bedrock of Chinese investment in the continent. This Article examines the trends, contours, and development implications of China-Africa BITs. This Article fills a gap in the literature by identifying and analyzing the evolving normative framework for South-South investment relations and calling attention to some troubling aspects of the BITs that countries in Africa are now concluding with other developing countries. Several questions are raised and addressed:

- In engaging Africa, how is China using BITs and why?
- In the BITs it is concluding with countries in Africa, is China merely using the rules, norms, and models used by the developed countries in the North or is China pursuing its own distinctive policies?<sup>7</sup>
- Do China-Africa BITs strike the right balance between protecting Chinese investors and safeguarding the public interest in Africa?
- What are the development implications of China-Africa BITs?
- To what extent does China's BIT agenda in Africa support or contradict China's Africa policy or the rhetoric of mutual benefit and win-win outcomes that underscore South-South cooperation discourse?
- Ultimately, are BITs that account for and are adapted to each country's individual and changing circumstances and development needs possible in the context of South-South economic relations?

Although a lot is known and has been written about North-South BITs, South-South BITs are still understudied. This is troubling for several

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6. See e.g., *Africans Welcome China's Growing Economic Power*, REUTERS (Mar. 28, 2011, 2:04 AM), <http://www.reuters.com/article/2011/03/28/ozabs-china-perceptions-africa-idAFJ0E72R01D20110328>; Tichaona Chifamba, *Zimbabwean Experts Applaud Chinese Trade Assistance*, XINHUA (Dec. 1, 2011, 8:36:52 AM), [http://news.xinhuanet.com/english2010/in-depth/2011-12/01/c\\_131280629.htm](http://news.xinhuanet.com/english2010/in-depth/2011-12/01/c_131280629.htm); Erin Conway-Smith, *African Union's New Chinese-Built Headquarters Opens in Addis Ababa, Ethiopia*, GLOBAL POST (Jan. 28, 2012, 9:13 AM), <http://www.globalpost.com/dispatch/news/regions/africa/120128/new-chinese-built-african-union-au-headquarters-opens-addis-ababa-ethiopia>.

7. In this paper "North-South" refers to the socioeconomic division between advanced and wealthy developed countries collectively referred to as "the North" and the less developed, poorer countries collectively referred to as "the South."

reasons. First, BITs, given their sheer number and in the absence of a comprehensive multilateral or regional treaty on investment, presently “constitute a *de-facto* international regime for the governance of foreign investment” and should be carefully studied for the norms they generate.<sup>8</sup> BITs, together with multilateral treaties such as the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention),<sup>9</sup> the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention),<sup>10</sup> the 1985 Convention Establishing the Multilateral Investment Guarantee Agency,<sup>11</sup> constitute the framework for international investment today.

Second, with the rise in South-South FDI flows has come a related increase in the number of South-South investment agreements. The implications of the growing number of South-South investment treaties and agreements for capital-importing countries and for individuals and groups within these countries need to be carefully analyzed.<sup>12</sup>

Finally, South-South BITs are frequently concluded without much discussion or debate, perhaps because of the false notion that South-South economic trade and investments are benign, mutually-beneficial, and always create win-win outcomes.<sup>13</sup> For capital-importing nations, this false

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8. Luke Eric Peterson, Conference Report, Dialogue on Globalization, Bilateral Investment Treaties – Implications for Sustainable Development and Options for Regulation 2 (Feb. 2007), [http://www.fes-globalization.org/publications/ConferenceReports/FES%20CR%20Berlin\\_Peterson.pdf](http://www.fes-globalization.org/publications/ConferenceReports/FES%20CR%20Berlin_Peterson.pdf).

9. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *opened for signature* June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 (codified at 9 U.S.C.A. 201-208 [1970]).

10. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, *opened for signature* Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159.

11. Convention Establishing the Multilateral Investment Guarantee Agency, *opened for signature* Oct. 11, 1985, 24 I.L.M. 1598 (entered into force April 12, 1988).

12. See generally, U.N. CONFERENCE ON TRADE AND DEV., INVESTOR-STATE DISPUTES ARISING FROM INVESTMENT TREATIES: A REVIEW, U.N. Doc. UNCTAD/ITE/ITT/2005/4, U.N. Sales No. E.06.II.D.1 (2005) (discussing the growing number of claims based on BITs through 2005).

13. FOCUS ON THE GLOBAL SOUTH, THE CHALLENGE OF FREE TRADE AGREEMENTS IN ASIA: A ROUNDTABLE DISCUSSION SUMMARY REPORT (Mar. 3, 2011), <http://www.focus-web.org/content/challenge-free-trade-agreements-asia-roundtable-discussion-summary-report-new-delhi-3-march> (observing that in the place of a failed World Trade Organization Doha Round, Asian countries are preferring to engage in a complicated web of ambitious bilateral and regional Free Trade Agreements and noting that Asian civil society groups are critiquing the lack of transparency and anti-development nature of these trade and investments treaties). In Africa, scholars, civil society groups, and activists lament the secrecy and back-room deals that appear to be a feature of China’s engagement in the region. See generally, Sharon LaFraniere & John Grobler, *China Spreads Aid in Africa, With a Catch*, N.Y. TIMES (Sept. 21, 2009), <http://www.nytimes.com/2009/09/22/world/africa/22namibia.html?pagewanted=all>. See also Omo Gabriel, *Nigeria: Lack of Transparency in Contract, Cause of Restiveness in Niger Delta - Okonjo-Iweala*, VANGUARD (Nov. 17, 2010), <http://www.vanguardngr.com/2010/11/lack-of-transparency-in-contract-cause-of-restiveness-in-n-delta-okonjo-iweala/>.

sense of security could prove very costly. Given some of the asymmetries in South-South relations, it is important to study and understand the ways that BITs may advantage some developing countries at the expense of others.

This Article examines emerging South-South BITs against the backdrop of the crisis of legitimacy confronting the international investment regime and the growing rejection of hitherto accepted norms, practices and structures of the regime. Evidence of this resistance within the regime abounds.<sup>14</sup>

This article is timely for several reasons. First, across the globe there is a growing revolt against standard BITs, with their exclusive emphasis on investor protection but not investor obligations.<sup>15</sup> While some countries (e.g. Bolivia and Ecuador) have denounced some of their BITs, other countries (e.g. South Africa) are refusing to renew some of their older BITs that are about to expire and are now insisting on BITs that are more development-friendly.<sup>16</sup> Furthermore, organizations such as the fifteen-member South African Development Community (SADC) are adopting model BITs that aim to balance investor rights and obligations.<sup>17</sup>

Second, China's FDI inflow into Africa has significantly increased in the last decade and is projected to grow in the years to come.<sup>18</sup> According

14. See S. AFR. DEP'T OF TRADE AND INDUSTRY, *BILATERAL INVESTMENT TREATY POLICY FRAMEWORK REVIEW 9* [hereinafter Department of Trade and Industry], available at <http://www.pmg.org.za/node/17313>.

15. See, UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, *DENUNCIATION OF THE ICSID CONVENTION AND BITS: IMPACT ON INVESTOR-STATE CLAIMS*, IIA ISSUE NOTE, No. 2 (December 2010)[hereinafter UNCTAD 2010].

16. See, e.g., *TERMINATION OF THE BILATERAL INVESTMENT TREATY WITH THE BELGO-LUXEMBOURG ECONOMIC UNION*, Letter from Maite Nkoana-Mashabane, Minister of Int'l Relations and Co-operation, to Johan Maricou, Ambassador of the Kingdom of Belg. to S. Afr. (Sept. 7, 2012). See also Peter Leon, Jonathan Veeran & Erin Warmington, *South Africa: South Africa Declines to Renew Bilateral Investment Treaties With European Union Member States*, MONDAQ (Oct. 5, 2012) <http://www.mondaq.com/x/199586/international+trade+investment/South+Africa+Declines+To+Renew+Bilateral+Investment+Treaties+With+European+Union+Member+States>.

17. For the Southern African Development Community Model BIT, see SADC MODEL BILATERAL INVESTMENT TREATY TEMPLATE WITH COMMENTARY (2012), available at <http://www.iisd.org/itn/wp-content/uploads/2012/10/SADC-Model-BIT-Template-Final.pdf>.

18. China's investments in Africa reportedly reached \$1 billion in 2010 (up from \$100 million in 2001) and China's total investment volume in Africa as at the end of 2010 exceeded \$10 billion (up from \$490 million by the end of 2003). See Zhou Siyu, *Still Room for Investment*, CHINA DAILY (Dec. 9, 2011), [http://www.chinadaily.com.cn/cndy/2011-12/09/content\\_14236341.htm](http://www.chinadaily.com.cn/cndy/2011-12/09/content_14236341.htm).

The author surmises that with an overall increase in China's direct investment overseas, China's investment in Africa will also increase given Beijing's continuing interest in the region. According to China's Ministry of Commerce (MOFCOM), in 2011, China's direct investment overseas was up by 1.8% year-on-year and amounted to US\$ 60.07 billion. Also in 2011, Chinese investors made direct investment overseas in 3,391 enterprises in 132 countries and regions. See *Brief Statistics on China's Non-financial Direct Investment Overseas in 2011*, MINISTRY OF COMMERCE PEOPLE'S REPUBLIC OF CHINA (3 February 2012), <http://english.mofcom.gov.cn/aarticle/statistic/foreigntradecooperation/201202/20120207950258.html>. See also UNCTAD 2005, *supra* note 2 (concluding that developing countries "are currently part

to information from the Ministry of Commerce (MOFCOM) of the Government of the People's Republic of China, in 2012, Chinese non-financial direct investment in Africa hit \$1.5 billion, up 17 percent from the previous year. Growing China-Africa investment relations demand that attention be paid to the legal framework of the unfolding arrangements. It is therefore likely that Beijing will be concluding BITs with more countries in the region.<sup>19</sup>

China is very active in negotiating BITs and ranks second after Germany on the list of the most active contracting parties to BITs worldwide.<sup>20</sup> Given China's BIT history, it is safe to conclude that Beijing will seek to conclude BITs with most countries in Africa that it has relations with.

Third, with the increase in South-South economic cooperation and the growing presence of emerging economies like Brazil, India, and Malaysia in Africa, African governments are likely to come under increased pressure to conclude BITs with other Southern partners.

Fourth, there is evidence to suggest that for some countries in Africa, particularly the least developed countries (LDCs) the touted benefits of South-South FDI may be exaggerated. It is important for countries in Africa to carefully scrutinize all BITs and investment agreements that they sign, including those concluded in the context of South-South cooperation.<sup>21</sup> Despite the increase in developing-country FDI in LDCs and the increase of FDI in non-traditional sectors such as manufacturing and tourism, only a very small percentage of total FDI inflows go to these two sectors.<sup>22</sup> Indeed, "[m]ost of the FDI inflows in LDCs . . . go to capital-intensive projects, especially natural resources, which have a limited impact on employment creation."<sup>23</sup>

There are several challenges to writing an article on China-Africa BITs. First, many of the relevant BITs are not yet in force and have not

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of a parallel growth trend of South-South FDI flows and of South-South investment agreements that may be mutually reinforcing.”).

19. If the goals of FOCAC are met, including goals articulated in the four plans of action that have been adopted to date, Africa will likely see an increase in Chinese OFDI in the region involving more countries.

20. *Switzerland's Investment Treaty Policy*, STATE SECRETARIAT FOR ECONOMIC AFFAIRS SECO, <http://www.seco.admin.ch/themen/00513/00594/04450/?lang=en> (last visited Aug. 14, 2013) (“After Germany (135) and China (125), Switzerland has the world's third largest network of such agreements (status: end of 2010).”).

21. Part of the problem is the even distribution of FDI flows among LDCs in Africa. FDI inflow into Africa tends to be concentrated in a few resource-rich countries. According to a United Nations background paper “LDCs received just 2.5% of global inflows in 2009, nearly half of which went to Angola.” The paper also observed that “LDCs’ share of global inflows remains very small in comparison to other countries of the South.” See U.N. LDC IV and OHRLLS, *Background Paper: Harnessing the Positive Contribution of South-South Cooperation for Least Developed Countries’ Development*, 20, New Delhi (Feb. 18–19, 2011) [hereinafter *Background Paper*].

22. *Id.* at 21.

23. *Id.*

generated much attention or scholarship.<sup>24</sup> Of the 30 BITs that China has concluded with countries in Africa, only 15 are in force. Second, many of the relevant BITs, including those that are in force, are not available for analysis; of the 31 BITs, only 13 are available (See Table 1 and 2). The result is that some China-Africa BITs are in force but not available and others are available but not yet in force. Consequently, this Article will focus on nine BITs—three BITs that are available and in force (Ghana, Ethiopia, and Egypt) as well as six that are available but not yet in force (Botswana, Djibouti, Benin, Uganda, Tunisia, Côte d'Ivoire). Only BITs available in English and publicly available have been analyzed. China-Cameroon BIT, China-Madagascar BIT and China-Morocco BIT are in French and are not examined in this Article.

Part I provides an overview of BITs generally. Part II discusses the growing revolt against BITs and the new push for what the United Nations Conference on Trade and Development (UNCTAD) calls “a new generation of IIAs.” Part III focuses on South-South economic relations, South-South investment, and the growing number of South-South investment agreements. Part IV reviews the evolution of China’s international investment policy and changes over time in Beijing’s attitude towards BITs; as will be seen, the last three decades witnessed a gradual shift in Beijing’s approach to BITs, from a traditional, conservative approach to BITs to a more liberal approach. Part V reviews the nature and content of China-Africa BITs, focusing on five key topics: non-discrimination, fair and equitable treatment, protection from expropriation, free transfer of capital, and investor-state dispute settlement mechanisms. Part VI offers a detailed development critique of China-Africa BITs. Part VII addresses important issues that are presently omitted from all China-Africa BITs. Human rights and environmental issues are presently omitted in all the BITs China has concluded with countries in Africa. Part VIII introduces the idea of an African BIT policy and highlights issues that countries in Africa could consider in crafting such a policy. Modest suggestions and conclusions are offered in Part IX.

## I. BILATERAL INVESTMENT TREATIES: OVERVIEW

BITs were specially designed by Western nations in the wake of decolonization in the 1950s and 1960s to protect their investors and the investment of their investors in developing countries.<sup>25</sup> In the absence of

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24. Author’s conclusion based on information available on UNCTAD’s website and author’s knowledge of available literature. United Nations Conference on Trade and Development, Investment Instruments Online: Bilateral Investment Treaties, available at [http://www.unctadxi.org/templates/docsearch\\_\\_\\_779.aspx](http://www.unctadxi.org/templates/docsearch___779.aspx)

25. Kenneth J. Vandavelde, *A Brief History of International Investment Agreements, in THE EFFECT OF TREATIES ON FOREIGN DIRECT INVESTMENT: BILATERAL INVESTMENT TREATIES, DOUBLE TAXATION TREATIES, AND INVESTMENT FLOWS* 3,13-35 (Karl P. Sauvart & Lisa E. Sachs eds., 2009) (observing that the motivation for the developed country to conclude BITs “was to obtain protection for its foreign investment.”) [hereinafter Vandavelde]; Patrick Juillard, *Bilateral Investment Treaties in the Context of Investment Law, Investment Compact Regional Roundtable on Bilateral Investment Treaties for the Protection and*

clear or comprehensive international law rules governing the treatment of foreign investment, capital-exporting nations saw the need to secure protection for their citizens and corporations using different types of investment agreements.<sup>26</sup>

In the context of North-South economic relations, BITs were used by the North to advance three broad policy goals: (1) promote and protect investment; (2) facilitate investment entry and operation; and (3) liberalize the economies of developing countries.<sup>27</sup> BITs have since become very popular. Since 1959, when the first BIT was signed,<sup>28</sup> BITs have become the primary vehicle through which FDI is regulated today. For their part, capital-importing nations sign BITs with the hope of attracting private foreign investments.<sup>29</sup> For many developing countries, including countries in Africa, private foreign investment is very important. The benefits of FDI for a capital-importing nation include: access to new technologies and opportunity for technology transfer; expanded tax base and related opportunity for increased revenue; reduced dependence on foreign aid and external debt; access to new sources of financing for development; and support for local business suppliers through linkages.<sup>30</sup> Despite the touted benefits of FDI, all FDI is not the same and the impact of FDI on economic development varies from country to country and from region to region.<sup>31</sup>

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*Promotion of Foreign Investment*, at 1 (2001) available at <http://www.oecd.org/dataoecd/44/41/1894794.pdf> (observing that BITs developed out of an emergency situation, which reached its peak in the late 60s and early 70s, and noting specifically that in the late 60s, “developing countries – former colonies of former major European powers – embarked upon extensive expropriation policies which involve at foreign held investment – i.e. investment owned by nationals of the former colonial powers”).

26. See Vandevelde, *supra* note 25, at 15 (stating that BITs “were a defensive reaction to past expropriations of existing investments without payment of fair market value”).

27. Jewald W. Salacuse & Nicholas P. Sullivan, *Do BITs Really Work?: An Evaluation of Bilateral Treaties and Their Grand Bargain*, 46 HARV. INT’L L. J. 67, 75-79 (2006) [hereinafter “Salacuse and Sullivan”].

28. Mahnaz Malik, Background Paper: South-South Bilateral Investment Treaties: The Same Old Story?, IV Annual Forum for Developing Countries and Investment Negotiators 1, New Delhi (Oct. 27-29, 2010) (observing that the first BIT was that concluded in 1959 between Germany and Pakistan). See also Vandevelde, *supra* note 25, at 13 (noting that Germany was the first to conclude a BIT).

29. Jennifer L. Tobin & March L. Busch, *A BIT is Better Than a Lot: Bilateral Investment Treaties and Preferential Trade Agreements*, 62 WORLD POLITICS 1, 4 (2010) (observing that fundamentally, “the hope for BITs is that, if they boost investor confidence, they are likely to result in greater inflows of FDI.”). See also Vandevelde, *supra* note 25, at 15 (noting that the motivation for the developing country to conclude BITs was to attract foreign investment).

30. See Background Paper, *supra* note 21, at 21 (discussing the benefits of FDI for developing countries, especially LDCs, including export boost, capital formation, job creation, infrastructure development, and overall economic diversification).

31. The fact the FDI inflows tends to be unevenly spread among developing countries suggests that the benefits of FDI are not spread evenly. *Id.* (observing that foreign investment “is highly concentrated in a few natural resource-rich countries,” and that most FDI

### A. History of BITs

BITs rose in prominence to address the demise of the Hull Rule, which provided that in the event of an expropriation, the host government was obliged to provide “prompt, adequate, and effective” compensation to the investor.<sup>32</sup> From the early 1960s through the mid-1970s, attack on the Hull Rule from developing countries was fierce and sustained.<sup>33</sup> These attacks culminated in the adoption of a host of United Nations declarations and resolutions that, taken together, appeared to threaten the investment interests of capital-exporting nations.<sup>34</sup> Declarations adopted in the UN during this period include the 1962 Resolution on Permanent Sovereignty over Natural Resources (Resolution 1803),<sup>35</sup> the 1973 Resolution on Permanent Sovereignty over Natural Resources (Resolution 3171),<sup>36</sup> the 1974 General Assembly resolution declaring a New International Economic Order (Resolution 3201),<sup>37</sup> and the 1974 Charter of Economic Rights and Duties of States (Resolution 3281).<sup>38</sup>

Although the 1960s and 1970s movement to advance a new international economic order more or less failed and although many developing countries have since adopted liberal economic policies,<sup>39</sup> BITs remain a

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inflow in LDCs goes towards capital-intensive projects which tend to have a limited impact on employment creation).

32. The Hull Rule was expounded in a diplomatic note that one-time U.S. Secretary of State, Cordell Hull sent to his Mexican Counterpart following Mexico’s confiscation of various agrarian and oil properties between 1915 and 1940. In the said note, Hull stated: “The Government of the United States merely adverts to a self-evident fact when it notes that the applicable precedents and recognized authorities on international law support its declaration that, under every rule of law and equality, no government is entitled to expropriate private property, for whatever purposes, without the provision for prompt, adequate, and effective payment therefor.” See Green H. Hackworth, *Digest of International Law* 228, at 655–59 (1942). Andrew Guzman, *Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties*, 38 VA. J. INT’L L. 639, 641 (1998).

33. Guzman, *supra* note 32, at 641 (noting that in the years that followed World War II, “developing countries questioned the Hull Rule,” that the challenge to the Hull Rule proved successful, and that by the mid 1970s, the Hull Rule “had ceased to be a rule of customary international law”).

34. The demise of the Hull Rule created a vacuum in international law and created legal uncertainty regarding the protection that was available to foreign investments. *Id.* (noting that BITs role rose in prominence “during a period in which the international regulation of foreign investment was the subject of great change, uncertainty, and controversy”).

35. G.A. Res. 1803 (XVII), U.N. GAOR, 17th Sess., Supp. No. 17, at 15, U.N. Doc. A/5217, at 15 (Dec. 14, 1962).

36. G.A. Res. 3171 (XXVIII), U.N. GAOR, 28th Sess., Supp. No. 30, at 52, U.N. Doc. A/9030, at 52 (Dec. 17, 1973).

37. G.A. Res. 3201 (S-VI), U.N. GAOR, 6th Special Sess., Supp. No. 1, at 3, U.N. Doc. A/9559, at 3 (May 1, 1974).

38. G.A. Res. 29/3281, pmb., art.1, U.N. Doc. A/Res/29/3281 (Dec. 12, 1974) (emphasizing the sovereign equality of all states).

39. To the extent that the success of the NIEO is measured by the number of specific principles and proposals in the 1974 Declaration and Program of Action that were accepted by the international community and ultimately implemented, many observers conclude that the NIEO was a failure. See Adam Sneyd, *New International Economic Order (NIEO)*,

popular instrument used by capital-exporting countries to protect their interests, to ensure that their investments abroad receive fair, equitable, non-discriminatory treatment and to secure special protection for investors.<sup>40</sup> Western countries such as the U.S. typically use BITs to secure, at a minimum, six core rights for investors: (1) right to fair, equitable and non-discriminatory treatment; (2) right to freely transfer capital out of host-country; (3) protection from expropriation and measures tantamount to expropriation and right to prompt and adequate compensation in the event of expropriation; (4) right to international arbitration if and when disputes arise; (5) limitation on performance requirements; and (6) right of investors to select top managerial personnel.<sup>41</sup>

BITs will likely be around for the foreseeable future, given the demise of the multilateral agreement on investment (MAI)<sup>42</sup> and the fact that investment is not comprehensively addressed in any World Trade Organization (WTO)<sup>43</sup> agreement and does not form part of the Doha Work Pro-

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GLOBALIZATION AND AUTONOMY ONLINE COMPENDIUM, [http://globalautonomy.ca/global1/glossary\\_pop.jsp?id=EV.0027](http://globalautonomy.ca/global1/glossary_pop.jsp?id=EV.0027) (observing that then-U.S. President Ronald Reagan unilaterally declared the death of the NIEO at the Cancun Summit on International Development Issues in 1981); see also Eric Allen Engle, *The Failure of the Nation State and the New International Economic Order: Multiple Converging Crises Present Opportunity to Elaborate a New Just Gentium*, 16 ST. THOMAS L. REV. 187, 196 (2003) (arguing that the NIEO failed to end poverty in the third world, notably in Africa and observing also that “[t]he end of the cold war in 1989 . . . marked the functional end of the NIEO” and that “[w]hile NIEO literature does continue, the chances of realizing the ambitions of the NIEO are currently nil.”); Miguel Wionczek, *The New International Economic Order: Past Failures and Future Prospects*, 10 DEV. & CHANGE 647, 668 (1971) (“Within less than five years of the official UN launching of the North-South dialogue on the New International Economic Order (NIEO), this ‘dialogue’ has reached a complete stalemate on all issues, whether major or minor.”). *But cf.* Vandeveld, *supra* note 25, at 27 (observing that many developing countries have adopted liberal investment policies: “in the Global Era, states almost universally adopted the view that foreign investment could promote prosperity and set about jointly creating legal frameworks that would promote and protect international investment flows.”).

40. Tobin & Busch, *supra* note 29, at 7 (observing that wealthy nations enter into BITs “to protect multinationals’ assets from being nationalized without compensation and to lessen the cost of doing business with offshore affiliates.”).

41. See OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, BILATERAL INVESTMENT TREATIES, available at <http://www.ustr.gov/trade-agreements/bilateral-investment-treaties> (discussing the “six core benefits” BITs provide to investors).

42. In the 1990s, countries that make up the Organization for Economic Cooperation and Development (OECD) unsuccessfully attempted to negotiate a multilateral agreement on investment. See Vandeveld, *supra* note 25, at 33 (noting that the negotiations towards a multilateral agreement on investment failed and that “[i]t was ironic that the countries that have, perhaps, the greatest consensus among themselves concerning the provisions that should be included in a bilateral investment treaty were unable to agree on a multilateral version of the agreement.”).

43. For example, the Agreement on Trade-Related Investment Measures [TRIMS], one of the World Trade Organization (WTO) Multilateral Agreements on Trade in Goods, is not a comprehensive investment treaty. The TRIMS Agreement prohibits trade-related investment measures such as local content requirements that are inconsistent with basic provisions of the 1994 General Agreement on Tariffs and Trade (GATT). See Agreement on Trade-Related Investment Measures, Apr. 15, 1994, 1868 U.N.T.S. 186 [hereinafter TRIMS Agreement], available at [http://www.wto.org/english/docs\\_e/legal\\_e/18-trims\\_e.htm](http://www.wto.org/english/docs_e/legal_e/18-trims_e.htm). See also

gram.<sup>44</sup> BITs are proving popular in the context of South-South investment cooperation and there presently appears to be no attempt by countries in the global South to come up with an alternative normative framework for the regulation of FDI.

### B. Trends in the Use of BITs

Between 1959 and 1991, over 400 BITs were concluded; the number jumped to about 2,500 by the end of 2005.<sup>45</sup> Today, it is estimated that nearly every country on the globe is a party to at least one BIT.<sup>46</sup> Unlike the friendship, commerce, and navigation (FCN) treaties of the nineteenth century, BITs are broader in scope, confer more rights on foreign investors, and contain binding investor-state dispute settlement clauses.<sup>47</sup> In terms of their content, very little geographical or regional distinctions can be discerned. Rather, over the years “[a] considerable degree of conform-

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Sherry Stephenson & Uri Dadush, *The Current (Fragmented) Governance of FDI, in FOREIGN DIRECT INVESTMENT AS A KEY DRIVER FOR TRADE, GROWTH AND PROSPERITY: THE CASE FOR A MULTILATERAL AGREEMENT ON INVESTMENT* 23, 23 (2013) available at [http://www3.weforum.org/docs/GAC13/WEF\\_GAC\\_GlobalTradeFDI\\_FDIKeyDriver\\_Report\\_2013.pdf](http://www3.weforum.org/docs/GAC13/WEF_GAC_GlobalTradeFDI_FDIKeyDriver_Report_2013.pdf) (“There is no single, comprehensive multilateral treaty or institution to oversee investment activity.”).

Trade and investment is also discussed in the WTO’s General Agreement on Trade in Services (GATS), an agreement that addresses the provision of services. One of the modes of supply of services addressed in GATS is delivery through foreign investment in the country where the services will be consumed (commercial presence). Article 1.2(c) of GATS defines trade in service as including the supply of service “by a service supplier of one Member, through commercial presence in the territory of any other Member.” See General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 U.N.T.S. 183 [hereinafter GATS], available at [http://www.wto.org/english/docs\\_e/legal\\_e/26-gats.pdf](http://www.wto.org/english/docs_e/legal_e/26-gats.pdf).

44. Investment is not one of the main areas covered in the Doha Ministerial Declaration, a multilateral round on trade, where at the Fifth Ministerial Conference, the Member States could not agree to commence negotiations on an investment agreement. See World Trade Organization (WTO), Ministerial Declaration of 14 November 2011, WT/MIN(01)/DEC/1 (2011), available at [http://www.wto.org/english/tratop\\_e/dda\\_e/dda\\_e.htm#declaration](http://www.wto.org/english/tratop_e/dda_e/dda_e.htm#declaration) (discussing how the WTO Member States agreed that negotiations on investment “will take place after the Fifth Session of the Ministerial Conference on the basis of a decision to be taken, by explicit consensus, at that Session on modalities of negotiations”); see also, WTO, *Subjects treated under the Doha Development Agenda*, [http://www.wto.org/english/tratop\\_e/dda\\_e/dohasubjects\\_e.htm](http://www.wto.org/english/tratop_e/dda_e/dohasubjects_e.htm) (indicating that “investment” was ultimately dropped from the Doha Round).

45. U. N. CONFERENCE ON TRADE AND DEV., *BILATERAL INVESTMENT TREATIES 1995–2006: TRENDS IN INVESTMENT RULEMAKING*, at 1 U.N. Doc. UNCTAD/ITE/IIT/2006/5, U.N. Sales No. E.06.II.D.16 (2007) available at [http://unctad.org/en/Docs/iteiia20065\\_en.pdf](http://unctad.org/en/Docs/iteiia20065_en.pdf) [hereinafter UNCTAD 2007].

46. Vandelde, *supra* note 25, at 157 (discussing the explosion in the number of BITs since the 1990s and observing that over 2500 BITs exist, where most were concluded after 1990).

47. Friendship, commerce treaties and navigation (FCN) treaties are considered the first generation of investment treaties and precursors to BITs, which are considered second generation of investment treaties. See Guzman, *supra* note 32, at 653 (observing that contrary to BITs, FCNs “were not exclusively, or even primarily, vehicles to protect investments abroad,” but that they nevertheless included some protection for investors).

ity has emerged in terms of the main contents of BITs.”<sup>48</sup> Most BITs offer a number of standard guarantees to foreign investors, including fair and equitable treatment, protection against unreasonable or discriminatory practices, protection from expropriation, free transfer of capital, and investor-state dispute settlement mechanisms.<sup>49</sup> Capital-exporting nations such as the United States and United Kingdom negotiate BITs on the basis of their own “model” BITs.<sup>50</sup> Some developing countries, for example India, have developed and now use a model BIT, as well.<sup>51</sup>

Africa is not new to BITs. However, an increasing number of BITs are now concluded between countries in Africa and other developing countries. Together, African countries have concluded 47 BITs with Germany, 31 with China, 27 with the Netherlands, 21 each with the United Kingdom (U.K.) and France, and 9 with the United States.<sup>52</sup> Countries in Africa have concluded more BITs with China than with any of their traditional trading partners, such as the U.S., France, U.K. and the Netherlands.<sup>53</sup>

### C. *International Investment Regime Under Attack: Revolt, Rejection, Resistance*

Developing countries are deeply suspicious of the international investment law regime and in the 1990s kicked against the idea of a multilateral investment treaty under the auspices of the World Trade Organization and the idea of a Multilateral Agreement on Investment (MAI) which was discussed within the frameworks of the Organization for Cooperation and Development in Europe (OECD). However, beginning in the mid-2000s, developing countries began to more forcefully express their displeasure with their existing BITs. In 2007, the Plurinational State of Bolivia withdrew from the International Centre for the Settlement of Investment Disputes Convention (ICSID Convention), followed quickly by Ecuador in 2009.<sup>54</sup> In 2008, Ecuador terminated nine of its BITs.<sup>55</sup> In 2009, South Africa initiated a comprehensive review of its BIT Program, culminating

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48. UNCTAD 2007, *supra* note 45, at xi.

49. OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, *supra* note 41.

50. *Id.* (discussing the U.S. BIT program and stating that “[t]he United States negotiates BITs on the basis of a model text”).

51. GOVERNMENT OF INDIA DEPARTMENT OF ECONOMIC AFFAIRS, INDIAN MODEL TEXT OF BILATERAL INVESTMENT PROMOTION AND PROTECTION AGREEMENT (BIPA), available at [http://finmin.nic.in/the\\_ministry/dept\\_eco\\_affairs/icsection/Indian%20Model%20Text%20BIPA.asp?pageid=1](http://finmin.nic.in/the_ministry/dept_eco_affairs/icsection/Indian%20Model%20Text%20BIPA.asp?pageid=1).

52. See UNCTAD, *Country-Specific Lists of Bilateral Investment Treaties*, UNCTAD.ORG (June 1, 2013), <http://unctad.org/en/Pages/DIAE/International%20Investment%20Agreements%20%28IIA%29/Country-specific-Lists-of-BITs.aspx>.

53. *Id.*

54. Bolivia’s notification of its withdrawal from the ICSID Convention “was received by ICSID on [May 2, 2007] and took effect on [November 3, 2007]. Ecuador’s notice of denunciation was received on [July 6, 2009] and took effect on [January 7, 2010.] See UNCTAD 2010, *supra* note 15, at 1 n.2.

55. The nine BITs were with Cuba, the Dominican Republic, El Salvador, Guatemala, Honduras, Nicaragua, Paraguay, Romania and Uruguay. *Id.* at 1 n.3.

in its announcement of a plan to allow some existing BITs to expire and a near moratorium on the negotiation of future BITs.<sup>56</sup>

Across the board, civil society groups, developing countries and even some developed countries have voiced dissatisfaction with the international investment regime as presently structured. They have voiced concerns about international investment law as well as the system of investor-state dispute settlement that the law birthed. As a result, the international investment regime is experiencing a crisis of legitimacy.<sup>57</sup> There is a growing rejection of hitherto accepted norms, practices and structures of the regime. Evidence of this resistance within the regime abounds:

- On May 2, 2007, Bolivia denounced the ICSID Convention;<sup>58</sup>
- On July 6, 2009, Ecuador sent the World Bank a written notice of denunciation of and withdrawal from the ICSID Convention;<sup>59</sup>
- On January 24, 2012, Venezuela also formally denounced the ICSID Convention.<sup>60</sup>
- In April 2011, Australia, announced that it will no longer include investor-state arbitration in future BITs;<sup>61</sup>

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56. Dr. Rob Davies, Speech at the South African Launch of the U.N. Conference on Trade and Development Investment Policy Framework for Sustainable Development, University of The Witwatersrand, (July 26, 2012) *available at* <http://www.info.gov.za/speech/DynamicAction?pageid=461&sid=29391&tid=77861> [hereinafter Witwatersrand Speech]. *See also* Leon, *supra* note 16 (citing Letter from Maite Nkoana-Mashabane, South African Minister of International Relations and Co-operation, to Johan Maricou, Ambassador of the Kingdom of Belgium to South Africa (Sept. 7, 2012)).

57. An Open Letter from TPP Legal and Concerned Lawyers to the Negotiators of the Trans-Pacific Partnership (May 8, 2012) (urging the rejection of investor-state dispute settlement), *available at* <http://tpplegal.wordpress.com/open-letter/>. [hereinafter An Open Letter]. *See also*, DEPARTMENT OF TRADE AND INDUSTRY OF SOUTH AFRICA, NOTICE 961, BILATERAL INVESTMENT TREATY POLICY FRAMEWORK REVIEW: EXECUTIVE SUMMARY OF GOVERNMENT POSITION PAPER (June 2009), *available at* <http://www.info.gov.za/view/DownloadFileAction?id=103768>.

58. On May 2, 2007, Bolivia submitted a Notice under Article 71 of the Washington Convention. Bolivia is the first State to denounce the ICSID Convention. *See* Sébastien Manciaux, *Bolivia's Withdrawal from ICSID*, 5 TRANSNT'L DISPUTE MGMT. (2007), *available at* <http://www.transnational-dispute-management.com/article.asp?key=1076>.

59. News Release, ICSID, Ecuador Submits a Notice Under Article 71 of the ICSID Convention (July 9, 2009), *available at* <https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=NewsReleases&pageName=Announcement20>.

60. Ernesto J. Tovar, *Venezuela Officially Withdraws from ICSID*, EL UNIVERSAL (Jan. 25, 2012, 12:52 PM), <http://www.eluniversal.com/economia/120125/venezuela-officially-withdraws-from-icsid>.

61. DEP'T OF FOREIGN AFFAIRS & TRADE, GILLARD GOV'T TRADE POLICY STATEMENT: TRADING OUR WAY TO MORE JOBS & PROSPERITY (2011) (Austl.).

- In 2012, South Africa took the decision not to renew some of the country's BITs that are about to expire;<sup>62</sup>
- In 2012, South Africa also decided to refrain from concluding BITs in the future except in cases of compelling economic and political circumstances;<sup>63</sup> and
- There is speculation that Argentina may withdraw from the ICSID soon.<sup>64</sup>

#### D. *International Investment Law*

##### 1. The Sources and Content of International Investment Law Today

There is no coherent multilateral treaty governing bilateral investment arrangements between countries and there is no single international institution, comparable to the World Trade Organization, responsible for administering BITs. In *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, the International Court of Justice (ICJ) bemoaned the slow development of international investment law. According to the ICJ:

Considering the important developments of the last half-century, the growth of foreign investments and the expansion of the international activities of corporations and considering the way in which the economic interests of states have proliferated, it may at first sight appear surprising that the evolution of law has not gone further and that no generally accepted rules in the matter have crystallized on the international plane.<sup>65</sup>

Today, the situation is very different. International investment law has evolved and is evolving. In the absence of a single global multilateral investment treaty, BITs and other international investment agreements (e.g. investment chapters of free trade agreements and regional trade agreements as well as special purpose treaties such as the Energy Charter Treaty)<sup>66</sup> are recognized as the primary sources of international investment law. Salacuse and Sullivan observed in a 2005 article that “[f]or all practical purposes, treaties have become the fundamental sources of international law in the area of foreign investment.”<sup>67</sup> Omar Garcia-Bolivar noted that initially, international law of foreign investment was “an appen-

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62. See, e.g. Leon, Veeran, & Warmington, *supra* note 56.

63. Witwatersrand Speech, *supra* note 56.

64. *Argentina to Withdraw from ICSID*, PRESS TV (Jan. 24, 2013, 12:17 PM), <http://www.presstv.com/detail/2013/01/24/285299/argentina-to-withdraw-from-icsid/>.

65. *Barcelona Traction, Light and Power Company, Ltd. (Belg. v. Spain)*, 1970 I.C.J. 3, 46-47 (Feb.5).

66. See, e.g., HE Energy Charter Treaty, *opened for signature* Feb. 1, 1995, 34 I.L.M. 360; North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 8, 1993, 32 I.L.M. 289.

67. See Salacuse and Sullivan, *supra* note 27, at 70.

dix of the doctrine of State Responsibility for Injury to Aliens,” but that today “it has evolved to a dynamic set of rules and principles comprised in treaties and applied by institutional and ad-hoc arbitral tribunals.”<sup>68</sup> Underscoring the lack of coherence in the body of law known as international investment law, Garcia-Bolivar notes that this body of law:

is comprised in several Bilateral Investment Treaties (BITs) signed between capital exporting and capital importing countries, in investment chapters of free trade agreements (FTAs), in conventions such as the one that creates an institutional arbitration center to settle disputes between the investors and States—International Centre for Settlement of Investment Disputes (ICSID)—in a convention that creates a multilateral agency for risk guarantee—Multilateral Investment Guarantee Agency (MIGA)—in principles of customary public international law, in soft law and in numerous decisions by institutional tribunals such as the International Court of Justice, the U.S.-Iran claim tribunals, ad-hoc arbitral tribunals and ICSID arbitral tribunals.<sup>69</sup>

BITs and other IIAs today make up the body of law known as international investment law. Not only is the number of these agreements increasing, but their scope is broadening to cover new issues. BITs with “more sophisticated investment protection provisions as well as liberalization commitments”<sup>70</sup> are becoming more common. According to UNCTAD:

[R]ecent agreements tend to encompass a broader range of issues that in the most comprehensive agreements may include not only investment protection and liberalization, but also trade in goods and services, intellectual property rights, competition policy, government procurement, temporary entry for business persons, transparency, the environment, and labor rights.<sup>71</sup>

In conclusion, the geographical reach of IIAs is outstanding. The broad geographic reach of BITs underscores their importance as sources of international investment law. As the arbitral tribunal in 2002 in *Mondev International Ltd. v. United States* noted: “Investment treaties run between North and South, and East and West, and between States in these spheres *inter se*.”<sup>72</sup> Most observers agree that IIAs “are truly universal in their

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68. Omar Garcia-Bolivar, *International Law of Foreign Investments at a Crossroads: The Need for Reform*, Presented at Second Biennial General Conference of International Law, University of Tokyo 1 (2009).

69. *Id.*, at 1.

70. U.N. CONFERENCE ON TRADE AND DEV., INVESTOR-STATE DISPUTE SETTLEMENT AND IMPACT ON INVESTMENT RULEMAKING, at 4, U.N. Doc. UNCTAD/ITE/IIA/2007/3, U.N. Sales No. E.07.II.D.10 (2005).

71. *Id.*

72. *Mondev Int'l Ltd. v. United States of America*, ICSID Case No. ARB(AF) 99/2, Award, ¶117 (Oct. 11, 2002), 6 ICSID Rep. 181 (2005).

reach and essential provisions.”<sup>73</sup> The implications of the “treatification” of international investment law are real and significant.<sup>74</sup> Even states that have strategically avoided concluding many BITs have reason to be interested in the development of international investment law, given their potential reach and effect in the sense that they can become evidence of customary international law now or in the near future.<sup>75</sup>

## 2. Developing Country Concerns about International Investment Law

The primary concern of developing countries, who have concluded most of their BITs with developed countries, is that those agreements primarily reflect the interests of the latter. First, most BITs contain explicit provisions on investor protection but are usually silent when it comes to investor obligations. Furthermore, most BITs focus on the obligation of host states but pay scant attention to the rights of host communities. Second, there are concerns that most BITs afford foreign investors greater rights than domestic investors and force host governments to implement policies that either harm domestic investors or make it very difficult for them to compete vis-à-vis foreign corporations. Third, there are also concerns that BITs are used to limit the regulatory space of host governments. According to South Africa’s Department of Trade and Industry:

Major issues of concern for developing countries are not being addressed in the BIT negotiating processes. BITs extend far into developing countries’ policy space, imposing damaging binding investment rules with far-reaching consequences for sustainable development. New investment rules in BITs prevent developing country governments from requiring foreign companies to transfer technology, train local workers, or source inputs locally. Under such conditions, investment fails to encourage or enhance sustainable development.<sup>76</sup>

In addition to concerns relating to the substance of BITs, developing countries are also concerned about the manner in which international investment disputes are handled. BITs typically provide for some type of investor-state dispute settlement (ISDS) mechanism. The effect is that BITs allow investors to bypass domestic courts and lodge claims against host governments directly with international arbitration tribunals. Thanks to the ISDS provisions in BITs, the number of investor-State claims has

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73. *CME Czech Republic BV v. Czech Republic*, Final Award, 14 March 2003, UNCITRAL Arbitration Tribunal, published in (2003/08) 15 WORLD TRADE AND ARBITRATION MATERIALS No. 4.

74. Jeswald W. Salacus, *The Treatification of International Investment Law*, 13 L. & BUS. REV. AM. 155, 158 (2007).

75. *Mondev v. United States*, *supra* note 72, at para. 117 (observing with regards to state practice in concluding BITs that “In the Tribunal’s view, such a body of concordant practice will necessarily have influenced the content of rules governing the treatment of foreign investment in current international law.”).

76. Department of Trade and Industry, *supra* note 14, at 11.

grown tremendously in the past two decades. Developing countries and civil society groups are concerned that giant corporations abuse this right and use it to cripple the economies of host States. As the South African Department of Trade and Industry put it:

Investors have become aware of the attractive *status quo* under the global investment regime. Literally hundreds of long-ignored investment treaties offer investors access to an investor-state dispute settlement mechanism, allowing them to take their disputes directly to international arbitration - leapfrogging domestic legal systems (and thus, any safeguards designed to protect important public goods).<sup>77</sup>

Specifically, there are concerns that “[s]ome investors are using bilateral investment treaties to challenge treatment of foreign investments in various sensitive areas, including water and sewage provision, oil and gas exploitation and mining concessions” and that “[m]ajor law firms are using BITs as the tool of choice for challenging host state regulation of public services.”<sup>78</sup> In a May, 2012, *Open Letter to the Negotiators of the Trans-Pacific Partnership*, lawyers in Asia and the Pacific Rim urged negotiators not to include ISDS provisions in the proposed partnership agreement out of concern that ISDS provisions threaten to undermine the justice system of their countries and “fundamentally shift the balance of power between investors, states and other affected parties in a manner that undermines fair resolution of disputes.”<sup>79</sup> Similar concerns were expressed in an August 2010 *Public Statement on the International Investment Regime*<sup>80</sup>

Developing countries are not the only countries concerned about the implications of investor-State dispute settlement systems for host countries and for state sovereignty. Countries like Australia have expressed concern as well. In a 2010 report, the Australian Productivity Commission recommended that the Australian government seek to avoid the inclusion of ISDS provisions in future trade agreements. Subsequently, in 2011 the Australian Government announced its intention not to push for inclusion of investor-State dispute settlement clauses in future investment agreements. In a Trade Policy Statement released on April 12, 2011, the Australian Government declared:

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77. *Id.*, at 10 (emphasis in the original).

78. *Id.*

79. Andreas von Staden and Rahim Moloo, *Standards of Review in Investment Arbitration: What Role for Deference?*, 4 INVESTMENT TREATY NEWS 17 (2012), available at [http://www.iisd.org/pdf/2012/iisd\\_itn\\_july\\_2012\\_en.pdf](http://www.iisd.org/pdf/2012/iisd_itn_july_2012_en.pdf).

80. In the 2010 *Public Statement on the International Investment Regime*, signatories expressed a “shared concern for the harm done to the public welfare by the international investment regime, as currently structured, especially its hampering of the ability of governments to act for their people in response to the concerns of human development and environmental sustainability.” *Public Statement on the International Investment Regime (31 August 2010)*, available at <http://www.osgoode.yorku.ca/public-statement/documents/Public%20Statement%20%28June%202011%29.pdf>.

In the past, Australian Governments have sought the inclusion of investor-state dispute resolution procedures in trade agreements with developing countries at the behest of Australian businesses. The Gillard Government will discontinue this practice. If Australian businesses are concerned about sovereign risk in Australian trading partner countries, they will need to make their own assessments about whether they want to commit to investing in those countries.<sup>81</sup>

## II. SOUTH-SOUTH INVESTMENT AND INVESTMENT AGREEMENTS?

Developing countries are increasingly dominant in the global economy and trade and investment linkages between developing countries are growing. In the last decade, some developed countries have become important players in the global economy and these countries are projected to play an even stronger role in the future. Countries such as India, China, Brazil, South Africa are examples. In a 2003 article, Goldman Sachs projected that “Over the next 50 years, Brazil, Russia, India and China—a group we term the BRICs—could become a much larger force in the world economy—much larger than they are now and much larger than many investors currently anticipate.”<sup>82</sup> In a January 2013 publication, Price Waterhouse Coopers (PWC) projected that China will “overtake the US as the largest economy by 2017 in purchasing power parity (PPP) terms and by 2027 in market exchange rate terms.”<sup>83</sup> PWC also projected that India “should become the third ‘global economic giant’ by 2050.”<sup>84</sup> Overall, developing countries are becoming important players in the global economy. The South’s share of global trade is growing and the South now accounts for an increasing share of global demand.<sup>85</sup>

Trade and investment relation between developing countries is growing.<sup>86</sup> Developing countries are trading with one another more than at any other time in history.<sup>87</sup> Developing countries are reshaping the world’s

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81. AUST. GOV’T, DEP’T OF FOREIGN AFF. & TRADE, GILLARD GOVERNMENT TRADE POLICY STATEMENT: TRADING OUR WAY TO MORE JOBS AND PROSPERITY 14 (2011), *available at* <http://www.dfat.gov.au/publications/trade/trading-our-way-to-more-jobs-and-prosperity.html> [hereinafter Trade Policy Statement].

82. DOMINIC WILSON & ROOPA PURUSHOTHAMAN, GOLDMAN SACHS, DREAMING WITH BRICs: THE PATH TO 2050, 99 (2003).

83. PRICEWATERHOUSECOOPERS, THE BRICs AND BEYOND: PROSPECTS, CHALLENGES AND OPPORTUNITIES (2013).

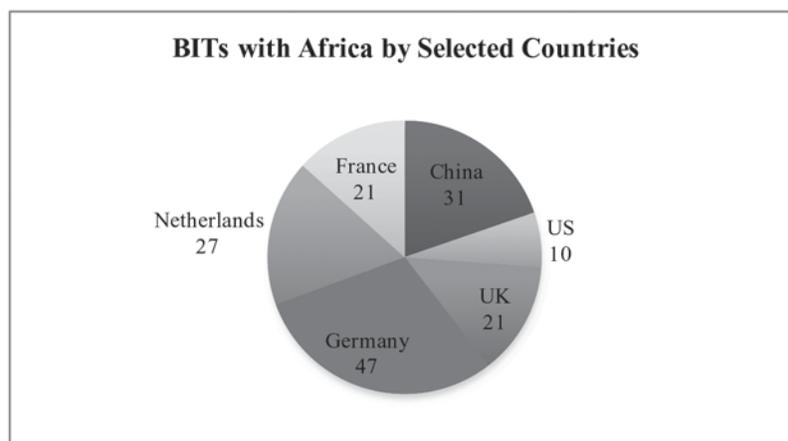
84. *Id.*

85. *Id.*

86. United Nations Conference on Trade and Development, THE ACCRA ACCORD, para 7, *available at* [http://www.unctad.org/en/docs/tdxii\\_accra\\_accord\\_en.pdf](http://www.unctad.org/en/docs/tdxii_accra_accord_en.pdf).

87. Jonathan Lynn, *Developing Countries Turn to South-South Trade*, REUTERS (Feb. 8, 2009, 7:57 AM), <http://uk.reuters.com/article/2009/02/08/businesspro-us-trade-south-analysis-idUKTRE5170BC20090208> (“Trade among developing countries has been increasing, as a share of developing countries’ total trade and as a share of global commerce.”).

investment architecture with the phenomenal increase in FDI from these countries into other developing countries.

FIGURE 1<sup>88</sup>

#### A. South-South FDI

FDI is very important to economies in the South because it brings advanced technology and fills investment gaps.<sup>89</sup> The 2011 Asian Development Outlook concludes that “many developing Asian economies owe their high long-run growth profiles, in part, to such FDI and spillover effects.”<sup>90</sup> Overall, FDI flows into the South and within the South are increasing, in both absolute terms and as a share of world FDI flows.<sup>91</sup> The South received 43% of global inflows in 2009, up from 16.8% in 1990,<sup>92</sup> and accounted for nearly half of global FDI flows (about \$684 billion) in 2011.<sup>93</sup>

Outward FDI flows from developing countries and transition economies have increased in the past ten years and reached “the second highest level recorded” in 2011.<sup>94</sup> In 1990, China’s outward FDI outflow stood at

88. See UNCTAD 2005, *supra* note 2, at 53-62.

89. ASIAN DEV. BANK, *ASIAN DEVELOPMENT: OUTLOOK 2011*, 65 (2011) (observing that FDI is important to the South as a group because it is a net inflow and that historically, FDI flows from the North have proved beneficial in that they brought advanced technology and filled investment gaps).

90. *Id.* at 66.

91. United Nations Conference on Trade and Development, Geneva, Switz., Feb 23-25, 2011, *Strengthening Productive Capacities: A South-South Agenda*, 3, U.N. Doc. TD/B/C.II/MEM.2/8, available at [www.unctad.org/templates/Download.asp?docid=14314&lang=1](http://www.unctad.org/templates/Download.asp?docid=14314&lang=1) [hereinafter *Strengthening Productive Capacities*].

92. Background Paper, *supra* note 21, at 19.

93. U.N. CONFERENCE ON TRADE AND DEV., *WORLD INVESTMENT REPORT 2012*, at 3, U.N. Sales No. E.12.II.D.3 (2012) [hereinafter *World Investment Report 2012*].

94. *Id.* at 4 (explaining that the share of developing countries and transition economies declined from 32% in 2010 to 27% in 2011. UNCTAD attributes this decline to declines in

\$0.8 billion (0.34% of global outflows), but jumped to \$48 billion in 2009 (4.3%)<sup>95</sup> and to \$65 billion in 2011.<sup>96</sup> India's FDI outflow has also jumped, having seen a more than 500-fold increase since 1990 and standing at \$14.8 billion (1.35%) by 2009.<sup>97</sup>

Even more remarkable is the surge in South-South FDI with the emergence of the South as an exporter of capital. As of 2008, annual South-South FDI flows stood at \$187 billion, up from around \$12 billion in 1990.<sup>98</sup> Also in 2009, South-South flows as a percentage of total world flows was up 14%, from 4% in 1998.<sup>99</sup> South-South investment is increasing in absolute and relative terms and is increasing in a variety of sectors, such as telecoms, tourism, finance, and agriculture.<sup>100</sup> The future looks good for economic growth in the South and for stronger South-South links. It is projected that by 2030 today's developing and emerging countries are likely to account for nearly 60% of world GDP.<sup>101</sup>

### B. Africa and South-South Investment

Africa is benefiting from the boom in South-South investment. For countries in Africa, including LDCs, South-South FDI represents a significant opportunity for industrial development through export and capital formation, potential knowledge transfer and spillover effects.<sup>102</sup> In 2008, inward FDI stock from the South stood at \$340 billion. Between the late 1990s and 2000-2008, the share of Southern countries' inflows of FDI to Africa rose from 18% to 21%; during this period, Asia's share of FDI inflow rose from almost 7% to 15%.<sup>103</sup> Asia is becoming a principal player in terms of FDI flow to Africa. In 2008, the top 5 developing country investors in Africa were: Singapore (US\$9,826 million), China (\$7,804 million), Hong Kong China (US\$5,268 million), Malaysia (US\$3,718 million), and India (US\$2,652 million).<sup>104</sup> China's foreign investment in Africa has grown in the last decade. According to information from the Ministry of

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outward FDI from the Caribbean and Latin America and to slowdowns in the growth of investment from Asia).

95. Background Paper, *supra* note 21, at 16.

96. World Investment Report 2012, *supra* note 93, at 5.

97. Background Paper, *supra* note 21, at 16.

98. *Id.* at 17.

99. *Id.*

100. *Id.* at 18.

101. Organisation for Economic Co-Operation and Development [OECD], *Perspectives on Global Development 2010: Shifting Wealth*, at 3 (2010), available at [http://www.oecd-ilibrary.org/development/perspectives-on-global-development-2010\\_9789264084728-en](http://www.oecd-ilibrary.org/development/perspectives-on-global-development-2010_9789264084728-en).

102. Background Paper, *supra* note 21, at 18 ("South-South FDI [flows] represent a significant set of . . . opportunities through their potential knowledge transfer and spillover effects.").

103. ASIAN DEV. BANK, ASIAN DEVELOPMENT OUTLOOK 2011: SOUTH-SOUTH ECONOMIC LINKS 69 (2011), available at [http://library.umac.mo/e\\_resources/org\\_publications/b11868272\\_2011.pdf](http://library.umac.mo/e_resources/org_publications/b11868272_2011.pdf).

104. See UNCTAD 2005, *supra* note 2, at 53-62.

Commerce (MOFCOM) of the Government of the People's Republic of China, in 2012, Chinese non-financial direct investment in Africa hit \$1.5 billion, up 17 percent from the previous year. Also as of 2012, more than 2,000 Chinese enterprises were engaging in African investment projects in the agriculture, telecommunications, energy, manufacturing and catering sectors. Africa is also reportedly China's second-largest overseas market in terms of project contracting. According to MOFCOM, Chinese enterprises signed project contracts worth \$38.2 billion with African partners during the January through October 2012 period, up 27 percent year-on-year. Unlike FDI in other regions, which is frequently dominated by the private sector, "a particular feature of FDI from the South to Africa is the frequent involvement of governments or state-owned enterprises."<sup>105</sup>

As noted, some LDCs in Africa have not been left out of the surge in South-South FDI. Although in 2009 FDI to LDCs declined 14%, to \$28 billion, prior to that time FDI inflows to LDCs had been rising year on year since 2001.<sup>106</sup> According to analysts, "FDI has been the most rapidly increasing resource flow to LDCs over the past decade" and the majority of FDI inflows to LDCs have gone to LDCs in sub-Saharan Africa.<sup>107</sup> Between 2000 and 2009, the total value of foreign investors' capital and reserves in African LDCs increased by around 260%.<sup>108</sup>

Overall, developing countries are playing an increasing role in Africa's trade and investment. While not replacing the continent's traditional partners, key developing countries, particularly China and India, are becoming more dominant in the continent. China is now considered "the biggest player in Angola's post-war reconstruction process," and has made inroads in countries such as Sierra Leone, Liberia, and Tanzania.<sup>109</sup> China is not alone in her foray into Africa. Countries like India and Brazil are also gaining a foothold in the continent. During the "Lula years" from 2003 to 2010, trade between Brazil and Africa expanded. Luiz Inácio Lula da Silva, the 35th President of Brazil, made 12 official visits to the continent, doubled the number of Brazilian embassies in Africa, and boosted trade from three billion dollars in 2000 to 26 billion dollars in 2008.<sup>110</sup>

Brazil's enthusiasm for investment in Africa has continued after Lula left office. In Namibia, there are plans for the Brazilian oil and gas explo-

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105. U.N. CONFERENCE ON TRADE & DEV., ECONOMIC DEVELOPMENT IN AFRICA REPORT 2010: SOUTH-SOUTH COOPERATION: AFRICA AND THE NEW FORMS OF DEVELOPMENT PARTNERSHIP, at 81, U.N. Doc. UNCTAD/ALOC/AFRICA/2010, U.N. Sales No. E.10.11.d.13 (2010) [hereinafter *Economic Development in Africa*].

106. Background Paper, *supra* note 21, at 18-19.

107. *Id.* at 19.

108. *Id.*

109. See CENTRE FOR CHINESE STUDIES AT STELLENBOSCH UNIVERSITY, CHINA'S INTEREST AND ACTIVITY IN AFRICA'S CONSTRUCTION AND INFRASTRUCTURE SECTORS 20 (2006) [hereinafter *CONSTRUCTION AND INFRASTRUCTURE SECTORS*].

110. Stuart Grudgings & Jon Herskovitz, *Brazil's Lula Ends Final African Tour With New Deals*, REUTERS (July 8, 2010, 12:31 PM), <http://www.reuters.com/article/2010/07/08/brazil-africa-idUKLDE6671Q420100708> (discussing Lula's legacies in terms of diplomacy with countries in Africa.).

ration company, High Resolution Technology (HRT), to drill for the black gold off of the Namibian coast.<sup>111</sup> The company is investing \$400 million in Namibia. Brazil was also reportedly instrumental in setting up a Namibian navy equipped with Brazilian ships. And in May 2011, mining company Vale opened a \$1.7 billion coal plant in Mozambique. The plant is reportedly the largest one-off investment the southeast African country has ever seen. The company expects to export 11 million tons of coal annually from the Moatizi mine within two years and recently announced plans to continue to invest in Africa to the tune of \$12 billion over the next five years. In total, it is estimated that some 500 Brazilian companies are active in over 30 African countries; Angola alone hosts more than 100 Brazilian companies.

Indian investment is expanding as well, beyond its traditional base in the continent, Mauritius, to countries such as Senegal and Sudan. Although FDI from Latin American countries is low compared to that from Asia, the influence of countries like Brazil is felt in many countries in the continent.<sup>112</sup>

### C. South-South Investment Agreements

With deepening South-South economic cooperation has come an increase in the number of South-South international investment agreements (IIAs) and a widening of the geographical scope of the IIAs. In addition to BITs, there has also been an increase in the number of South-South double taxation treaties and preferential trade and investment agreements (PTIAs). Thus, although BITs “have traditionally been signed mainly between developed and developing countries,”<sup>113</sup> they are increasingly used in the context of South-South investment arrangements.<sup>114</sup> According to UNCTAD, South-South BITs account for 25% of all BITs and involve about 104 countries.<sup>115</sup> China is number one among developing countries in the number of BITs it has concluded. China, together with countries like Egypt, Malaysia, and the Republic of Korea, has signed more than 40 South-South BITs. China has also signed more agreements with other de-

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111. Servaas van den Bosch, *Brazil and Africa Ready to Do the Samba*, INTER PRESS SERVICE (July 1 2011), <http://www.ipsnews.net/2011/07/trade-brazil-and-africa-ready-to-do-the-samba/>.

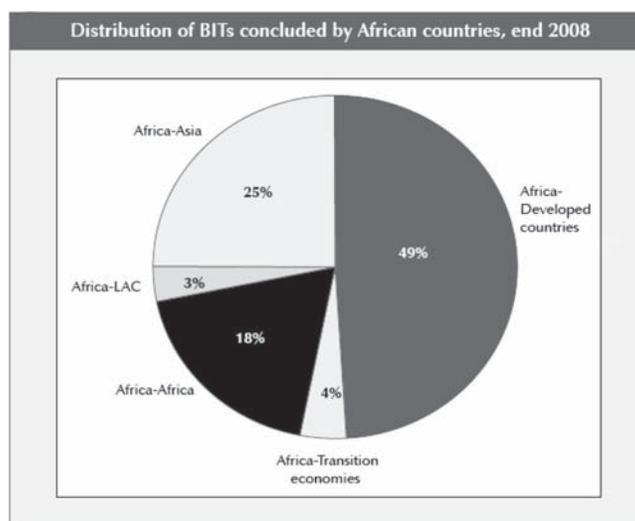
112. UNCTAD 2005, *supra* note 2, at 88 (noting that the Brazil’s energy giant Petrobras has operations in about six countries in Africa and that Brazil’s mining company has a presence in 7 countries in the continent.).

113. UNCTAD 2005, *supra* note 2, at 5.

114. Vandervelde, *supra* note 25, at 27 (observing that while in the past BITs were primarily between capital-exporting developed country and a capital-importing developing country, today “the number of investment agreements between developing countries has grown remarkably as developed countries have become capital exporters, often to other developing countries”).

115. *Id.*; UNCTAD 2005, *supra* note 2 at 5. Furthermore, 10% of all BITs are between developing countries and countries in transition, while 40% of all BITs are between developed and developing countries.

veloping countries than with developed countries.<sup>116</sup> As noted earlier, countries in Africa are concluding BITs with other non-African developing countries. In this respect, countries in North Africa lead the pack. The top five countries in terms of the number of BITs concluded with Southern partners are Egypt, Morocco, Tunisia, Algeria and Sudan.

FIGURE 2<sup>117</sup>

As pressures for stronger South-South links grow, as emerging-market multinational corporations expand their areas of operation seeking efficiency gains and market opportunities globally, and as state-owned enterprises and sovereign funds seek natural resources overseas, the world is likely to see an even greater use of BITs and other investment agreements by capital-exporting developing countries.

With changing geography of investment and a sustained surge in South-South investment, South-South FDI may be more attractive to developing countries for at least two reasons.<sup>118</sup> First, “being generally less capital intensive than the North’s and more suited to conditions in the South, it may be easier to set up [FDI] even in low-income countries, thereby increasing employment and income levels.”<sup>119</sup> Second, the longer term prospects appear to be better for South-South FDI flows because they “may be more stable and resilient to economic crisis.”<sup>120</sup> Given the changes in the global economic landscape, it is likely that the number of South-South BITs will increase as capital-exporting developing countries seek to protect their corporations and investments. Tough choices await

116. UNCTAD 2005, *supra* note 2, at 8.

117. Economic Development in Africa, *supra* note 105 at 89.

118. ASIAN DEV. BANK, *supra* note 89, at 66.

119. *Id.*

120. *Id.*

capital-receiving developing countries considering negotiating BITs now or in the future. On the one hand, there is the need to attract capital from the new capital exporters in the South, while on the other hand there is the need to ensure that investments will ultimately benefit the host country.

### III. CHINA AND BILATERAL INVESTMENT TREATIES: HISTORY AND EVOLUTION

China concluded its first BIT in 1982 and by 2007 had concluded BITs with about 120 countries.<sup>121</sup> China now ranks second, after Germany, in terms of countries that have signed the most BITs.<sup>122</sup> Today, about 74% of the destinations of Chinese outward FDI are covered by BITs.<sup>123</sup> In the 1960s and 1970s, as a capital-importing nation, China criticized and rejected BITs.<sup>124</sup> Over the years the number of BITs involving China has grown and Beijing's views regarding BITs has evolved.<sup>125</sup>

#### A. Evolution and Trends in China's BITs

Early Chinese BITs "provided investors with little protection in practice"<sup>126</sup> and accorded host governments considerable policy space. Regarding dispute resolution, for instance, a marked feature of China's early treaties was the absence of effective investor-State dispute resolution provisions.<sup>127</sup> BITs that China signed in the 1980s and early 1990s either contained no investor-State dispute settlement provisions or had very restrictive provisions.<sup>128</sup> In these earlier BITs, Beijing pushed for several provisions that enhanced China's position as a host government. First was a provision allowing the host government to consent to dispute settlement

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121. Axel Berger, *China's New Bilateral Investment Treaty Programme: Substance, Rational and Implications for International Investment Law Making, The Politics of International Economic Law: The Next Four Years*, at 7 (2008), available at <http://www.asil.org/files/ielconferencepapers/berger.pdf>.

122. Malik, *supra* note 1, at 3 (observing that Germany maintains its lead on number of BITs concluded and that Germany is closely followed by China.).

123. Cai Congyan, *Outward Foreign Direct Investment Protection and the Effectiveness of Chinese BIT Practice*, 7 J. WORLD INVESTMENT & TRADE 639 (2006).

124. Berger, *supra* note 121, at 7 (observing that "[d]uring the first three decades of self-imposed isolation from the world market (all through the 1950s until the late 1970s), Beijing adopted a hostile approach towards international investment law and the protection of FDI").

125. *Id.* (noting the increase in the number of BITs that Beijing has concluded since the early 1980s and observing that this increase "reveals Beijing's growing acceptance of international investment law").

126. *Id.*

127. An Chen, *Should the Four Great Safeguards in Sino-Foreign BITs Be Hastily Disbanded?* 7 J. WORLD INVESTMENT & TRADE 899, 900 (2006) (observing that in the past Beijing maintained a cautious attitude towards BITs and paid much attention to reserve various sovereign rights).

128. *Id.* at 901 (observing that Chinese BITs concluded during the 1980s and the 1990s imposed serious restrictions on the scope and procedure of arbitration of investment disputes between foreign investors and China as the host country).

on a case-by-case basis.<sup>129</sup> Second was a requirement that investors exhaust domestic remedies before invoking international arbitration.<sup>130</sup> Third was a provision that a dispute settlement be in accordance with a host country's laws.<sup>131</sup> Fourth was a provision allowing exception to dispute settlement on the grounds of an essential security interest of the State.<sup>132</sup> Fifth was a provision permitting investors to refer only certain cases (typically disputes over the amount of compensation payable following an expropriation) to arbitration.<sup>133</sup>

But during the last two decades, China gradually moved toward a more liberal approach to BITs. 1998 marked a turning point in China's BIT practice following the adoption of China's 'Going Abroad' policy encouraging Chinese outbound investment.<sup>134</sup> The result is that second generation BITs involving China exhibit characteristics, which together suggest a more liberal, pro-investor approach to BITs, including more comprehensive substantive provisions, automatic and compulsory dispute settlement by international arbitration, broader national treatment clauses, and considerably fewer restrictions on the transfer of funds.<sup>135</sup>

#### B. *China's Motivations for Concluding BITs*

Why is China concluding BITs with developed countries? With developing countries? With countries in Africa? BITs are an integral part of China's "Going Global" strategy.<sup>136</sup> BITs have assumed increasing importance to Beijing as China's status has changed from that of a capital-importer to that of capital-exporter.<sup>137</sup>

The last decade saw a massive FDI inflow from China into Africa as trade between the two sides grew. China is reportedly Africa's largest trading partner today and Africa is now China's fourth largest investment destination.<sup>138</sup> "According to Chinese Ministry of Commerce[s] latest data, China- Africa trade volume reached 122.2 billion U.S. dollars in the first three quarters of this year, attaining a year-on-year growth of 30 percent. The trade volume reached 126.9 billion U.S. dollars last year, and is

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129. *Id.* at 902.

130. *Id.*

131. *Id.* at 903.

132. See *id.*

133. Berger, *supra* note 121.

134. *Id.*

135. Congyan, *supra* note 123, at 637-8.

136. Berger, *supra* note 121, at 7 (ascribing the change in China's international investment policy making to China's evolution from a mere FDI-importing country to an economy that is increasingly investing abroad).

137. *Id.* (noting that China is becoming a FDI-exporting economy).

138. Yu Shengnan, *Yearender: China-Africa cooperation: unlimited opportunity with vitality*, XINHUA (Dec. 19, 2012), [http://news.xinhuanet.com/english/china/2011-12/19/c\\_131315292.htm](http://news.xinhuanet.com/english/china/2011-12/19/c_131315292.htm). See also Ding Ying, *Quality Cooperation*, BEIJING REV. (Jan. 19, 2012), [http://www.bjreview.com/world/txt/2012-01/16/content\\_420764.htm](http://www.bjreview.com/world/txt/2012-01/16/content_420764.htm) (asserting that "China is now Africa's largest trading partner" and that "Chinese investment in Africa is growing rapidly").

expected to reach 150 billion - 160 billion U.S. dollars this year.”<sup>139</sup> In 2011, China was responsible for \$1.08 billion of non-financial direct investment to Africa, a figure which represented a year-on-year growth of approximately 87%.<sup>140</sup> In addition, Chinese companies concluded construction contracts in Africa for over \$25 billion; these companies accomplished a turnover of \$23.7 billion.<sup>141</sup>

According to Congyan, as a capital-exporting nation, “the effective implementation of [an outward FDI (“OFDI”)] policy to a great extent depends on whether effective investment protection is available to overseas investors.”<sup>142</sup> To Congyan, China’s protection of OFDI is particularly important both because of the destination of Chinese investment (high-risk countries)<sup>143</sup> and the sectors that Chinese investors typically invest in (natural resources).<sup>144</sup> Presently, China “is party to BITs with most Asian countries, with many developed countries outside Asia, and with a growing number of developing countries outside Asia.”<sup>145</sup>

According to the Chinese Ambassador to Ghana, Gong Jianzhong, in recent years, China’s investment in Africa has shown new characteristics in the form of: rapid growth,<sup>146</sup> wide distribution, wide range of areas, multiform methods,<sup>147</sup> and diverse investors.<sup>148</sup> China’s investment in Africa is distributed across 49 African countries, the Ambassador claims.<sup>149</sup>

#### IV. CHINA-AFRICA BILATERAL INVESTMENT TREATIES: TRENDS AND CHARACTERISTICS

China has concluded 31 BITs and 9 DTTs with countries in Africa.<sup>150</sup> China has also concluded trade agreements or economic cooperation

139. Shengnan, *supra* note 138.

140. *Id.*

141. *Id.*

142. Congyan, *supra* note 123, at 631, 635 (also noting that “OFDI protection is an important part of China’s emerging overseas interests protection system as a whole”).

143. *Id.* at 635 (noting that China is engaged with developing countries, some of which are in a transitional period, unstable political situation, and in the midst of rule of law problems).

144. *Id.* (noting that “natural resource projects involve huge investment[s] and long construction and return periods”).

145. *See* Berger, *supra* note 121

146. Gong Jianzhong, Chinese Ambassador to Ghana, Speech at GIBS Seminar (Mar. 22, 2011), available at <http://www.fmprc.gov.cn/eng/wjb/zwjg/zwbdt808586.htm> (“By the end of 2003 China’s direct investment in Africa had reached 490 million USD, rocketing to 9.33 billion USD by the end of 2009”) [hereinafter Jianzhong Speech].

147. *Id.* (“In addition to sole proprietorship and joint-venture ownership, investment methods are also being increasingly diversified, such as equity participation, merger and acquisition, and joint-venture cooperation with third-country enterprises for resources development”).

148. *Id.* (“State-owned large and medium-sized enterprises, private enterprises and individuals have all invested and started business in Africa”).

149. *Id.*

150. *Supra* Figure 1; *infra* Annex 3.

agreements with 45 countries on the continent.<sup>151</sup> Nine countries in Africa have concluded both a BIT and a DTT with China.<sup>152</sup>

Nine BITs are reviewed in this section. These include three BITs that are available and in force (Ghana,<sup>153</sup> Ethiopia,<sup>154</sup> and Egypt<sup>155</sup>) as well as six BITs that are available but not yet in force (Botswana,<sup>156</sup> Djibouti,<sup>157</sup> Benin,<sup>158</sup> Uganda,<sup>159</sup> Tunisia,<sup>160</sup> Côte d'Ivoire<sup>161</sup>). China-Cameroon BIT, China-Madagascar BIT and China-Morocco BIT are in French and are not examined in this paper.

#### A. Background to China-Africa BITs

Within the framework of the Forum on China-Africa Cooperation (FOCAC), China has pushed countries in Africa to conclude BITs.<sup>162</sup> Almost all the key FOCAC documents call on participating countries to con-

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151. See *China-Africa Trade and Economic Relationship Annual Report 2010*, FORUM ON CHINA-AFR. COOPERATION (June 22, 2011), <http://www.focac.org/eng/zxxx/t832788.htm>.

152. See Annexes 2 and 3.

153. Agreement Concerning the Encouragement and Reciprocal Protection of Investments, China-Ghana, Oct. 12, 1989, available at [http://www.unctad.org/sections/dite/ia/docs/bits/china\\_ghana.pdf](http://www.unctad.org/sections/dite/ia/docs/bits/china_ghana.pdf). [hereinafter China-Ghana BIT].

154. Agreement Concerning the Encouragement and Reciprocal Protection of Investments, China-Eth., May 11, 1998, available at [http://www.unctad.org/sections/dite/ia/docs/bits/china\\_ethiopia.pdf](http://www.unctad.org/sections/dite/ia/docs/bits/china_ethiopia.pdf) [hereinafter China-Ethiopia BIT].

155. Agreement Concerning the Encouragement and Reciprocal Protection of Investments, China-Egypt, Apr. 21, 1994, 1998 U.N.T.S. 125 available at [http://www.unctad.org/sections/dite/ia/docs/bits/egypt\\_china.pdf](http://www.unctad.org/sections/dite/ia/docs/bits/egypt_china.pdf) [hereinafter China-Egypt BIT].

156. Agreement on the Promotion and Protection of Investments, China-Bots., June 12, 2000, available at: [http://www.unctad.org/sections/dite/ia/docs/bits/china\\_botswana.pdf](http://www.unctad.org/sections/dite/ia/docs/bits/china_botswana.pdf) [hereinafter China-Botswana BIT].

157. Agreement on the Promotion and Protection of Investments, China-Djib., Aug. 18, 2003, available at: [http://www.unctad.org/sections/dite/ia/docs/bits/china\\_djibouti.pdf](http://www.unctad.org/sections/dite/ia/docs/bits/china_djibouti.pdf) [hereinafter China-Djibouti BIT].

158. The Government of the People's Republic of China and the Government of the Republic of Benin, China-Benin, Feb. 18, 2004, available at: [http://www.unctad.org/sections/dite/ia/docs/bits/China\\_Benin.pdf](http://www.unctad.org/sections/dite/ia/docs/bits/China_Benin.pdf) [hereinafter China-Benin BIT].

159. Agreement on the Reciprocal Promotion and Protection of Investments, China-Uganda, May 27, 2004, available at [http://www.unctad.org/sections/dite/ia/docs/bits/Uganda\\_China.pdf](http://www.unctad.org/sections/dite/ia/docs/bits/Uganda_China.pdf). [hereinafter China-Uganda BIT].

160. Agreement Concerning the Reciprocal Encouragement and Protection of Investment, China-Tunis., June 21, 2004, available at [http://unctad.org/sections/dite/ia/docs/bits/China\\_Tunisia.pdf](http://unctad.org/sections/dite/ia/docs/bits/China_Tunisia.pdf) [hereinafter China-Tunisia BIT].

161. Agreement on the Promotion and Protection of Investments, China-Côte D'Ivoire, Sept. 23, 2002, available at [http://www.unctad.org/sections/dite/ia/docs/bits/china\\_cote\\_divoire.pdf](http://www.unctad.org/sections/dite/ia/docs/bits/china_cote_divoire.pdf). [hereinafter China-Cote D'Ivoire BIT].

162. See e.g., *The Programme for China-Africa Cooperation in Economic and Social Development*, FORUM ON CHINA-AFRICA COOPERATION (Nov. 17, 2000), <http://www.fmprc.gov.cn/eng/wjdt/2649/t15777.htm> [hereinafter Programme for China-Africa Cooperation 2000] (last visited August 15, 2013); *Forum on China-Africa Cooperation Addis Ababa Action Plan 2004-2006*, MINISTRY OF FOREIGN AFFAIRS OF THE PEOPLE'S REPUBLIC OF CHINA, ¶4.3.4 (Dec. 26, 2003), <http://www.fmprc.gov.cn/eng/topics/Second/t57032.htm> [hereinafter Addis Ababa Action Plan 2004-2006]; *Forum on China-Africa Cooperation Beijing Action Plan (2007-2009)*, AFRIQUE CHINE.NET, ¶3.2.2 (Nov. 2006), <http://www.afriquechine.net/en/>

clude BITs and DTTs with China.<sup>163</sup> In the *Programme for China-Africa Cooperation in Economic and Social Development*, adopted in 2000, the two sides expressed their readiness to develop a strategy for promoting trade and investment “by creating an enabling legal and business environment, so that such co-operation will gradually play a leading role in the China-Africa economic partnership.”<sup>164</sup>

More specifically, the two sides agreed to conclude an appropriate legal framework on trade promotion and capacity building, encouragement, protection and guarantee of investments, and avoidance of double taxation.<sup>165</sup> In the *Addis Ababa Plan of Action* adopted in 2003, both sides resolved to “take concrete measures to continuously promote investment in both directions.”<sup>166</sup> While China agreed to “further encourage and support its strong and viable enterprises . . . to invest in Africa,” African countries were encouraged to “conclude with China bilateral agreements on investment protection and on the avoidance of double taxation.”<sup>167</sup> Furthermore, in the *Beijing Action Plan 2007-2009* adopted in 2006, the two sides decided to “facilitate the negotiation, conclusion and implementation of the Agreement on Bilateral Facilitation and Protection of Investment and the Agreement on Avoidance of Double Taxation to create an enabling environment for investment cooperation and protect the lawful rights and interests of investors from both sides.”<sup>168</sup> Finally, in the *Sharm El-Sheikh Plan of Action* adopted in 2009, the two sides also agreed to “continue to promote the conclusion and implementation of bilateral agreements on investment promotion and protection, and create a sound environment with a view to scaling up mutual investment.”<sup>169</sup> FOCAC documents demonstrate the importance of BITs to China in her role as a capital exporter. Compared to its strong rejection of BITs in the 1960s, 1970s and even the 1980s, China now embraces and even encourages the use of BITs.

### B. Features of China-Africa BITs

In general, the key features of China-Africa BITs are: a broad asset-based definition of investments; absolute standards of treatment (for example, fair and equitable treatment) clauses; relative standards of treat-

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forum-sino-african/Beijing-Action-Plan-2007-2009.html [hereinafter Beijing Action Plan 2007-2009].

163. See e.g., *Programme for China-Africa Cooperation 2000*, *supra* note 162, ¶ 10.1; *Addis Ababa Action Plan 2004-2006*, *supra* note 162, ¶ 4.4.3; *Beijing Action Plan 2007-2009*, *supra* note 162, ¶ 3.3.

164. *Programme for China-Africa Cooperation 2000*, *supra* note 162, ¶ 3.1.

165. *Id.* ¶ 3.2.

166. *Addis Ababa Action Plan 2004-2006*, *supra* note 162, ¶ 4.4.3.

167. *Id.*, ¶ 4.4.3

168. Beijing Action Plan 2007-2009, *supra* note 162, ¶ 3.2.2.

169. *Forum on China-Africa Cooperation Sharm El Sheik Action Plan*, FORUM ON CHINA-AFRICA COOPRATION, ¶ 4.2.2 (November 2009), <http://www.focac.org/eng/dsjbjjhy/hywj/t626387.htm> [hereinafter Sharm El Sheik Action Plan 2009].

ment (for example, National Treatment and Most-Favored-Nations) clauses; protection against expropriation; protection against wars, riots, and related civil disturbances; State-State dispute settlement as well as Investor-State dispute settlement procedures; subrogation clauses; and clauses guaranteeing the right of investors to freely transfer funds.<sup>170</sup> Noticeably absent from China-Africa BITs are provisions pertaining to human rights, labor rights, environmental protection and sustainable development. Almost all the BITs reviewed apply to investments after they are established in the host country. In this respect, the Chinese-Africa BITs follow the European model rather than the U.S. and Canadian model, which extends protection to investment prior to the establishment phase.<sup>171</sup>

### 1. Temporal Scope of Application

The temporal scope of a BIT is one element that affects its potential impact on a host country. Some BITs apply only to investments made after the BIT's entry into force, while others apply also to investments made prior to the BIT's entry into force. Do China-Africa BITs apply to pre-existing investments? Are they retroactive? Almost all the BITs reviewed address their temporal scope. Three types can be discerned: (1) BITs that apply to investments made prior to and after the entry into force of the agreement that are in accordance with the host country's laws; (2) BITs that apply to investments made prior to and after the entry into force of the treaty that are in accordance with the host country's laws but excluding any dispute that arises before the entry into force of the agreement; and (3) BITs that stipulate that the treaty shall apply only to investments made after a specific date.

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170. See *infra*, Annex 5.

171. For example, Article II(3) of the Canada-Thailand BIT states: "Each Contracting Party shall, in accordance with its applicable measures in existence on the date of entry into force of this agreement, permit establishment of a new business enterprise or acquisition of an existing enterprise or a share of such enterprise by investors or prospective investors of the other Contracting Party on a basis no less favorable than that which in like circumstances, it permits such acquisition or establishment by: (a) its own investors or prospective investors; or (b) investors or prospective investors of any third state." Agreement for the Promotion and Protection of Investment, Can.-Thai., January 17, 1997, B.E. 2537, available at [http://www.unctad.org/sections/dite/ia/docs/bits/canada\\_thailand.pdf](http://www.unctad.org/sections/dite/ia/docs/bits/canada_thailand.pdf) [hereinafter Canada-Thailand BIT].

China-Ghana BIT Article 8	China-Benin BIT Article 11	China-Tunisia BIT Article 12
This Agreement shall apply to investments which are <b>made prior to or after its entry into force</b> by investors of either Contracting State <b>in accordance with the laws and regulations of the other Contracting State</b> in the territory of the latter. <sup>172</sup>	This Agreement shall apply to investment <b>made prior to or after its entry into force by investors</b> of one Contracting Party in the territory of the other Contracting Party <b>in accordance with the laws and regulations of the Contracting Party concerned, but not apply to the dispute arose before its entry into force.</b> <sup>173</sup>	This Agreement shall apply to investments, which are <b>made by investors of either Contracting Party in the territory of the other Contracting Party after 8th of July in 1979 in the People's Republic of China and after 1st January 1957 in the Republic of Tunisia.</b> However the Agreement shall not apply to any dispute concerning an investment which arose before its entry into force. <sup>174</sup>

## 2. Duration

All the China-Africa BITs have a definite duration and generally specify that they shall remain in force for a minimum fixed period; almost all provide for an initial term of 10 years which can be renewed.

China-Ghana BIT	China-Uganda BIT	China-Tunisia BIT
Article 14 1. This Agreement shall . . . remain in force for a period of ten years. 2. This Agreement shall continue in force if either Contracting State fails to give a written notice to the other Contracting State to terminate it one year before the expiration specified in Paragraph 1 of this Article. <sup>175</sup>	Article 16 1. This Agreement shall . . . remain in force for a period of ten years. 2. This Agreement shall continue to be in force unless if either Contracting Party has fails to given a written notice to the other Contracting Party to terminate this Agreement one year before the expiration of the initial ten year period specified in Paragraph 1 of this Article or at any time thereafter. <sup>176</sup>	Article 13 (1) This Agreement shall enter into force on the first day of the following month after the date on which both Contracting Parties have notified to each other . . . that their respective internal legal procedures necessary for its entry into force have been fulfilled and remain in force for a period of ten years. <sup>177</sup>

172. China-Ghana BIT, *supra* note 153, art. 8 (emphasis added).

173. China-Benin BIT, *supra* note 158, art. 11 (emphasis added).

174. China-Tunisia BIT, *supra* note 160 (emphasis added).

175. China-Ghana BIT, *supra* note 153, art. 14 (emphasis added).

176. China-Uganda BIT, *supra* note 159, art. 16 (emphasis added).

177. China-Tunisia BIT, *supra* note 160, art. 13.

### 3. Definition of Investment

The definition of “investment” in a BIT is another element that determines the scope of a BIT. A common feature of China-Africa BITs is a broad asset-based definition of “investment.” Investment is defined to cover “every kind of asset.”<sup>178</sup> The BITs then offer a non-exhaustive list of examples of the form such investment might take. In China-Africa BITs, investments are defined to include “movable and immovable property and other property rights such as mortgages, and pledges,” “claims to money, or to any other performance having an economic value associated with an investment,” “shares, debentures, stock and any other kind of participation in companies,” “business concessions conferred by law or under contract permitted by law, including concessions to search for, cultivate, extract or exploit natural resources,” and “intellectual property rights.”<sup>179</sup> Some BITs go on to state that “[a]ny change in the form in which assets are invested shall not affect their character as investments.”<sup>180</sup> Regarding intellectual property, while some BITs cover only the main types of intellectual property<sup>181</sup>—copyrights, industrial property, know-how, and technological process—other BITs adopt an open-ended language that appears to cover every type of intellectual and industrial property.<sup>182</sup>

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178. *E.g.*, China-Djibouti, *supra* note 157, art. 1(1).

179. *E.g.*, *id.*, art. 1(1) (a) – (e).

180. *E.g.*, China-Tunisia BIT, *supra* note 160, art. 1(1).

181. *E.g.*, China-Ghana BIT, *supra* note 153, art. 1(a)(iv) (stating that the term “investment[ ]” includes “copyrights, industrial property, know-how and technological process”).

182. *E.g.*, China-Tunisia BIT, *supra* note 160, article 1(1)(d) (stating that the term “[i]nvestment” includes “intellectual property rights, including copyrights, patents, trade marks, trade names, technological process, know-how and good will”).

China-Ghana BIT	China-Djibouti	China-Tunisia BIT
<p>Article 1 For the purpose of this Agreement, The term “investments” means every kind of asset made as investment in accordance with the laws and regulations of the Contracting State accepting the investment in its territory, including mainly: (i) movable and immovable property and other property rights; (ii) shares in companies or other forms of interest in such companies; (iii) a claim to money or to any performance having economic value; (iv) copyrights, industrial property, know-how, and technological process; (v) concessions conferred by law, including concessions to search for or exploit natural resources.<sup>183</sup></p>	<p>Article 1 For the purposes of this Agreement: (a) The term “investment” means every kind of asset invested by investors of one Contracting Party in accordance with the laws and regulations of the other Contracting Party in the territory of the latter, and in particular, though not exclusively, includes: (i) movable and immovable property and other property rights such as mortgages and pledges; (ii) shares, debentures, stock and any other kind of participation in companies; (iii) claims to money or to any performance having an economic value associated with an investment; (iv) intellectual and industrial property rights, in particular copyrights, patents, trademarks, trade-names, technical processes, know-how, and goodwill; (v) business concessions conferred by law or under contract permitted by law, including concessions to search for, cultivate, extract or exploit natural resources.<sup>184</sup></p>	<p>Article 1 For the purpose of this Agreement: (1) The term “Investment” means every kind of asset invested by investors of one Contracting Party in the territory of the other Contracting Party in accordance with the laws and regulations of the latter, and in particular, though not exclusively, includes: (a) movable and immovable property as well as other rights in rem, such as, mortgages, pledges and liens; (b) shares, stocks and any other kind of participation in companies; (c) claims to money or to any other performance having an economic value; (d) intellectual property rights, including copyrights, patents, trademarks, trade names, technological process, know-how and good will; (e) concessions conferred by law or under contract permitted by law, including concessions to search for, or exploit natural resources. Any change in the form in which assets are invested shall not affect their character as investments, provided that such change is not contrary to the laws and regulations of the host country.<sup>185</sup></p>

#### 4. Obligation to Promote Investment

Almost all China-Africa BITs have a “Promotion of Investments” clause. Pursuant to this clause, Contracting States undertake to encourage investors of the other Contracting Party to make investments in their territory and to admit such investments.<sup>186</sup> The language is hortatory and treaties do not specify the promotional activities Contracting States are expected to undertake. None of the BITs reviewed require Contracting States to exchange information regarding investment opportunities in their territories and only a few require States to provide assistance with respect to visas and work permits.

183. China-Ghana BIT, *supra* note 153, art. 1 (emphasis added).

184. China-Djibouti.BIT, *supra* note 157, at art. 1 (emphasis added).

185. China-Tunisia BIT, *supra* note 160, art. 1 (emphasis added).

186. *E.g.*, China-Ethiopia BIT, *supra* note 154, art. 2.

China-Ghana BIT	China-Benin BIT	China-Tunisia BIT
<p>Article 2</p> <p>1. Each Contracting State shall encourage investors of the other Contracting State to make investments in its territory and admit such investments in accordance with its laws and regulations.</p> <p>2. Each Contracting State shall grant assistance in and provide facilities for obtaining visa and working permit to nationals of the other Contracting State to or in the territory of the Former in connection with investments or activities associated with such investments.<sup>187</sup></p>	<p>Article 2</p> <p>1[.] Each Contracting Party shall endeavor to promote investments made by investors of the other Contracting Party in its territory and, shall admit and protect such investments in accordance with its laws and regulations.</p> <p>False</p> <p>5[.] Subject to its laws and regulations, one Contracting Party shall provide assistance and facilities for obtaining visas and working permit to nationals of the other Contracting Party engaging in activities associated with investments made in the territory of that Contracting Party.<sup>188</sup></p>	<p>Article 2</p> <p>1. Each Contracting Party shall encourage and create favourable conditions for investors of the other Contracting Party to make investments in its territory and admit such investments in accordance with its laws and regulations.<sup>189</sup></p>

### 5. Admission of Investment

China-Africa BITs adopt the “admission clause” or “controlled entry” model, meaning that investors do not enjoy market access rights but only post-establishment protection.<sup>190</sup> Under the admission clause model, admission and establishment of investment is subject to the domestic laws of the host country and investors do not enjoy any right of establishment.<sup>191</sup> By contrast, under the “establishment” or “full liberalization” model, countries undertake to extend the non-discrimination standard to the pre-entry state of the investment.<sup>192</sup> Article 2 of the China-Ghana BIT requires each Contracting State to admit covered investment “in accordance with its laws and regulations.”<sup>193</sup> Similar provisions can be found in the

187. China-Ghana BIT, *supra* note 153, art. 2.

188. China-Benin BIT, *supra* note 158, art. 2 (emphasis added).

189. China-Tunisia BIT, *supra* note 160, art. 2 (emphasis added).

190. Peter Muchlinski, *The Framework of Investment Protection: The Content of BITs*, in *THE EFFECT OF TREATIES ON FOREIGN DIRECT INVESTMENT: BILATERAL INVESTMENT TREATIES, DOUBLE TAXATION TREATIES, AND INVESTMENT FLOWS* 37, 40 (noting that a “controlled entry” model reserves the right of the host country to regulate the entry of foreign investments into its territory”).

191. *Id.* at 40-41 (noting that under general international law, “countries have the unlimited rights to exclude foreign nationals and companies from entering their territory.” Observing further that under the “controlled entry” approach, the application of the BIT to an investment is made conditional on its being approved in accordance with the laws and regulations of the host country).

192. *Id.* (noting that the “full liberalization” model is favored in the BIT practice of the United States and Canada).

193. China-Ghana BIT, *supra* note 153, art. 2.

China-Botswana BIT,<sup>194</sup> China-Cote d'Ivoire BIT,<sup>195</sup> and China-Djibouti BIT.<sup>196</sup> The implication of the admission clause “is that, regardless of whether the host country maintains an admission and screening mechanism for foreign investment—and unless the BIT states otherwise—there is no obligation on the part of the host country to eliminate discriminatory legislation affecting the establishment of foreign investment.”<sup>197</sup>

## 6. General and Absolute Standards of Treatment Obligation to Protect Investments

All the BITs reviewed have a general obligation clause under which Contracting States undertake to protect the investments of an investor. The obligations identified are “general” because they pertain to all aspects of the existence of an investment in a host country. The obligations are also absolute because they are not dependent or conditioned on how a Contracting State treats investment by nationals or nationals of other countries. Four different standards are typically addressed under the general obligation clause: (i) guarantee of fair and equitable treatment; (ii) guarantee of full protection and security; (iii) non-discrimination obligation; and (iv) guarantee of protection against unreasonable measures.<sup>198</sup>

Some of the BITs reference one or more of the standards and others reference all four standards.<sup>199</sup> The language in the China-Ghana BIT is somewhat weaker than the language of more recent BITs. In the China-Ghana BIT, the Parties agreed that investments and activities associated with the investments of the investor shall be accorded “equitable treatment and shall enjoy protection in the territory of the other Contracting state.”<sup>200</sup> More recent BITs protect investments and returns on investment and stipulate that these shall “be accorded fair and equitable treatment” at all times, “enjoy full protection,” and be protected against unreasonable or discriminatory measures in the territory of the other Party.<sup>201</sup> The China-Ghana BIT is also benched on the MFN standard.

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194. China-Botswana BIT, *supra* note 156, art. 2(1).

195. China-Cote D'Ivoire BIT, *supra* note 161, art. 2(1).

196. China-Djibouti BIT, *supra* note 157, art. 2(1).

197. South Ctr., *The European Union and the United States' Approach to International Investment Agreements with Developing Countries: Free Trade Agreements and Bilateral Investment Treaties*, ¶ 52, SC/TDP/AN/EPA/24 (Apr. 2010) [hereinafter South Centre].

198. See Rudolph Dolzer, *Fair and Equitable Treatment: A Key Standard in Investment Treaties*, 39 INT'L LAW 87 (2005).

199. See, e.g., China-Ghana BIT, *supra* note 153, art. 3(1) (providing for “equitable treatment” and “protection”). *C.f.* China-Tunisia BIT, *supra* note 160, arts. 2, 3 (providing for the “full protection and security,” protection against “any unreasonable or discriminatory measure,” and “fair and equitable treatment”).

200. China-Ghana BIT, *supra* note 153, art. 3(1).

201. See, e.g., China-Ethiopia BIT, *supra* note 155, art. 3(1).

China-Ghana BIT	China-Cote d'Ivoire BIT	China-Uganda BIT
<p>Article 3</p> <p>1. Investments and activities associated with investments of investor of either Contracting State shall be accorded equitable treatment and shall enjoy protection in the territory of the other Contracting State.</p> <p>2. The treatment and protection referred to in Paragraph 1 of this Article shall not be less favorable than that accorded to Investments and activities associated with such investments of investors of a third state.<sup>202</sup></p>	<p>Article 2</p> <p>. . .</p> <p>2. Investments of the investors of either Contracting Party shall enjoy the constant protection and security in the territory of the other Contracting Party.</p> <p>3. Without prejudice to its laws and regulations, neither Contracting Party shall take any unreasonable or discriminatory measures against the management, maintenance, use, enjoyment and disposal of the investments by the investors of the other Contracting Party.<sup>203</sup></p>	<p>Article 2</p> <p>False</p> <p>2. The investments made by investors of one contracting party shall enjoy full and complete protection and safety in the territory of the other Contracting Party.</p> <p>3. Without prejudice to its laws and regulations, neither Contracting Party shall take any discriminatory measures against the management, maintenance, use, enjoyment and disposal of the investments by the investors of the other Contracting Party.</p> <p>Article 3</p> <p>1. Investments of investors of each Contracting Party shall all the time be accorded fair and equitable treatment in the territory of the other Contracting Party.<sup>204</sup></p>

## 7. National Treatment Provision

A national treatment provision is considered a standard feature of BITs.<sup>205</sup> Under a national treatment clause, host countries usually commit to grant investors of the other contracting party treatment that is no less favorable than that granted to investment from their own citizens.<sup>206</sup> The goal of the national treatment clause is to eliminate any discrimination against foreign investors in favor of domestic investors and investment. National treatment is now a common feature of China-Africa BITs, but this was not always so and some variations can still be seen. For instance, some of the earlier BITs do not have national treatment provisions.<sup>207</sup> In addition, some BITs lack a national treatment provision but incorporate a

202. China-Ghana BIT, *supra* note 153, art. 3 (emphasis added).

203. China-Cote D'Ivoire BIT, *supra* note 161, art 2 (emphasis added).

204. China-Uganda BIT, *supra* note 159, arts. 2-3 (emphasis added).

205. Muchlinski, *supra* note 190, at 50 (identifying national treatment clause as a provision commonly found in BITs).

206. *Id.* (noting that the national treatment standard "requires that foreign investors should receive treatment no less favorable than that accorded to nationals of the host country engaged in similar business activity").

207. *See, e.g.*, China-Ghana BIT, *supra* note 153; *see also* China-Ethiopia BIT, *supra* note 154.

general non-discrimination principle.<sup>208</sup> Lastly, other BITs have national treatment provisions that are qualified and apply without prejudice to domestic laws and regulations of the host country.<sup>209</sup> For BITs containing a national treatment provision, the clause typically applies to investors and “activities associated with such investments.”<sup>210</sup> The national treatment provisions appear to apply to all sectors and industries.

China-Djibouti BIT	China-Uganda BIT	China-Cote d'Ivoire BIT
Article 3 (2) Without prejudice to its laws and regulations, each Contracting Party shall accord to investments and activities associated with such investments by the investors of the other Contracting Party treatment not less favorable than that accorded to the investments and associated activities by its own investors. <sup>211</sup>	Article 3(2) Without prejudice to its laws and regulations, each Contracting Party shall accord to investments and activities associated with such investments by the investors of the other Contracting Party treatment not less favorable than that accorded to the investments and associated activities by its own investors. <sup>212</sup>	Article 3(2) Without prejudice to its laws and regulations, each Contracting Party shall accord to investments and activities associated with such investments by the investors of the other Contracting Party treatment not less favorable than that accorded to the investments and associated activities by its own investors. <sup>213</sup>

The implication of a general non-discrimination clause that is not tied to the national treatment or MFN standard is not altogether clear. From the perspective of the host government, such clauses are risky for two reasons. First, the term “discrimination” is not defined and could be interpreted expansively in the event of a dispute. Second, non-discrimination clauses are typically not subject to the host countries’ laws and regulations, as is the case with national treatment provisions.

## 8. Most-Favored-Nations Clause

The most-favored-nation standard ensures that investments and investors of a Contracting Party to a BIT receive the best treatment that parties to the BIT have granted to investments and investors of third countries.<sup>214</sup> All China-Africa BITs provide for the MFN standard at the post-establishment phase. Variations exist, however. First, in some of the BITs, the

208. See, e.g., China-Tunisia BIT, *supra* note 160, art. 3(2) (obliging Contracting Parties to ensure that investments in its territory of investors of the other Contracting Party, “shall not in any way be impaired by any unreasonable or discriminatory measure.”). While this may be read to preclude Contracting Parties from according more favorable treatment to domestic investors, this is not explicitly stated in the BIT. *Id.*

209. China-Djibouti BIT, *supra* note 157, art. 3(2); see also China-Benin BIT, *supra* note 158, art. 3(1).

210. China-Uganda BIT, *supra* note 159, art. 3(2); China-Cote D'Ivoire BIT, *supra* note 161, art. 3(2).

211. China-Djibouti BIT, *supra* note 157, art. 3(2) (emphasis added).

212. China-Uganda BIT, *supra* note 159, art. 3(2) (emphasis added).

213. China-Cote D'Ivoire, *supra* note 161, art. 3(2) (emphasis added).

214. UNCTAD 2007, *supra* note 45, at 38.

MFN standard is limited to certain principles such as the “fair and equitable” principle.<sup>215</sup> Second, some BITs have independent MFN clauses that are not tied to any particular principle or set of principles. Third, a few BITs contain exceptions to the MFN standard.<sup>216</sup>

China-Ghana BIT	China-Cote D'Ivoire	China-Uganda BIT
<p>Article 3</p> <p>1. Investments and activities associated with investments of investors of either Contracting State shall be accorded equitable treatment and shall enjoy protection in the territory of the other Contracting State.</p> <p>2. The treatment and protection referred to in Paragraph 1 of this Article shall not be less favourable than that accorded to investments and activities associated with such investments of investors of a third State.<sup>217</sup></p>	<p>Article 3</p> <p>False</p> <p>3. Neither Contracting Party shall subject investments and activities associated with such investments by the investors of the other Contracting Party to treatment less favorable than that accorded to the investments and associated activities by the investors of any third State.<sup>218</sup></p>	<p>Article 3</p> <p>3. Neither Contracting Party shall subject investments and activities associated with such investments by the investors of the other Contracting Party to treatment less favorable than that accorded to the investments and associated activities by the investors of any third State.</p> <p>False</p> <p>5. The provisions of this Agreement shall not apply to matters of taxation in the territory of either Contracting Party. Such matters shall be governed by the Double Taxation Treaty between the two Contracting Parties and the domestic laws of each Contracting Party.<sup>219</sup></p>

## 9. Expropriation

Although all the BITs reviewed contain expropriation clauses, there is a discernible difference between the early BITs and more recent BITs. In general, all the BITs recognize the right of host countries to expropriate the property of investors, but there are wide variations in terms of their content and scope. In older BITs, the focus is strictly on expropriation and nationalization or “similar measures.”<sup>220</sup> More recent BITs, by contrast,

215. *E.g.*, China-Ghana BIT, *supra* note 153; China-Ethiopia BIT, *supra* note 154.

216. Most of the BITs exempt from the application of the most-favored nation principle custom unions, common markets, and free trade zones. In addition, a few exempt matters of taxation from the scope of the most-favored nation clause. *See, e.g.*, China-Uganda BIT, *supra* note 159, art. 3(5) (exempting from the scope of the most-favored nation clause “matters of taxation in the territory of either Contracting Party”). *See also* China-Tunisia BIT, *supra* note 160, art. 3(3)(b) (exempting from the application of the most-favored nation clause “any international agreement or arrangement relating wholly or mainly to taxation”).

217. China-Cote D'Ivoire BIT, *supra* note 161, art. 3(3) (emphasis added).

218. China-Ghana BIT, *supra* note 153, art. 3.,

219. China-Uganda BIT, *supra* note 159, art. 3 (emphasis added).

220. China-Ghana BIT, *supra* note 153, art. 4(1). *See also* China-Cote D'Ivoire BIT, *supra* note 161, art. 4(1).

are broader in scope and extend to measures having effects equivalent to expropriation or nationalization.<sup>221</sup> By and large, all the BITs require that expropriation meet one or more of the following four conditions: (1) public interest purpose;<sup>222</sup> (2) non-discriminatory basis; (3) due process of law; and (4) compensation.

China-Ghana BIT	China-Cote D'Ivoire BIT	China-Uganda BIT
<p>Article 4 Either Contracting State may, for the national security and public interest, expropriate, nationalize or take similar measures . . . against investment of investors of the other Contracting State in its territory, but subject to the following conditions: under domestic legal procedure; without discrimination; payment of compensation.<sup>223</sup></p>	<p>Article 4 1, Neither Contracting Party shall expropriate, nationalize or take other similar measures (hereinafter referred to as "expropriation") against the investments of the investors of the other Contracting Party in its territory, unless the following conditions are met: (a) for the public interests; (b) under domestic legal procedure; (c) without discrimination; (d) against compensation.<sup>224</sup></p>	<p>Article 4 1. Neither Contracting Party shall take any measures of expropriation or nationalization or any other measures having the effect of dispossession, direct or indirect, of investors of the other Contracting Party of their investments in territory, except for the public interest, without discrimination and against compensation.<sup>225</sup></p>

Furthermore, while the conditions required to make expropriation lawful are almost the same in all the treaties, there are variations in terms of the time in which compensation should be paid and whether interest should be paid on the accrued sum. Thus, there is a noticeable difference in the details regarding the payment of compensation. Although all the BITs provide for the payment of compensation, more recent BITs specifically provide for "prompt, adequate and effective compensation"—a marked departure from the position most developing countries took in the 1970s and 1980s regarding compensation.<sup>226</sup> And while older BITs call for payment of compensation "without unreasonable delay," more recent BITs call for payment "without delay."

Additionally, older BITs stipulate that the compensation shall be equivalent to the value of the expropriated property at the time the expropriation is announced, but leave it open how to determine the value of such property. By contrast, more recent BITs stipulate that the market

221. See China-Uganda BIT, *supra* note 159, art. 4(1).

222. The China-Ghana BIT allows expropriation on grounds of national security—a phrase that can be subsumed under the "public interest" category. See China-Ghana BIT, *supra* note 153.

223. *Id.* (emphasis added).

224. China-Cote D'Ivoire BIT, *supra* note 161, art. 4(1).

225. China-Uganda BIT, *supra* note 159, art. 4(1) (emphasis added).

226. M. SORNARAJAH, INTERNATIONAL LAW OF FOREIGN INVESTMENT, 241 (2nd ed. 2004).

value of the property immediately before the expropriation is announced shall be the basis for determining the value of the expropriated property. Some variations also exist in the provisions relating to payment of interest. While some BITs, such as the China-Egypt BIT, are silent on the issue and do not address accrued interest at all, others address this issue directly.

According to the China-Benin BIT, compensation payable in the event of an expropriation “shall include interest at a normal commercial rate from the date of expropriation until the date of payment.”<sup>227</sup> Finally, a slight variation can be seen in the investor’s right to judicial review of expropriation. Older BITs oblige the Contracting State involved in the expropriation to review the expropriation if an investor so requests; more recent BITs accord more protection to investors.<sup>228</sup>

China-Ghana BIT	China-Cote D’Ivoire	China-Uganda BIT
<p>Article 4 2. The compensation . . . shall be equivalent to the value of the expropriated investments at the time when expropriation is proclaimed, be convertible and freely transferable.<sup>229</sup></p>	<p>Article 5 2. The compensation . . . shall be equivalent to the value of the expropriated investments immediately before the expropriation is taken or the impending expropriation becomes public knowledge, which is earlier. The value shall be determined in accordance with generally recognized principles of valuation. The compensation shall include interest at a normal commercial rate from the date of expropriation until the date of payment. The compensation shall also be made without delay, be effectively realizable and freely transferable.<sup>230</sup></p>	<p>Article 4 2. Any measures of dispossession which might be taken shall give rise to prompt compensation, the amount of which shall be equivalent to the real value of the investments immediately before the expropriation is taken or the impending expropriation becomes public knowledge, whichever is earlier. 3. The said compensation shall be set not later than the date of dispossession. The compensation shall include interest at a normal commercial rate from the date of expropriation until the date of payment. The compensation shall also be made without delay, be effectively realizable and freely transferable.<sup>231</sup></p>

227. China-Benin BIT, *supra* note 158, art. 4(2) (emphasis added). *See also* China-Botswana BIT, *supra* note 156, at art. 4(2) (“The compensation shall include interest at the current rate prevailing in the London inter-bank financial market (LIBOR) applicable to the currency in which the investment was originally made from the date of expropriation until the date of payment.”).

228. *See, e.g.*, China-Ghana BIT, *supra* note 153, art. 4(3) (obliging Contracting States to review expropriation “upon the request of the investor,” if the “investor considers the expropriation . . . incompatible with the laws of the Contracting State taking such expropriation”).

229. *Id.*, art. 4(2).

230. China-Cote D’Ivoire BIT, *supra* note 161, art. 4(2).

231. China-Uganda BIT, *supra* note 159, art. 4(2)-(3) (emphasis added).

Altogether, with respect to expropriation, most of the BITs reviewed appear to accord ample protection to investors by: (1) covering expropriation and measures having equivalent effects; (2) stipulating that expropriation must be in the public interest, on a non-discriminatory basis, under due process of law, and against prompt, adequate and effective compensation; (3) stipulating that compensation “shall include interest at a normal commercial rate”; and (4) including provisions according investors the right to judicial review in the event of expropriation.<sup>232</sup>

#### 10. War Clauses

All the BITs reviewed in this article have provisions directed at protecting investors from discrimination in the event of property damage as a result of war or other civil strife.<sup>233</sup> There are variations in the scope and content of war clauses. In terms of scope, all the BITs cover man-made disturbances and none address natural disasters. Furthermore, all the BITs mention “a state of national emergency” as a triggering event. None of the BITs provide a parameter for determining the amount of compensation to be paid, however. And while some of the BITs grant MFN treatment as regards restitution, indemnification, compensation and other settlements, others accord both MFN and national treatment protection.

China-Ethiopia BIT	China-Cote d'Ivoire BIT	China-Benin BIT
<p>Article 5 Investors of one Contracting Party who suffers losses in respect of their investment in the territory of the other Contracting Party owing to war, a state of national emergency, insurrection, riot or other similar events, shall be accorded by the latter Contracting Party, if it takes relevant measures, treatment no less favorable than that accorded investors of a third State.<sup>234</sup></p>	<p>Article 5 1. Investors of one Contracting Party whose investments in the territory of the other Contracting Party suffer losses owing to war, a state of national emergency, armed conflicts, insurrection, riot or other similar events in the territory of the latter Contracting Party, shall be accorded by the latter Contracting Party treatment, as regards restitution, indemnification, compensation and other settlements no less favorable than that accorded to the investors of its own or any third State.<sup>235</sup></p>	<p>Article 5 Investors of one Contracting Party whose investments in the territory of the other Contracting Party suffer losses owing to war or other armed conflicts a state of national emergency, insurrection, riot, revolt or other similar events occurring in the territory of the latter Contracting Party, shall be accorded by the said Contracting Party treatment, as regards restitution, indemnification, compensation and other settlements no less favorable than that accorded to the investors of its own or any third State, whichever is more favorable to the investor concerned.<sup>236</sup></p>

232. China-Benin BIT, *supra* note 158, art. 4(2).

233. See UNCTAD 2007, *supra* note 45, at 52 (“The rationale for including a clause on war and civil disturbance in BITs is that war and civil strife are exceptional situations, which are often excluded from the coverage of insurance contracts that investors may have concluded.”).

234. China-Ethiopia BIT, *supra* note 154, art. 5 (emphasis added). See also, China-Egypt BIT, *supra* note 155, art. 5.

235. China-Cote d'Ivoire BIT, *supra* note 161 (emphasis added).

236. China-Benin BIT, *supra* note 158, art. 5 (emphasis added).

Some BITs go a step further and address issues such as requisitioning of investment property by the forces or authorities of a contracting party and destruction of investment property by forces and authorities of a contracting party.<sup>237</sup> For instance, the China-Cote D'Ivoire BIT provides:

investors of one Contracting Party who . . . suffer losses in the territory of the other Contracting Party resulting from: (a) requisitioning of their property by the forces or authorities of the other Contracting Party, or (b) destruction of their property by the forces or authorities of the other Contracting Party, which was not caused in combat action or was not required by necessity of the situation, shall be accorded restitution or reasonable compensation.<sup>238</sup>

## 11. Repatriation of Funds

All of the China-Africa BITs reviewed provide for the repatriation of capital and returns. And they all provide that each Contracting State shall, "subject to its laws and regulations," guarantee the transfer of investment and returns held within its territory.<sup>239</sup> However, the BITs vary in terms of their scope, content, and specificity. First, some of the BITs are very detailed and provide examples of the types of investments and returns on investment that can be repatriated.<sup>240</sup> Second, some BITs include more investor guarantees, such as provisions that transfers shall be made in "a freely convertible currency"<sup>241</sup> and that transfers shall be made "at the prevailing market rate of exchange applicable within the Contracting Party accepting the investments and on the date of transfer" (or in the absence of a market for foreign exchange, "the most recent exchange rate for the conversions of currencies into Special Drawing Rights.")<sup>242</sup> By contrast, the China-Ghana BIT provides that transfers shall be made "at the official exchange rate as determined by the Central Bank of the Contracting State accepting investment on the date of transfer."<sup>243</sup> Third, some of the BITs make the rights accorded investors subject to the laws and regulations of the host country.<sup>244</sup>

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237. China-Cote d'Ivoire BIT, *supra* note 161, art. 5(2).

238. *Id.*

239. China-Ghana BIT, *supra* note 153, art. 5; China-Benin BIT, *supra* note 158, art. 6.

240. *See e.g.* China-Uganda BIT, *supra* note 159, art. 7; China-Cote d'Ivoire BIT, *supra* note 161, art. 6; China-Tunisia BIT, *supra* note 160, art. 6.

241. *See, e.g.*, China-Benin BIT, *supra* note 158, art. 6(3).

242. *Id.*, art. 6(3)-(4).

243. China-Ghana BIT, *supra* note 153, art. 6(1). Article 6(2) permits market rate to be used "if no official exchange rate is available." *Id.*, art. 6(2).

244. *See, e.g.*, China-Cote d'Ivoire BIT, *supra* note 161, art. 6.

China-Cote D'Ivoire	China-Uganda BIT
<p>Article 6 Each Contracting Party shall, subject to its laws and regulations, guarantee to the investor of the other Contracting Party the transfer of their investments and returns held in its territory<sup>245</sup></p> <p>False The transfer mentioned . . . shall be made in a freely convertible currency and at the prevailing market rate of exchange applicable within the Contracting Party accepting the investments and on the date of transfer.<sup>245</sup></p>	<p>Article 7 1. Each Contracting Party shall guarantee to the investors of the other Contracting Party the transfer of their investments and returns held in its territory, including: (a) profits, dividends, interests and other legitimate income; (b) proceeds obtained from the total or partial sale or liquidation of investments; (c) payments pursuant to a loan agreement in connection with investments; (d) royalties in relation to the matters in Paragraph 1 (d) of Article 1; (e) payments of technical assistance or technical service fee, management fee; (f) payments in connection with contracting projects; (g) earnings of nationals of the other Contracting Party who work in connection with an investment in its territory. 2. . . . 3. The transfer mentioned above shall be made in a freely convertible currency and at the prevailing market rate of exchange applicable within the Contracting Party accepting the investments and on the date of transfer.<sup>246</sup></p>

Finally, some BITs provide for some limited exceptions to the rights of investors to repatriate funds. For example, China-Uganda BIT includes an important balance-of-payment exception and also provides that the investor must meet formalities in the law prior to such transfer. Article 7(4) states:

4. In case of a serious balance of payments difficulties and external financial difficulties or the threat thereof, each contracting party may temporarily restrict transfers, provided that this restriction: i) shall be promptly notified to the other party; ii) shall be consistent with the articles of agreement with the International Monetary Fund; iii) shall be within an agreed period; iv) would be imposed in an equitable, non-discriminatory and in good faith basis.

5. A Contracting Party may require that, prior to the transfer of payments, formalities arising from the relevant laws and regulations are fulfilled by the investors, provided that those shall not be used to frustrate the purpose of paragraph 1 of this article.<sup>247</sup>

245. *Id.*

246. China-Uganda BIT, *supra* note 159, art. 7 (emphasis added).

247. *Id.*, art. 7(4)-(5).

Overall, while some BITs cover only transfers of funds out of the host country, the majority use language suggesting they apply to both inbound and outbound transfers. However, none of the BITs reviewed explicitly apply to inbound transfers of funds. A few BITs have provisions subjecting the guarantee to the domestic legislation of the host country.<sup>248</sup> Almost all the BITs provide for transfer of funds in “any convertible currency” or “a freely convertible currency” and specify the applicable exchange rate. Finally, only one BIT, the China-Uganda BIT, limits the obligation in any way, as noted above.<sup>249</sup>

## 12. Investor-State Dispute Settlement

All China-Africa BITs provide for State-to-State as well as investor-State dispute resolution procedures. The scope of the investor-State dispute settlement provisions have evolved over time in the direction of less restriction on the right of the investor to invoke mandatory international arbitration.

### a. Types of Disputes Ripe for Arbitration

Dispute settlement clauses in BITs address a number of issues including the types of disputes that can be submitted to an arbitral tribunal. Under the older BITs that China concluded with countries in Africa, only a narrow range of issues could be submitted for arbitration. For example, under Article 10(1) of the China-Ghana BIT, only disputes “concerning the amount of compensation for expropriation” may be submitted to an arbitral tribunal.<sup>250</sup> By contrast, the China-Benin BIT provides that “[a]ny dispute between an investor of one Contracting Party and the other Contracting Party in connection with an investment in the territory of the other Contracting Party” may be submitted for arbitration.<sup>251</sup>

### b. What Type of Tribunal May Hear a Dispute?

Another issue that dispute settlement clauses in BITs address is the tribunal (domestic, regional, or international) that will hear a case if and when a dispute arises. Most of the BITs grant investors the choice of submitting a dispute to a competent domestic court in a host country or to international arbitration. Regarding international arbitration, the ICSID is not always explicitly mentioned. Thus, Article 9(3) of the China-Benin

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248. UNCTAD 2007, *supra* note 45, at 59 (observing that numerous BITs “do not subject the guarantee to the domestic legislation of the host country” and suggesting that the opposite approach “reduces the level of investment protection considerably” and “might also generate uncertainty among investors”).

249. See Jianzhong Speech, *supra* note 146 (explicitly providing that a Contracting Party may temporarily restrict transfers “[i]n case of a serious balance of payment difficulties and external financial difficulties or the threat thereof”). Cf. China-Djibouti BIT, *supra* note 157, art. 6(1) (stating that Each Contracting Party shall “subject to its laws and regulations,” guarantee the transfer of investments and returns held in its territory”).

250. China-Ghana BIT, *supra* note 153, art. 10(1).

251. China-Benin BIT, *supra* note 158, art. 9(1)-(2).

BIT provides that disputes “shall be submitted by the choice of the investor, either to the competent court of the State where the investment was made, or to international arbitration.”<sup>252</sup> On the other hand, Article 8(2) of the China-Uganda BIT allows investors to submit disputes either to “the competent court of the Contracting Party that is a party to the dispute” or to the ICSID.<sup>253</sup> Another variation is to simply provide that disputes may be submitted to an ad hoc tribunal without clarifying whether the arbitral tribunal has to be local or international.<sup>254</sup>

### c. Applicable Law

There is also variation in the provisions relating to the law that will apply in the event of an investment dispute. Under the earlier BITs, disputes are to be resolved in accordance with the laws of the host country, the relevant BIT, and recognized principles of international law. More recent BITs have an expanded list of applicable law. Article 10(5) of the China-Ghana BIT, for example, stipulates that the tribunal shall adjudicate “in accordance with the laws of the Contracting State to the dispute accepting the investment including its rules on the conflict of laws, the provisions of this Agreement as well as generally recognized principles of international law accepted by both Contracting States.”<sup>255</sup> Compare this with Article 9(5) of the China-Benin BIT, which stipulates that “the arbitral tribunal shall make arbitral award based on: (a) provisions of this Agreement; (b) laws of the State where the investment was made including its rules on the conflict of laws; (c) the principles of international law accepted by both Contracting Parties; (d) specific bilateral agreements on investment between the Contracting Parties; (e) and other international treaties on investment to which both Contracting Parties are or may become parties.”<sup>256</sup>

### d. Finality of Arbitral Award

All the China-Africa BITs stipulate that arbitral decisions shall be “final” and “binding.” Article 9(6) of the China-Benin BIT stipulates that “the arbitral award shall be final and binding upon both parties to the dispute. Both Contracting Parties shall commit themselves to the enforcement of the award.”<sup>257</sup> Similar provisions are found in the China-Botswana BIT, China-Tunisia BIT, and China-Uganda BIT.<sup>258</sup>

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252. *Id.*, art 9(2).

253. China-Uganda BIT, *supra* note 159, art. 8(2).

254. *See, e.g.*, China-Tunisia BIT, *supra* note 160, art. 8(2); China-Ghana BIT, *supra* note 153, art. 10(1).

255. China-Ghana BIT, *supra* note 153, art. 10(1).

256. China-Benin BIT, *supra* note 158, art. 10(5).

257. *Id.*, art. 9(6).

258. *See, e.g.*, China-Botswana BIT, *supra* note 156, art. 9(6); China-Tunisia BIT, *supra* note 160, art. 8(6); and China-Uganda BIT, *supra* note 159, art. 9(5).

### e. Enforcement Obligations

Under most of the BITs reviewed, Contracting States reference is made to the enforcement of arbitral decisions. Some variations exist, however. First, some BITs make no reference to enforcement of arbitral awards.<sup>259</sup> Second, under some of the BITs,<sup>260</sup> Contracting Parties commit themselves to enforce arbitral awards. Third, in some BITs, Contracting Parties commit themselves to the enforcement of arbitral decisions “in accordance with their respective domestic laws.”<sup>261</sup>

### 13. Umbrella Clauses

“Umbrella” clause, also as “observance of undertakings” clause, are common in BITs. Under an umbrella clause, the host country typically agrees to respect other obligations it has regarding the investment of investors of the other Contracting Party arising from other agreements.<sup>262</sup> Umbrella clauses are extremely controversial. Depending on how an umbrella clause is interpreted, “other agreements” could include investment contracts, other bilateral treaties, and other multilateral agreements.<sup>263</sup> Two recent arbitral decisions have only added to the confusion about the precise scope of umbrella clauses: *SGS v. Pakistan* and *SGS v. Philippines*. UNCTAD estimates that about 40% of existing BITs contain an umbrella clause.<sup>264</sup>

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259. See China-Uganda BIT, *supra* note 159, art. 9(5).

260. China-Djibouti BIT, *supra* note 157, art. 9(6).

261. China-Ghana BIT, *supra* note 153, art. 10(4).

262. Muchlinski, *supra* note 190 at 54.

263. See, e.g., *Société Générale de Surveillance S.A. v. Islamic Republic of Pak.*, ICSID Case No. ARB/01/13, Objections to Jurisdiction, ¶¶ 163-74 (Aug. 6, 2003), 18 ICSID Rev. 307 (2003) [hereinafter *SGS v. Pakistan*] (rejecting claimant’s expansive reading of an “umbrella clause”); *Société Générale de Surveillance S.A. v. Republic of the Phil.*, ICSID Case No. ARB/02/6, Objections to Jurisdiction, ¶¶ 113-29, 136-55 (Jan. 29, 2004), 8 ICSID Rep. 518 (2005) [hereinafter *SGS v. Philippines*] (agreeing in part with claimant’s argument that the BIT in question does include an “umbrella clause”). See also Patricio Grané and Brian Bombassaro, *Umbrella Clause Decisions: The Class of 2012 and a Remapping of the Jurisprudence*, KLUWER ARB. BLOG (Jan. 17, 2013), <http://kluwerarbitrationblog.com/blog/2013/01/17/umbrella-clause-decisions-the-class-of-2012-and-a-remapping-of-the-jurisprudence/> (discussing *SGS v. Pakistan* and *SGS v. Philippines* and noting that umbrella clauses are common to investment treaties, exist in myriad formulations, and are generating much controversy). See also enacting much controversy Philippines he precise scope tribunal that will hear a case if and when a dispute arises.

264. UNCTAD 2007, *supra* note 45, at 73.

China-Djibouti BIT	China-Cote d'Ivoire BIT	China-Uganda BIT
<p>Article 10</p> <p>1. If the legislation of either Contracting Party or international obligations existing at present or established hereafter between the Contracting Parties result in a position entitling investments by investors of the other Contracting Party to a treatment more favorable than is provided for by the Agreement, such position shall not be affected by this Agreement.</p> <p>2. Each Contracting Party shall observe any commitments it may have entered into with the investors of the other Contracting Party as regards to their investments.<sup>265</sup></p>	<p>Article 10</p> <p>1. If the legislation of either Contracting Party or international obligations existing at present or established hereafter between the Contracting Parties result in a position entitling investments by investors of the other Contracting Party to a treatment more favorable than is provided for by the Agreement, such position shall not be affected by this Agreement.</p> <p>2. Each Contracting Party shall observe any commitments it may have entered into with the investors of the other Contracting Party as regards to their investments.<sup>266</sup></p>	<p>Article 11</p> <p>1. Investments made pursuant to a specific agreement concluded between one Contracting Party and investors of the other Party shall be covered by the provisions of this Agreement and by those of the specific agreement.</p> <p>2. Each Contracting Party undertakes to ensure at all times that the commitments it has entered into vis-à-vis investors of the other Contracting Party shall be observed.<sup>267</sup></p>

### C. Conclusion: China-Africa BITs: Salient Features

What conclusions can be drawn from the analysis of China-Africa BITs? Are the provisions of Africa-China BITs markedly different from those of Africa-North BITs in terms of their objectives, coverage of investment issues and development dimension? China-Africa BITs depart from model BITs used by Western States like the United States in a few respects. In terms of coverage, Africa-China BITs focus primarily on investment promotion and protection and much less on investment liberalization,<sup>268</sup> have limited transparency clauses, do not prohibit performance requirements in their entirety, and typically do not grant free access and establishment. Perhaps to provide policy space for host countries, a few China-Africa BITs include limited exceptions to some of the obligations.

Although there are some differences between China-Africa BITs and standard BITs used by developed countries, major similarities can be discerned. Like BITs that countries in Africa have concluded with developed countries, China-Africa BITs:

265. China-Djibouti BIT, *supra* note 157, art. 10.

266. China-Cote d'Ivoire BIT, *supra* note 161, art. 10.

267. China-Uganda BIT, *supra* note 159, art. 11.

268. This means that the BITs typically do not oblige countries in Africa to open new sectors or industries to Chinese investment. Under all the BITs reviewed, African governments retain the freedom to determine the sectors and industries where Chinese investment is permitted.

- contain the standard guarantees found in most Africa-North BITs;
- do not have provisions providing for “special and differential treatment” or provisions which acknowledge the development exigencies of one or both treaty parties;
- do not account for and are not adapted to each country’s individual and changing circumstances (most appear to have been adopted more or less from a boilerplate template favored by China);
- do not affirm the state’s right to development, its right to regulate in the public interest, or its right to pursue other social policy goals; and
- generally pay little attention to the wider policy objectives of the signatory governments.

Finally, in terms of their overall impact on development, it is not clear that China-Africa BITs create or will create more development dividends than Africa-North BITs. More empirical studies are needed before any conclusions in this regard can be drawn. A more detailed discussion of the development implications of China-Africa BITs is taken up in Part V.

#### V. CHINA-AFRICA BITs AND DEVELOPMENT POLICY MAKING: A CRITIQUE

This section analyzes the development dimension of China-Africa BITs, focusing on the structures of the BITs, the substantive provisions of the agreements, as well as their implementation mechanisms.<sup>269</sup>

##### A. Structure of the BITs

Do the structures of the China-Africa BITs suggest sensitivity for the need to allow government flexibility in addressing domestic problems? Do any noticeable differences exist between the BITs China has with developing African countries and the ones it has with the least developing countries (LDCs) in the continent?

##### 1. Flexibility

According to UNCTAD, “flexibility is a central feature of the development dimension of IIAs . . . because it allows signatories to preserve the necessary policy space for the pursuit of development-oriented policies.”<sup>270</sup> Flexibility could be created in the preamble, in the substantive provisions of the agreement, or in provisions allowing differentiated obligations as between parties at different levels of economic development.

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269. See generally Patrick Robinson, *Criteria to Test the Development Friendliness of International Investment Agreements*, 7 *TRANSNATIONAL CORPORATIONS* 83 (1998).

270. UNCTAD 2005, *supra* note 2, at 37.

As already noted, the preambles of the BITs reviewed were not crafted with a view to providing the necessary flexibility and policy-space for capital-importing countries. Admittedly, however, the admission clause model adopted in all China-Africa BITs allow countries in the region to regulate the entry and establishment of foreign investment.<sup>271</sup> The admission model allows host countries to reserve some economic sectors to national investors or to favor the nationals of one country over the nationals of another country as regards market access.<sup>272</sup>

## 2. Tailoring: The Fate of Least Developed Countries

There is no noticeable difference between BITs concluded between China and LDCs in Africa and those concluded between China and other developing countries in the region. The BITs China has with African LDCs do not provide for differentiated obligations as between China and African LDCs. All of the BITs, including those concluded with LDCs, are highly reciprocal in terms of the commitments assumed by the Contracting Parties. The BITs concluded by the African LDCs did not contain any phased-in commitments or specially tailored undertakings suggesting sensitivity to their status as LDCs. This is not unique to China-Africa BITs: the common practice is to draft BITs as a highly reciprocal, mutually beneficial document. Flexibility can also be introduced for LDCs by allowing parties to shelter infant industries and selected sectors from the national treatment obligation. Surprisingly, no country in Africa made use of this tool in their negotiations with China. Several factors could explain the failure of countries in Africa to negotiate for more flexibilities in their BITs with China. These factors include: lack of negotiation capacity, disparities in bargaining power, lack of appreciation of the legal implications of BITs for host countries and the general belief among developing countries that South-South economic relations are inherently more benign than North-South relations and will automatically yield win-win outcomes. In the absence of empirical studies, firm conclusions are impossible.

### B. Substantive Provisions

The substantive provisions of international investment agreements are “particularly important in reflecting the development dimension, and the overall balance of rights and obligations that arise out of a treaty.”<sup>273</sup> An examination of issues that are included and issues that are excluded in China-Africa BITs does not suggest an overall sensitivity to the development dimension. Some provisions suggesting sensitivity to the development dimension are:

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271. South Centre, *supra* note 197, ¶ 52 (“The implications of the admission clause is that, regardless of whether the host country maintains any admission and screening mechanism for foreign investment—and unless the BIT states otherwise—there is no obligation on the part of the host country to eliminate discriminatory legislation affecting the establishment of foreign investment.”).

272. See Muchlinski, *supra* note 190, at 40-41.

273. UNCTAD 2005, *supra* note 2, at 40.

- The use of the admission clause model, that is the absence of pre-establishment rights;
- The absence of provisions obliging states to liberalize;
- The absence of explicit restriction on the use performance requirements;<sup>274</sup>
- The absence of non-derogation clauses as found in the U.S.-Rwanda BIT;<sup>275</sup>
- War clauses that do not extend to acts of God;<sup>276</sup>
- The absence of national treatment obligation in some of the earlier BITs;
- The use of exceptions in relation to some of the obligations;<sup>277</sup>
- The absence of extensive transparency requirements as found in the U.S.-Rwanda BIT.<sup>278</sup>
- On the other hand, some provisions suggest a lack of sensitivity to the development dimension including:
  - Broad asset-based definitions of “investment”;
  - No direct reference to “economic development,” “sustainable development,” or the right to development;
  - The absence of differentiated obligations to take into account different levels of economic development;
  - Vague investment promotion clauses;
  - The use of standard national treatment provisions;
  - War clauses that cover “state of national emergency” regardless of the reason why national emergency was declared;
  - Broad and potentially expansive definitions of expropriation;
  - No duty or responsibility imposed on investors or the investor’s home country.

Given the vague language of many clauses in the BITs reviewed, estimations about their development implications are only best guesses. Terms such as “full protection and security,” “fair and equitable” treatment, or “measures having effects equivalent to nationalization or expropriation”

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274. See, e.g., Treaty Concerning the Encouragement and Reciprocal Protection of Investment, U.S.-Rwanda, art. 8, Sept. 26, 2011, available at <http://www.state.gov/documents/organization/101735.pdf> [hereinafter U.S.-Rwanda BIT].

275. *Id.* art. 16.

276. *Id.*

277. See e.g. China-Uganda BIT, *supra* note 159, art. 3(4)-(5).

278. U.S.-Rwanda BIT, *supra* note 274, art.11.

cannot be easily defined and their scope depends on individual arbitrators and will likely vary from one case to another. Thus, the full implications of the BITs reviewed will ultimately depend on the arbitrators chosen to interpret a given agreement in a given case. Uncertainty regarding the meaning and precise scope of treaty terms is heightened by the fact that *stare decisis* is not a recognized principle in international investment law.<sup>279</sup> As Peterson notes, investment arbitration “can be plagued by a troubling lack of consistency” and tribunals can reach widely divergent conclusions in parallel cases.<sup>280</sup> The substantive provisions of some of the BITs are troubling. A few are reviewed here.

### 1. Application to Existing Investments

All China-Africa BITs reviewed apply to pre-existing investments, even though under the Vienna Conventions treaties generally have no retro-spective effect. It is important that future BITs are clear on whether or not they apply to pre-existing investments and they should also expressly declare whether they apply only to investments made after they enter into force. Article 12 of the Cyprus-Egypt BIT stipulates that the agreement “shall apply to all investments made by investors of either Contracting Party in the territory of the other Contracting Party after its entry into force.”<sup>281</sup>

### 2. Broad Asset-Based Definition of Investment

The broad definition of “investment” is concern. As noted in Section IV of the article, “investment” is typically defined to cover “every kind of asset.”<sup>282</sup> In some China-Africa BITs, the asset-based definition is qualified by a clause stipulating that the BIT applies only to investments made in accordance with the laws and regulations of the host country.<sup>283</sup> There are other options available to host countries as well, including a closed-list definition of investment and a definition that expressly excludes specific types of assets and transactions.<sup>284</sup> Whether a closed-list or an open-list definition is used, the key is for host country negotiators to pay attention

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279. See LUKE ERIC PETERSON, INTERNATIONAL INSTITUTE FOR SUSTAINABLE DEVELOPMENT, *BILATERAL INVESTMENT TREATIES AND DEVELOPMENT POLICY-MAKING* 27 (2004).

280. *Id.*

281. Agreement for the Promotion and Reciprocal Protection of Investments, Cyprus-Egypt, Oct. 21, 1998, available at [http://www.unctad.org/sections/dite/ia/docs/bits/egypt\\_cyprus.pdf](http://www.unctad.org/sections/dite/ia/docs/bits/egypt_cyprus.pdf) [hereinafter Egypt-Cyprus BIT].

282. UNCTAD 2007, *supra* note 45, at 7.

283. See, e.g., China-Ghana BIT, *supra* note 159, art. 12.

284. An example is the definition of Investment in the 2004 Canadian model BIT. Whether a closed-list or an open-list, the key is to pay attention to details in order to avoid an overly broad concept of investment. See, e.g., Canada-Thailand BIT, *supra* note 171, at art. I(f) (stating explicitly that the term investment “does not mean real estate or other property, tangible or intangible, not acquired in the expectation or used for the purpose of economic benefit or other business purposes.”). See also Egypt-Cyprus BIT, *supra* note 281, art. 1(1) (offering an open-ended, asset-based definition of investment, but explicitly stating that “[t]hese investments shall be made in compliance with the laws and regulations and any writ-

to the details of the agreement in order to avoid an overly broad concept of investment and to ensure that certain types of assets and transactions are excluded from the definition. For example, some BITs exclude property not acquired for the purpose of economic benefit and used for non-business purposes<sup>285</sup> and others exclude claims arising solely from commercial contracts for the sale of goods and services by nationals in the territory of a Party to a national in the territory of another Party.<sup>286</sup>

### 3. Investment Promotion

In all the BITs reviewed, Contracting States assume a very general and vague commitment to promote investment. In view of the fact that BITs do not necessarily translate into increased FDI inflow for capital-importing nations, stronger investment promotion clauses are advisable. Some new BITs require Contracting States to exchange information on investment opportunities available in their territory.<sup>287</sup> The contours of an investment promotion clause could be fleshed out by inserting provisions requiring Contracting Parties to exchange information regarding investment opportunities, to facilitate the granting of work permits, visas and licenses, to provide incentives as a way to promote investment,<sup>288</sup> and to facilitate the establishment of representative offices.<sup>289</sup> Given asymmetries in information and the poor job done by African states of providing business development services, particularly to small- and medium-sized enterprises on the continent, the private sector in Africa needs more information about trade and investment opportunities to better access Chinese markets. A strengthened investment promotion clause may work to their advantage in this regard.

### 4. General/Absolute Standards of Treatment

The following four standards typically covered under the absolute standard of treatment clause raise concerns: “full and complete protection

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ten permits that may be required thereunder of the Contracting Party in the territory of which the investment has been made.”).

285. See, e.g., Agreement for the Promotion and Reciprocal Protection of Investments, Belr.-Czech, art. 1, Oct. 14, 1996, available at [http://unctad.org/sections/dite/ia/docs/bits/czech\\_belarus.pdf](http://unctad.org/sections/dite/ia/docs/bits/czech_belarus.pdf) (stating that the term “investment” shall mean “every kind of asset invested in connection with economic activities by an investor of one Contracting Party in the territory of the other Contracting Party in accordance with the laws and regulations of the latter . . .”).

286. UNCTAD 2007, *supra* note 45, at 13.

287. *Id.* at 27; Agreement for the Promotion and Reciprocal Protection of Investments, Arg.-Mex., art. 7, Nov. 13, 1996, available at [http://unctad.org/sections/dite/ia/docs/bits/mexico\\_argentina\\_sp.pdf](http://unctad.org/sections/dite/ia/docs/bits/mexico_argentina_sp.pdf)

288. Agreement for the Promotion and Protection of Investments, Fin.-Kuwait, art. 2, March 10, 1996, available at [http://www.unctad.org/sections/dite/ia/docs/bits/finland\\_koweit\\_eng\\_fn.pdf](http://www.unctad.org/sections/dite/ia/docs/bits/finland_koweit_eng_fn.pdf).

289. Agreement Concerning the Promotion and Reciprocal Protection of Investments, Croat.-Den., art. 2(1), July 5, 2000, available at [http://www.unctad.org/sections/dite/ia/docs/bits/croatia\\_denmark.pdf](http://www.unctad.org/sections/dite/ia/docs/bits/croatia_denmark.pdf).

and security,” “non-discrimination,” “fair and equitable treatment,” and “unreasonableness.” When all four standards are present in a BIT, a host country may be in a difficult position in the event of a dispute. The vagueness and imprecision of these terms is a problem and raises some questions: What is the nature and scope of these standards? Do they trigger an obligation different from the obligation to treat foreign investors and investments in accordance with international minimum standards? Will the terms be interpreted based on customary international law? What is the threshold for breaching the different obligations?

In the event of a dispute, it is not clear how future arbitrators will interpret each of these principles. There are several ways, in the course of treaty drafting, to reduce the risk of unexpected and widely divergent interpretations of the terms in the event of a dispute: (1) ensure that reference is made in the BIT to international law or some other criteria as the standard to be used to determine the meaning and scope of the standards;<sup>290</sup> (2) make the standards contingent on the domestic legislation of the host country;<sup>291</sup> and (3) make the standards more precise by defining what the terms mean. With respect to the latter, countries must be careful to avoid overly broad definitions that go beyond those provided by customary international law.

#### 5. National Treatment Standard

National treatment standards, even at the post-establishment phase of an investment, can constrain the ability of a host country to address domestic problems by, for example, protecting a sensitive sector. Although the China-Ghana BIT does not have a national treatment clause, such an omission is rare today. One way that countries have attempted to retain some policy space is to make the application of national treatment standards subject to local laws and regulations. Thus, Article 3(2) of the China-Uganda BIT states: “*Without prejudice to its laws and regulations, each Contracting Party shall accord to investments and activities associated with such investments by the investors of the other Contracting Party treatment not less favorable than that accorded to the investments and associated activities by its own investors.*”<sup>292</sup>

A second option is to include some explicit exceptions to the national treatment obligation. Article 3(5) of the China-Uganda BIT states that “the provisions of this Agreement *shall not apply to matters of taxation in the territory of either Contracting Party*. Such matters shall be governed by the Double Taxation Treaty between the two Contracting Parties and the

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290. UNCTAD 2007, *supra* note 2, at 31 (observing that “linking the fair and equitable treatment standard to the principles of international law removes the possibility of interpreting the provision using the semantic approach. Furthermore, this link implies that the fair and equitable treatment standard cannot be applied separately from the principles of international law, which would include customary international law on State responsibility in respect of aliens”).

291. China-Uganda BIT, *supra* note 159 art. 3(2).

292. *Id.* (emphasis added).

domestic laws of each Contracting Party.”<sup>293</sup> A third option is to create a blanket exception shielding host countries activities relating to certain specified sectors.

The first option is the most frequently utilized in China-Africa BITs. Such a practice is risky as the meaning and scope of the phrase “without prejudice to its laws and regulations” is not very clear. Since the options identified above are not mutually exclusive, it is unclear why governments in Africa limit themselves to one option instead of exercising all three.

## 6. Most-Favored-Nation Standard

The BITs reviewed grant MFN treatment at the post-establishment phase of an investment and provide for the standard exceptions to the MFN obligation.<sup>294</sup> To further broaden the policy space of States, several options exist. First, States could consider conditioning their MFN obligations on domestic legislation; such BITs are rare, however.<sup>295</sup>

Second, States could state which substantive obligations are subject to the MFN standard and which are not. For example, they could specify whether the MFN standard applies to all the substantive provisions, including the provision relating to dispute settlement. All the BITs reviewed do not explicitly state to which substantive obligations the MFN provision applies. This omission could spell trouble for host governments in light of the *Maffezini v. the Kingdom of Spain* case.<sup>296</sup> In *Maffezini*, the MFN clause in the BIT between Argentina and Spain expressly applied “in all matters subject to this Agreement.”<sup>297</sup> Based on the broadly worded MFN clause, Mr. Maffezini was able to bypass some restrictions in the dispute

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293. *Id.*, art. 3(5) (emphasis added).

294. Like most BITs, China-Africa BITs contain some standard exceptions to the MFN obligation: (1) membership of regional economic integration organization; (2) rights granted under a double taxation treaty; (3) agreements for facilitating frontier trade; (4) special advantages accorded to development finance institutions with foreign participation and established for the exclusive purpose of development assistance though mainly nonprofit activities. See China-Uganda BIT, *supra* note 159, art.3(4); China-Ghana BIT, *supra* note 159, art. 3(3); China-Benin BIT, *supra* note 158, art. 3(3).

295. See UNCTAD 2007, *supra* note 45, at 38 for an example of such a BIT. Article 3(1) of the Malaysia-Saudi Arabia BIT stipulates: “*In accordance with its laws and regulations*, each Contracting Party shall in its territory accord investments and returns of investors of the other Contracting Party treatment not less favourable than that which it accords to investments and returns of its own investors, or to investments and returns of investors of any third State whichever is the more favourable.” (emphasis added). Agreement Concerning the Promotion and Reciprocal Protection of Investments, Malay.-Saudi Arabia, Oct. 25, 2000, available at [http://unctad.org/sections/dite/ia/docs/bits/saudi\\_malaysia.pdf](http://unctad.org/sections/dite/ia/docs/bits/saudi_malaysia.pdf).

296. Emilio Agustin Maffezini v. Kingdom of Spain, ICSID Case No. ARB/97/7, Decision on Jurisdiction (Jan. 25, 2000), Award of the Tribunal (Nov. 13, 2000), 16 ICSID Rev. 203 (2001) [hereinafter *Maffezini v. Spain*].

297. Agreement for the Promotion and Reciprocal Protection of Investments, Arg.-Spain, Oct. 3, 1991, available at [http://unctad.org/sections/dite/ia/docs/bits/argentina\\_spain\\_sp.pdf](http://unctad.org/sections/dite/ia/docs/bits/argentina_spain_sp.pdf) [hereinafter Argentina-Spain BIT].

resolution provision in the Argentina-Spain BIT and import a more favorable dispute resolution clause from the Chile-Spain BIT of 2003.<sup>298</sup>

Third, negotiators could consider creating some exceptions to the MFN clause. Good examples can be found in the China-Uganda and China-Benin BITs.<sup>299</sup> A final option is to specifically narrow the terms and scope of the MFN obligation to certain activities. For example, the Canada-Thailand BIT obliges each Contracting Party to accord MFN treatment to investors of the other Contracting Party “as regards their management, use, enjoyment or disposal of their investments or returns.”<sup>300</sup>

China-Uganda BIT	China-Benin BIT
<p>Article 3</p> <p>4. This treatment shall not include the privileges granted by one Contracting Party to nationals or companies of a third State by virtue of its participation or association in a free trade zone, customs union, common market or any other form of regional economic organization.</p> <p>5. The provisions of this Agreement shall not apply to matters of taxation in the territory of either Contracting Party. Such matters shall be governed by the Double Taxation Treaty between the two Contracting Parties and the domestic laws of each Contracting Party.<sup>301</sup></p>	<p>Article 3</p> <p>3. The provisions of Paragraph 2 of this Article shall not be construed so as to oblige one Contracting Party to extend to the investors of the other Contracting Party the benefit of any treatment, preference or privilege by virtue of :</p> <p>(a) any customs union, free trade zone, economic union and any international agreement resulting in such unions, or similar institutions;</p> <p>(b) any international agreement or arrangement relating to taxation;</p> <p>(c) any arrangements for facilitating small scale frontier trade in border areas.<sup>302</sup></p>

## 7. War Clause

War clauses are arguably unavoidable in BITs involving African countries given the proliferation and intensity of active civil strife in the region. However, such clauses can be extremely broad and this can pose problems when applying them to distinct situations on the ground. For example, BITs that afford protection to foreign investors in situations of national emergency could be problematic given the vagueness of the terms. Not every state of emergency will come within the ambit of such a clause, nor

298. Essentially, the Argentina-Spain BIT required investors to first present their claim to Spanish courts before submitting the case to the ICSID while the Chile-Spain BIT did not contain a similar restriction. *Maffezini* underscores the need for clarity as to the scope of the MFN clause in any BIT. *See Maffezini v. Spain, supra* note 296.

299. China-Uganda BIT, *supra* note 159, art. 3 (stating that each Contracting Party shall accord national treatment “Without prejudice to its laws and regulations” and also exempting from the scope of the national treatment obligation “matters of taxation in the territory of either Contracting Party”). *See also* China-Benin BIT, *supra* note 158, art. 3(1) (stating that each Contracting Party shall accord national treatment “without prejudice to its laws and regulations”).

300. Canada-Thailand BIT, *supra* note 171, art. III(2).

301. China-Uganda BIT, *supra* note 159.

302. China-Benin BIT, *supra* note 158.

will such a clause be limited to state of emergency within the context of a given conflict.<sup>303</sup>

To provide more flexibility, a BIT could make the provision of national treatment subject to the right of a host government to exercise powers conferred by its laws. The 1999 Argentina-New Zealand BIT offers an example of such a provision.<sup>304</sup>

Risks for capital-importing countries are also present when the war clauses are vague as to how much compensation will be paid. Will the compensation be determined by domestic legislation or will the host country be obliged to provide “prompt, adequate and effective” compensation based on market value? These questions must be clearly addressed to avoid problems many years down the road.

## 8. Repatriation of Funds

In crafting the transfer of funds provision, it is most important to strike the right balance between the interests of investors and those of the host country. A review of the China-Africa BITs suggests the need to clarify whether the provision applies to inbound as well as outbound transfers; most of the BITs reviewed are not clear on this point. In addition, the list of funds and assets that can be transferred can be overly broad when BITs adopt the open-list approach. Countries may consider the use of an exhaustive list of covered transfers or pay close attention to the illustrative list of covered transfers included in their BITs.

To accord more policy space to capital-importing countries, negotiators may also consider including some specific exceptions that will provide them room to address financial crisis when they arise. For example, the China-Uganda BIT includes an exception relating to a balance of payments (BoP) crisis.<sup>305</sup>

Other exceptions are possible, however. For example, a provision found in Article 6 of the 2000 Mexico-Republic of Korea BIT allows the host country to prevent a transfer through the application of its laws relating to “bankruptcy, insolvency or other legal proceedings to protect the rights of creditors;” “issuing, trading or dealing in securities;” “criminal or administrative violations;” or “ensuring the satisfaction of judg[ ]ments in adjudicatory proceedings.”<sup>306</sup> Furthermore, it may be wise to include a provision that allows a host government to address problems created by speculative capital inflows. For example, Article 4 of the Protocol to the BIT between Austria and Chile states that “capital can only be transferred

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303. See UNCTAD 2007, *supra* note 45, at 53.

304. Agreement for the Promotion and Reciprocal Protection of Investments, Arg.-N.Z., art. 4(1), Aug. 27, 1999, available at [http://www.unctad.org/sections/dite/ia/docs/bits/argentina\\_newzealand.pdf](http://www.unctad.org/sections/dite/ia/docs/bits/argentina_newzealand.pdf).

305. See China-Uganda BIT, *supra* note 159, art. 7(4).

306. Agreement for the Promotion and Reciprocal Protection of Investments, Mex.-S. Kor., art. 6(3), Nov. 14, 2000, 2281 U.N.T.S. 61, available at [http://www.unctad.org/sections/dite/ia/docs/bits/korea\\_mexico.pdf](http://www.unctad.org/sections/dite/ia/docs/bits/korea_mexico.pdf).

one year after it has entered the territory of the Contracting Party unless its legislation provides for a more favourable treatment.”<sup>307</sup>

### 9. Expropriation

With expropriation clauses, the problem is how to draw the line between the exercise of legitimate government regulation and creeping or indirect expropriation. All the BITs reviewed protect investors from expropriation and nationalization and “measures having equivalent effect.” As is common in most BITs globally, none of the expropriation clauses in China-Africa BITs define the terms “expropriation” or “nationalization” or offer any criteria for identifying what amounts to “measures having an effect equivalent” to expropriation or nationalization.<sup>308</sup> Given the vagueness of the expropriation clauses of the BITs reviewed, the risk of over-expansive interpretation of the concept of creeping or indirect expropriation is always present. The concern is that routine regulatory acts may be construed to amount to indirect expropriation<sup>309</sup> and that the expropriation clauses, coupled with investor-State dispute settlement clauses, could allow international arbitrators to pass judgment on the legitimate scope of regulatory oversight in sensitive areas such as water provision.<sup>310</sup>

Useful lessons could be learned from the case of *Biwater Gauff Ltd. v. United Republic of Tanzania* (involving water and sewage management)<sup>311</sup> and the case of *Piero Foresti, et al. v. The Republic of South Africa*.<sup>312</sup> The case against the South African government was initiated by three Italian mining firms (Marlin Holdings Ltd, Marlin Corporation and Red Granti Pty Ltd.) and centered on the Mineral and Petroleum Resource Development Act of 2002;<sup>313</sup> implicated in the case was South Africa’s policy of black economic empowerment.<sup>314</sup> Did Tanzania’s conduct

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307. Agreement for the Promotion and Reciprocal Protection of Investments, Austria-Chile, art. 4, Sept. 8, 1997, available at [http://www.unctad.org/sections/dite/iaa/docs/bits/austria\\_chile.pdf](http://www.unctad.org/sections/dite/iaa/docs/bits/austria_chile.pdf).

308. U.S.-Rwanda BIT, *supra* note 274.

309. Some recent arbitral decisions suggest that routine regulatory acts do not usually amount to expropriation. See, e.g., *Feldman v. Mexico*, ICSID Case No. ARB(AF)/99/1, Award, ¶¶ 24, 89, 102-11 (Dec 16, 2002), 18 ICSID Rev. 488 (2003); *S.D. Myers, Inc. v. Canada*, Partial Award, ¶¶ 284-87 (Nov. 13, 2000), 15 World Trade & Arb. Mat’l 184 (2003).

310. Peterson, *supra* note 279, at 16-17.

311. *Biwater Gauff (Tanzania) Ltd. v. Tanzania*, ICSID Case No. ARB/05/22, Award, (July 24, 2008), available at [http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC1589\\_En&caseId=C67](http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC1589_En&caseId=C67).

312. *Foresti, v. South Africa*, ICSID Case No. ARB(AF)/07/01, Award, (Aug. 4, 2010), available at [http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC1651\\_En&caseId=C90](http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC1651_En&caseId=C90).

313. The Mineral and Petroleum Resources Development Act 2002 (‘the Act’) received assent on 3 October 2002 and came into force on 10 October 2002. See Mineral and Petroleum Resources Development Act 22 of 2002 (S. Afr.), available at <http://www.info.gov.za/gazette/acts/2002/a28-02.pdf>

314. Although the broader purpose of the Mineral and Petroleum Resources Development Act 2002 (‘the Act’), the Act also sets out to address discrimination in South Africa’s mineral and Petroleum sector. The stated goals of the Act include *inter alia* “eradicating all

in repudiating the Lease Contract, occupying City Water facilities, usurping management control and deporting City Water's senior managers constitute expropriation? The Arbitral Tribunal answered in the positive. The Arbitral Tribunal noted the expansive language of Article 5 of the U.K.-Tanzania BIT which stipulates that investments shall not be: "nationalised, expropriated or subjected to measures having effect equivalent to nationalisation or expropriation . . . in the territory of the other Contracting Party except for a public purpose related to the internal needs of that Party on a nondiscriminatory basis and against prompt, adequate and effective compensation. . . .". According to the Tribunal, as worded, the BIT "encompasses not only direct expropriation . . . but also de facto or indirect expropriation which do not involve actual takings of title but nonetheless result in the effective loss of management, use or control, or a significant depreciation of the value, of the assets of a foreign investor"<sup>315</sup> In determining what might qualify as "expropriation" the Tribunal considered the conduct of Tanzania "both in terms of the effect of individual, isolated, acts complained of, as well as in terms of the cumulative effect of a series of individual and connected acts, in so far as such a cumulative effect might be to deprive the investor in whole or in material part of the use or economic benefit of its assets." The Tribunal drew a distinction between interference with rights and economic loss and concluded that "[a] substantial interference with rights may well occur without actually causing any economic damage which can be quantified in terms of due compensation." To determine if indirect expropriation has occurred, "a substantial deprivation of rights, for at least a meaningful period of time, is required" the Tribunal concluded. Ultimately, the Tribunal decided that BGT's investment, as embodied in the Lease Contract, "was the subject of an expropriation." Although the Tribunal found that by the beginning of May 2005, the normal contractual termination process was underway, it nevertheless concluded that the normal course of the contractual termination was interrupted by the conducts of Tanzania beginning on 13 May 2005. Regarding the occupation of City Water's facilities and usurpation of management control, the Arbitral Tribunal stated:

These were acts executed by the Republic with the assistance of its police force, and well beyond the ambit of normal contractual behaviour. They were unreasonable and arbitrary, unjustified by any public purpose (there being no emergency at the time), and

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forms of discriminatory practices in the mineral and petroleum industries," fulfilling "the State's obligations under the Constitution to take legislative and other measures to redress the result of past racial discrimination," and "recognising the need to promote local and rural development and the social upliftment of communities affected by mining." *Id.* pmb1. Furthermore, incorporated into the Act is South Africa's policy of Black Economic Empowerment (BEE), including the provision for increased participation, ownership and management of "historically disadvantaged South Africans" in the mineral and petroleum industries. *See id.* ¶100(2)(a). Specific measures to further the BEE policies are found in Government Notice (GN) R. 527 (S. Afr.).

315. Bivater Gauff, *supra* note 311, ¶ 452.

the most obvious display of *puissance publique*. In effect, City Water was completely shut out of the Project, in violation of its rights under the Treaty, without any adequate justification.

## 10. Dispute Settlement

Dispute settlement provisions are considered indispensable in any BIT because they “increase the level of certainty and predictability that investors need” and “constitute[ ] one of the key elements in diminishing the country risk.”<sup>316</sup> Thus, the issue is usually not whether a BIT should provide for dispute settlement, but what the nature and scope of the dispute settlement clause in a given BIT should be. To the extent that BITs contribute to the evolution and development of the global governance architecture of investments, investment adjudications are very important and play a role in shaping investment relations and determining the balance of rights as between investors and host countries. Dispute settlement provisions need to be drafted with caution.

The dispute settlement provisions of the BITs reviewed lack the four major safeguards that China used in the 1980s and early 1990s to protect its interests against encroachment from in relations with foreign investors. All the BITs allow automatic recourse to international arbitration and none of the BITs reviewed require investors to exhaust domestic remedies prior to invoking international arbitration. The surge in investor-State disputes over the last decade points to the need for clarity and care in drafting the dispute settlement clauses of BITs.<sup>317</sup> Although in the past Chinese investors did not utilize international investment arbitration, this has changed.<sup>318</sup> In February 2007, ICSID received what is considered the first case by a Chinese investor against a host government (the Republic of Peru) for alleged breach of obligations under the 1994 China-Peru BIT.<sup>319</sup>

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316. UNCTAD 2007, *supra* note 45, at 99.

317. *Id.* at 1 (noting the surge in investor-State disputes and the fact that some countries are seeking to clarify the provisions of their BIT with a view to reducing risks of disputes).

318. Berger, *supra* note 121.

319. This case arose from the freeze of some US\$4 million in the bank account of a fish flour company, TSG Peru S.A.C., by Peru’s National Tax Administration Superintendence (SUNAT). Tza Yap Shum, a Chinese national owned 90% of TSG Peru S.A.C. SUNAT claims that the money in question was the tax charge owed by the company while Mr. Tza claims that the action was unlawful confiscation of assets and amounted to an expropriation of the company. Mr. Tza is reportedly claiming US\$20 million. On June 19, 2009, the ICSID Tribunal issued a Decision on Jurisdiction, holding that the Tribunal has jurisdiction on and is competent to hear the case. *See Tza Yap Shum v. Republic of Peru*, ICSID Case No. ARB/07/6, Decision on Jurisdiction (June 19, 2009). It is worth noting that this dispute arose from a Chinese investor in Hong Kong. The first case arising from mainland China, Ping An Life Insurance Company of China, Limited and Ping An Insurance (Group) Company of China, Limited v. Kingdom of Belgium, was filed in 2012. *Ping An Life Insurance Company of China, Limited and Ping An Insurance (Group) Company of China, Limited v. Kingdom of Belgium*, ICSID Case No. ARB/12/29 (2012). For a discussion of the Tribunal’s decision in the Tza Yap Shum case, see Reuben J. Sequeira, *Tribunal Interprets Legacy Chinese BIT in*

Biwater and *Piero Foresti* teach that dispute settlement provisions of BITs can be used to internationalize disputes between foreign investors and regulators in sensitive sectors such as water and to remove such disputes from the reach of applicable domestic laws and domestic courts.<sup>320</sup> This problem is complicated by the fact that none of the BITs reviewed take note of broader policy objectives such as sustainable development or environmental protection, which means that international arbitrators may not be able to interpret substantive provisions of a given BIT in ways that balance the interests of foreign investors against the declared policy objectives.

Given the cost of investment treaty arbitration and other problems associated with the current system, countries in Africa should consider cooperating with other developing countries to explore the possibility of designing more meaningful and effective mechanisms for settling investment disputes. Peterson estimates that the average cost of hiring ICSID arbitrators to be close to \$500,000, with fees for legal counsel possibly running into the millions of dollars.<sup>321</sup> Furthermore, Investment law is an area where information asymmetry is profound. Many countries in Africa have yet to develop the relevant expertise with respect to investment disputes thus increasing the uncertainty and cost associated with investment arbitration.<sup>322</sup>

## 11. Performance Requirements

None of the BITs reviewed explicitly restrict the use of performance requirements. Does this mean that Contracting Parties have free reign to impose performance requirement on foreign investors?<sup>323</sup> Arguably, China's BIT partners in Africa are free, subject to the MFN and national treatment requirements, to use performance requirements to advance certain development policy objectives such as employment creation, stimulation of domestic production and encouragement of exports.<sup>324</sup> In the

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*First Chinese ICSID Claim*, INT'L DISPUTES Q. (White & Case, LLP, New York, N.Y.), Winter 2010.

320. LUKE ERIC PETERSON, *BILATERAL INVESTMENT TREATIES AND DEVELOPMENT POLICY-MAKING*, 22 (2004).

321. *Id.* at 25.

322. Rukia Baruti, *Is Africa Finally Confronting Its Challenges On Investment Treaty Arbitration?*, KLUWER ARB. BLOG (Nov. 4, 2011), <http://kluwerarbitrationblog.com/blog/2011/11/04/is-africa-finally-confronting-its-challenges-on-investment-treaty-arbitration/> (noting that "[i]nvestment treaty law is a complex area with multiple sources and is in a constant state of evolution" and that due to its specialised nature, "expertise in this field has generally been limited to a small group of lawyers and arbitrators, based mainly in Europe and the United States." The article notes specifically that "African states have usually relied on foreign lawyers to mount an effective defence to investment treaty claims. Investment treaty law is a complex area with multiple sources and is in a constant state of evolution.").

323. See UNCTAD 2007, *supra* note 45, at 64.

324. It must be noted that there are compelling arguments why the use of performance requirement may be counter-productive to the extent that such use can deter foreign investment and have a distorting effect on global trade.

future, however, there could be pressure on African governments to agree to provisions limiting their use of performance requirements. The decision whether to allow explicit disciplines on performance requirements in future BITs with China or other capital-exporting countries must not be taken lightly and should be arrived at after careful deliberation. In the event that negotiators are willing to accept discipline on the use of performance requirements, it is important that they:

- ensure that whatever disciplines they accept do not go beyond the level of obligations in the WTO agreements particularly, the Agreement on Trade-Related Investment Measures (TRIMS), the General Agreement on Trade in Services of the World Trade Organization (WTO);
- exercise the right to introduce exceptions and make use of reservations to introduce some flexibility in the obligations they accept (they may consider inserting some general exceptions);<sup>325</sup>
- ascertain whether the new disciplines apply to both the pre- and post-establishment phases of an investment;
- ascertain whether the disciplines are limited to mandatory performance requirements or whether they apply to performance requirements used as a condition for granting advantages or incentives;
- determine whether the disciplines will apply to goods alone or whether they will also extend to services;
- avoid the use of an open-ended positive list approach in drafting the list of excluded performance requirements; an exhaustive positive list approach is preferred.

In conclusion, China-Africa BITs do not explicitly circumscribe the ability of governments in Africa to take measures aimed at promoting domestic development objectives. However, the BITs are not necessarily development-friendly and do not appear to have been designed with a view to promoting development in participating African countries. Some important issues have been clearly left out of all the BITs reviewed.

## VI. CHINA-AFRICA BITS: OMITTED ISSUES

What important development-implicating issues have been left out of China-Africa BITs? None of the BITs reviewed contain provisions relating to the environment, labor rights or human rights; impose any obligation on foreign investors or the host state of the investors; specifically mention “sustainable development,” “environmental protection,” labor

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325. Such exceptions may be used to exempt some sensitive sectors or to exempt existing non-conforming measures.

rights” or “human rights” as an objective; or allow for block sectoral exemptions to some obligations. None of the BITs reviewed contain provisions relating to the environment, labor rights or human rights, nor do they specifically mention “sustainable development,” “environmental protection,” “labor rights” or “human rights” as an objective. Moreover, none impose any obligation on foreign investors or the host state of the investors in this regard, or allow for block sectoral exemptions to some obligations.

#### A. Objectives/Preambles

None of the China-Africa BITs reviewed set out development as a direct objective and none explicitly acknowledge that the host country has any right to development.<sup>326</sup> The primary purpose of all China-Africa BITs is to create favorable conditions for investment. Development is neither mentioned in the preambles to the BITs nor in the substantive provisions of these agreements. Furthermore, the fact that China and most countries in Africa are at different stages of economic development is not acknowledged in any of the BITs. The unstated assumption in all the BITs reviewed is that the Contracting Parties are at the same level of development and will reap equal benefit from the agreement, although a few of the BITs mention economic development as an indirect by-product of foreign investment. For example, China-Benin BIT recites a conviction that the promotion and protection of these investments “would succeed in stimulating transfers of capital and technology between the two States in the interest of their economic development.”<sup>327</sup>

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326. China-Africa BITs are not unique in this respect as most BITs do not set out development as their central objectives. See Peterson, *supra* note 320, at 4 (observing that “references to development are exceedingly rare in treaties pushed by a number of Western governments with developing countries”).

327. China-Benin BIT, *supra* note 158, pmb1.

China-Ghana BIT	China-Benin BIT	China-Uganda BIT
<p>Preamble The Government of the People's Republic of China and the Government of the People's Republic of Ghana. Desiring to encourage, protect and create favourable conditions for investment by investors of one of the Contracting States in the territory of the other Contracting States based on the principles of mutual respect for sovereignty, equality and mutual benefit and for the purpose of the development of economic cooperation between both States.<sup>328</sup></p>	<p>Preamble The Government of the People's Republic of China and the Government of the Republic of Benin False Recognizing that the reciprocal encouragement, promotion and protection of such investment on the basis of equality and mutual benefits will be conducive to stimulating business initiative of the investors and will increase prosperity in both States; Convinced that the promotion and protection of these investments would succeed in stimulating transfers of capital and technology between the two States in the interest of their economic development<sup>329</sup></p>	<p>Preamble The Government of the People's Republic of China and the Government of the Republic of Uganda False Recognising that the encouragement and reciprocal protection of such investments will be conducive to the stimulation of business initiative and will increase prosperity of both Contracting States; Convinced that the promotion and protection of these investments would succeed in stimulating transfers of capital and technology between the two Contracting States in the interest of their economic development<sup>330</sup></p>

Under the Vienna Convention on the Law of Treaties, preambles do not create legally binding rights.<sup>331</sup> However, they constitute part of the context of an agreement and can become important in the event a particular treaty is interpreted.<sup>332</sup> It is therefore troubling that existing China-Africa BITs do not emphasize key development policy objectives such as environmental conservation or sustainable development.

A good example of an agreement that addresses these concerns is the BIT between the Republic of Korea and Trinidad and Tobago, in which the Contracting States expressed a conviction that the objectives of creating favorable conditions for investment “can be achieved without relaxing

328. China-Ghana BIT, *supra* note 153, pmbl. (emphasis added).

329. China-Benin BIT, *supra* note 158, pmbl. (emphasis added).

330. China-Uganda BIT, *supra* note 159, pmbl. (emphasis added).

331. Article 31(1) states that “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” According to Article 31(2), for the purpose of the interpretation of a treaty, the context shall comprise *inter alia* the text, including its preamble and annexes, implying that preambles themselves do not create legally binding rights. Vienna Convention on the Law of Treaties art. 31, May 23, 1969, 1155 U.N.T.S. 331. *See also*, DEPT. OF TRADE & INDUS., GOV'T POSITION PAPER, BILATERAL INVESTMENT TREATY POLICY FRAMEWORK REVIEW 27 (2009) (S. Afr.) (“[a] preamble does not create any legally binding rights and duties”).

332. UNCTAD 2007, *supra* note 45, at 37 (“Given the substantial increase in investor-State disputes, the specific language used in preambles might play a more significant role in the interpretation of BITs in the future”).

health, safety and environmental measures of general application.”<sup>333</sup> In the same vein, in the fifth preambular paragraph of the 2008 US-Rwanda BIT, the Contracting Parties expressed a desire to achieve the objectives of the treaty “in a manner consistent with the protection of health, safety, and the environment, and the promotion of internationally recognized labor rights.”<sup>334</sup>

### B. Labor Rights

With increased FDI into Africa from other developing countries, new market participants and employers are appearing on the scene. The impact of the activities of emerging market multinationals on labor rights in Africa is a growing concern. Unfortunately, many countries in the continent appear to lack the capacity to closely monitor the employment and labor practices of foreign investors in the region. There is some evidence that labor rights violations are occurring.<sup>335</sup> A baseline study by the International Labor Organization (ILO) of labor practices on eleven large construction projects in the United Republic of Tanzania found that three of four projects found to have exceptionally low labor standards were operated by Chinese contractors.<sup>336</sup>

With transnational corporations from other developing countries investing in different sectors and industries in Africa and generating employment in these sectors, there should be greater scrutiny of the labor-implications of South-South FDI, and Africa-China FDI specifically. Countries in Africa must also explore how BITs can be used to protect labor rights. Although arguably very weak and ambiguous,<sup>337</sup> the U.S. Rwanda BIT nonetheless contains a provision relating to labor rights.<sup>338</sup> In Article 13, the Parties “recognize that it is inappropriate to encourage investment by weakening or reducing the protections afforded in domestic

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333. Agreement for the Promotion and Protection of Investments, S. Kor.-Trin. & Tobago, pmb., Nov. 5, 2002, available at [http://www.unctad.org/sections/dite/ia/docs/bits/korea\\_trinidad.pdf](http://www.unctad.org/sections/dite/ia/docs/bits/korea_trinidad.pdf).

334. U.S.-Rwanda BIT, *supra* note 274.

335. See Int'l Labour Org., *Baseline Study of Labour Practices on Large Construction Sites in the United Republic of Tanzania*, 84-85 (Int'l Labour Org., Working Paper No. 225, 2005).

336. *Id.* (concluding that “[t]hree of the four project sites with the lowest labour standards are operated by Chinese contractors” and that “[t]his suggests that the success of the Chinese contractors (the ‘new entrants’ to the market) in winning an increasing number of tenders in the United Republic of Tanzania may, to some extent at least, be at the expense of the labour force.”). Eleven large construction projects served as case studies in the study. The nationalities of the main contractors of the projects were: Chinese (4), Japanese (2), South African (1), Kuwaiti (1), Danish (1), Indian (1), and Tanzania (1). The study investigated a number of key issues (labor standards) including: freedom of association, child labour, wages, hours of work, welfare, health and safety, pension schemes, casualization, discrimination, and HIV/AIDS. *Id.*

337. For example, labor law is narrowly defined to mean statutes and regulations “directly related” to specified internationally recognized labor rights.

338. See U.S.-Rwanda BIT, *supra* note 274.

labor laws.”<sup>339</sup> “Accordingly, each Party agreed to strive to ensure that it does not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such laws in a manner that weakens or reduces the protections afforded in those laws as an encouragement for the establishment, acquisition, expansion, or retention of an investment in its territory.”<sup>340</sup>

### C. Environmental Protection

Africa-China economic cooperation is prompting new activities in the extractive industries as well as the construction and infrastructure sectors in Africa.<sup>341</sup> China has become a major player in the development of hydropower in Africa.<sup>342</sup> With deepening China-Africa relations and related increase in China’s investment imprint in the region as come a growing concern about China’s ecological footprint in the continent. Specifically, concerns about the environmental impact of Chinese-financed projects in Africa are mounting.<sup>343</sup> These concerns are heightened by the fact that many of the activities in the extractive industries and the construction sector involve relatively unknown Chinese corporations—companies that may not have credible and vetted environmental policies. Troubling projects of the past decade involving such corporations include

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339. *Id.*

340. *Id.*

341. CONSTRUCTION AND INFRASTRUCTURE SECTORS, *supra* note 109 at 75.

342. Randall Hackley & Lauren van der Westhuizen, *Africa’s Friend China Finances \$9.3 Billion of Hydropower*, BLOOMBERG (Sept. 9, 2011, 12:18 PM), <http://www.bloomberg.com/news/2011-09-09/africa-s-new-friend-china-finances-9-3-billion-of-hydropower.html> (discussing Chinese-financed dam projects in Africa that are either under construction or planned for the future, and noting that the projects all have Chinese know-how and money in common); Fred Pearce, *Will Huge New Hydro Project’s Bring Power to Africa’s People?*, YALE ENV’T 360 (May 30, 2013), [http://e360.yale.edu/feature/will\\_huge\\_new\\_hydro\\_projects\\_bring\\_power\\_to\\_africas\\_people/2656/](http://e360.yale.edu/feature/will_huge_new_hydro_projects_bring_power_to_africas_people/2656/) (“Meanwhile, Chinese banks and construction companies are keen to get involved, because China wants power to run its growing portfolio of African mines. And the Chinese are less squeamish about environmental downsides than Western aid agencies. Chinese companies recently finished a 1,250-MW scheme in Sudan on the Nile at Merowe, which displaced 15,000 families and flooded a 174-kilometer section of the fertile Nile valley. And they are busy in Ghana damming the Bui Gorge to create a reservoir that will flood a quarter of the Bui National Park.”).

343. The environmental impact of China’s engagement in Africa, THE CHINA MONITOR, Issue 16 (March 2007). Ian Taylor, China’s environmental footprint in Africa, CHINA DIALOGUE, (2007). <https://www.chinadialogue.net/article/show/single/en/741-China-s-environmental-footprint-in-Africa>.

the Bélinga mine/dam project in Gabon,<sup>344</sup> the Merowe Dam project in Sudan,<sup>345</sup> and the Gibe 3 Dam in Ethiopia.<sup>346</sup>

In the last decade China has improved its environmental laws, policies and institutions<sup>347</sup> and Chinese investors and financiers have adopted new environmental guidelines.<sup>348</sup> However, legal developments in China, positive as they are, do not and should not rule out the need for environmental clauses in China-Africa BITs.

The US-Rwanda BIT is an example of an investment agreement that addresses environmental issues in a constructive manner. Pursuant to Article 12, Contracting Parties “recognize that it is inappropriate to encourage investment by weakening or reducing the protections afforded in domestic environmental laws.”<sup>349</sup> Each Party is obliged to “strive to ensure that it does not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such laws in a manner that weakens or reduces the protec-

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344. The Bélinga Dam Project is a US\$3.5 billion dam construction project involving a Chinese company—the China National Machinery and Equipment Import and Export Corporation. Civil Society groups allege that the construction of the mine threatens the destruction of the Kongou Fall in the Inwindo National Park. *See generally*, Romain Dittgen, *To Bélinga or not to Bélinga? China’s Evolving Engagement in Gabon’s Mining Sector* 15 (South African Inst. of Int’l Affairs, Occasional Paper No. 98, Nov. 2011), available at <http://www.africaportal.org/dspace/articles/b%C3%A9linga-or-not-b%C3%A9linga-chinas-evolving-engagement-gabons-mining-sector>.

345. The Merowe Dam project is a US\$519 million project approved by the China Ex-IM Bank and credited with displacing more than 15,000 families from the Nile Valley into desert locations. *See Pearce, supra* note 342.

346. The Gibe Dam project is a US\$1.75 billion project by Italian hydropower developer Salini Costruttori backed by Industrial and Commercial Bank of China (ICBC) and mainland power equipment supplier Dongfang Electric Corporation. *See generally*, John Vidal, *Ethiopia Dam Project Rides Roughshod Over Heritage of Local Tribespeople*, THE GUARDIAN (Feb. 23, 2012, 12:23 PM), <http://www.guardian.co.uk/global-development/2012/feb/23/ethiopia-dam-project-resettlement-concerns>.

347. China created a Ministry of Environmental Protection, strengthened environmental regulations, and adopted a green credit policy. *See* MINISTRY OF COMMERCE PEOPLE’S REPUBLIC OF CHINA, NOTIFICATION OF THE MINISTRY OF COMMERCE AND THE MINISTRY OF ENVIRONMENTAL PROTECTION ON ISSUING THE GUIDELINES FOR ENVIRONMENTAL PROTECTION IN FOREIGN INVESTMENT AND COOPERATION (Mar. 1, 2013), available at <http://english.mofcom.gov.cn/article/policyrelease/bbb/201303/20130300043226.shtml>. State-owned Assets Supervision and Administration Commission of the State Council (SASAC) publicly issued CSR Guideline for State-Owned Enterprises. *See generally* Kimberly Ascoli and Tamar Benzaken, *Public Policy and the Promotion of Corporate Social Responsibility*, BSR, (Aug. 2009), [http://drafta.bsr.org/images/partners/Public\\_Policy\\_Promotion\\_of\\_CSR\\_final.pdf](http://drafta.bsr.org/images/partners/Public_Policy_Promotion_of_CSR_final.pdf).

348. For example, in 2004, China Ex-Im Bank adopted an environmental policy and in 2008 adopted more detailed guidelines. In 2008, the Industrial and Commercial Bank of China (ICBC) adopted the international environmental principle known as the Equator Principles. China Ex-Im Bank has reportedly signed a memorandum of understanding with the World Bank to share information on project evaluation procedures. *See* Toh Han Shih, *Ethiopia Dam Blot on China’s Record*, INT’L RIVERS (June 7, 2010), <http://www.internationalrivers.org/resources/ethiopia-dam-blot-on-china-s-record-2768>.

349. U.S.-Rwanda BIT, *supra* note 274.

tions afforded in those laws as an encouragement for the establishment, acquisition, expansion, or retention of an investment in its territory.”<sup>350</sup>

#### VII. TOWARDS AN AFRICAN BIT PROGRAM?

Despite the rhetoric of mutual benefit, win-win outcomes and solidarity that pervades South-South discourse, Africa-China BITs appear to mirror Africa-North BITs and do not deviate from the standard model that has developed over time to any significant degree. There is presently no evidence to suggest that BITs negotiated within the framework of South-South cooperation will not fail Africa as previous BITs has. Furthermore, there is no evidence to suggest that in negotiating BITs with Southern partners, countries in Africa have pushed for BITs that account for and adapt to each country’s individual and changing circumstances and there is presently no reason to believe that development-oriented BITs will be possible in the context of South-South cooperation. The critical question to ask is why do countries in Africa continue to ratify BITs that do not deviate from the standard model?

BITs are important both from the perspective of capital-exporting countries and of capital-importing countries. Investors need assurance that their property is safe in the countries that they invest in. Given the intense competition for foreign sources of development capital, capital-importing countries use BITs to attract FDI as well as to signal their willingness to create a safe environment for foreign investment. Like Western nations, capital-exporting developing countries need assurance about their investments in Africa. South-South cooperation does not mandate that capital-exporting developing countries ignore market and political risks associated with foreign direct investment in countries in the South.

With their growing presence in Africa, Chinese companies will increasingly encounter a variety of risks and will seek ways to avoid and manage these risks.<sup>351</sup> From the perspective of China, therefore, an argument could be made that BITs with African countries are not only very important but are absolutely essential. Indeed, Congyan questions whether China’s existing BITs are effective in protecting Chinese FDI<sup>352</sup>

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350. *Id.*

351. SANNE VAN DER LUGT, VICTORIA HAMBLIN, ET. AL., CENTRE FOR CHINESE STUDIES AT STELLENBOSCH UNIVERSITY, *ASSESSING CHINA’S ROLE IN FOREIGN DIRECT INVESTMENT IN SOUTHERN AFRICA* 25 (2011) (“However, by focusing on risks when assessing the political environment in Africa, prospective foreign investors are in danger of missing a substantial business opportunity. Both the government and businesses in the PRC have minimized this, by using the tool of forecasting, ‘logically following an analysis of the identified variables in a risk model, determining their relationships and establishing their influence on a certain situation,’ in order to ‘protect’ and ‘weigh up the outcome’ of their FDI in Africa.”). See also Robert Hunter, *Strategic Suggestion on Using China’s Bilateral Investment Treaties to Protect Outbound Investment*, *CORPORATE LEGAL AFFAIRS* 40, 48 (2010) (arguing that the protective function provided by BITs should play a key role in every Chinese investor’s strategic planning).

352. Congyan, *supra* note 123, at 639 (arguing that although 74% of the destination of Chinese OFDI are covered by Sino-foreign BITs, this does not mean that existing BITs are

and Robert Hunter suggests that when evaluating an investment's risk and profitability, Chinese investors "need to consider the essential supplementary legal protection and remedies that BITs provide, especially in the case of perceived inadequacy, unfairness or ineffectiveness in the host state's domestic legal framework."<sup>353</sup>

For Africa, the continent's failure to attract FDI and the failure of FDI in Africa to promote development are major concerns. African leaders have, in the past, expressed concerns at the continent's poor performance in attracting FDI.<sup>354</sup> In a 2005 Decision, the Executive Council of the African Union requested Member States and the AU Commission to "review the investment promotion strategies pursued by African countries in order to eliminate existing constraints to FDI inflows" and called on international organizations to "support African countries to review their investment policies and identify more focused and targeted investment promotion strategies."<sup>355</sup> Thus for Africa, the fact that foreign investment and foreign aid are often the only sources of financing for the continent,<sup>356</sup> that Africa still attracts less FDI than many other regions, and that available data indicates that the continent is one of the riskiest regions in which to do business<sup>357</sup> all combine to put pressure on African governments to hastily negotiate and ratify very liberal BITs without due regard to their development implications.

Going forward, countries in Africa must do four things to address this problem: (1) engage in a comprehensive review of their BIT program, (2) address structural factors that, compared to BITs, play a more important role in attracting FDI, (3) consider a common African Position on BITs, and (4) if necessary, negotiate BITs that effectively balance rights and obligations and do not unduly constrain policy space.

#### A. BIT Review

African countries as a whole should consider a moratorium on BIT negotiations until they can and have comprehensively assessed the costs and benefits of existing instruments, developed better negotiation skills, developed the capacity to understand the growing interface between different international investment agreements that they ratify and how the treaties interact with one another, with regional instruments and with domestic law.

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effective in protecting Chinese OFDI as a whole especially when the investment legal framework between China and her top 20 investment destinations are factored in. China presently has no BIT with countries such as United States, Mexico, and Russia.).

353. Hunter, *supra* note 351.

354. Afr. Union Exec. Council, Decision on Trade Facilitation, June 28-July 2, 2005, 7th Ordinary Sess., EX.CL/Dec. 205 (VII).

355. *Id.*

356. Albert H. De Wet & René Van Eyden, *Capital Mobility in Sub-Saharan Africa: A Panel Data Approach*, 73 S. AFR. J. ECON. 22, 22 (2005) (observing that foreign investment and foreign aid are often the only sources of financing in Africa).

357. THE WORLD BANK, 2010 DOING BUSINESS INDICATORS (2010).

Countries in Africa need to review their existing BITs and review their negotiation strategies and positions. A comprehensive review of existing BITs will help countries assess whether the BITs they concluded in the past yielded any tangible benefit, perhaps in the form of increased FDI inflow? A comprehensive review of existing BITs will also help countries identify areas of vulnerability and potential claims by investors. Finally, such a comprehensive review would also help countries develop new negotiation strategies and positions going forward. Overall, there is need for countries to rethink their growing network of IIAs. In 2008 South Africa initiated a review of the country's BITs.<sup>358</sup> In a 2009 position paper, the Government of South Africa was very critical of the country's BITs.<sup>359</sup> South Africa's Department of Trade and Industry observed that "existing international investment agreements are based on a 50-year-old model that remains focused on the interests of investors from developed countries" and that "major issues of concern for developing countries are not being addressed in the BIT negotiating processes."<sup>360</sup> South Africa is now declining to renew BITs that have expired or are set to expire.<sup>361</sup> In a July 2012 speech, South Africa's Minister of Trade and Industry, Dr. Rob Davis, said that going forward, "[k]ey considerations would be to codify BIT-type protection into South African law and clarify their meaning in line with the South African Constitution. We would also seek to incorporate legitimate exceptions to investor protection where warranted by public policy considerations such as, for example for national security, health, environmental reasons or for measures to address historical injustice and or promote development."<sup>362</sup>

Although not typically advised, some countries may need to renegotiate BITs that they consider particularly dangerous to their national interest. Ecuador and Bolivia have both denounced the ICSID Convention,<sup>363</sup> in 2008 Ecuador terminated nine in-force BITs,<sup>364</sup> and in 2010 the Constitutional Court in Ecuador declared the arbitration provisions of six of the country's BITs to be unconstitutional and void.<sup>365</sup>

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358. Bilateral Investment Treaty Policy Framework Review, S. Afr. Dept of Trade and Industry (2009), at 7-8 <http://www.pmg.org.za/node/17313> [hereinafter Department of Trade and Industry].

359. *Id.*

360. *Id.* at 11.

361. One notice of termination was reportedly contained in a September 7, 2012 letter entitled, "Termination of the Bilateral Investment Treaty with the Belgo-Luxembourg Economic Union", from Maite Nkoana-Mashabane, Minister of International Relations and Cooperation, to the Ambassador of the Kingdom of Belgium to South Africa, Johan Maricou. *See* Leon, *supra* note 16.

362. Witwatersrand Speech, *supra* note 56.

363. UNCTAD 2010, *supra* note 15.

364. *Id.*

365. *Id.*

### B. *Address Structural and Institutional Framework of African Economies*

BITs are not substitutes for quality legal and institutional frameworks.<sup>366</sup> Rather than limit or constrain policy space and relinquish regulatory flexibility by signing on to questionable BITs, it may be best for countries in Africa to focus on improving domestic legal and policy conditions first.<sup>367</sup> An over-emphasis on BITs may distract attention from needed institutional reforms and may even lead to a deterioration of local institutions, the rule of law, and overall governance.<sup>368</sup>

Improving Africa's investment climate will enhance the continent's competitiveness and does not carry the costly tradeoffs associated with BITs. Many of the accepted conditions for solid and sustained economic growth are presently absent in many countries in Africa. These include sound macroeconomic policies, a stable macroeconomic background, strong and stable political institutions, peace and security, openness and high levels of education. Brazil attracts more FDI than most countries in Africa and yet Brazil does not have a single BIT in force and is not even a party to the ISCID Convention.<sup>369</sup> Not only has Brazil been successful at attracting FDI, it has attracted investment in capital and technology-intensive sectors—sectors in Africa in dire need of foreign capital.<sup>370</sup>

### C. *Consider a Common African Position*

African countries must consider developing a common African position on BITs. Such an approach can discourage unhealthy competition among states, prevent a race to the bottom by investors, and strengthen the negotiation position of African countries. Moreover, such a move is already underway in other regions. For example, the European Union now

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366. See Matthias Busse, Jens Königer, and Peter Nunnenkamp, *FDI Promotion Through Bilateral Investment Treaties: More Than a Bit?* in *REVIEW OF WORLD ECONOMICS* 146 (2008) (finding that BITs may even substitute for weak institutions in developing countries).

367. *Id.* (noting that BITs do not perform their primary function—investor protection—in the absence of good domestic institutional quality). See also, e.g., Witwatersrand Speech, *supra* note 56 (stating that South Africa's government has recently concluded it should “refrain from entering into BITs in future, except in cases of compelling economic and political circumstances,” and that it should also consider renegotiating or terminating existing first-generation BITs).

368. Alec R. Johnson, Comment, *Rethinking Bilateral Investment Treaties in Sub-Saharan Africa*, 59 *EMORY L. J.* 919, 921 (2010) (arguing that “BITs that provide foreign investors with substitutes for weak domestic institutions may lead to a deterioration of local institutions, the rule of law, and overall governance”). See also Tom Ginsburg, *International Substitutes for Domestic Institutions: Bilateral Investment Treaties and Governance*, 25 *INT'L REV. L. & ECON.* 107, 119–22 (2005) (arguing that BITs reduce governmental and institutional quality by distracting key actors from a need to invest in institutional improvement).

369. *List of Contracting States and Other Signatories of the Convention*, ICSID (July 25, 2012), <https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ShowDocument&language=English>.

370. South Centre, *supra* note 197, ¶ 92.

has exclusive competence over FDI-related matters.<sup>371</sup> The Managing Director of Goldman Sachs' South African office, Colin Coleman, recently made the case for a code of foreign direct investment conduct in Africa. He asked: "Is there a case for an 'FDI in Africa code of conduct' that should be thought about, articulated, marketed, popularized, bought into and owned by investors, countries, and communities alike?"<sup>372</sup>

There is evidence that such a proposal is now being seriously considered at a regional level. In June 2012, Member States of the South African Development Community (SADC), an inter-governmental organization made up of fifteen African nations,<sup>373</sup> completed work on a Model Bilateral Investment Treaty Template and Commentary (Model BIT).<sup>374</sup> Hopefully, the Model BIT will guide member states in future investment treaty negotiations. The Model BIT departs from traditional BITs in several respects, particularly by addressing investor rights as well as investor obligations. Regarding investor obligations, some issues covered include: Common Obligation against Corruption (Article 10), Compliance with Domestic Law (Article 11), Provision of Information (Article 12), Environmental and Social Impact Assessment (Article 13), Environmental Management and Improvement (Article 14), Minimum Standards for Human Rights, Environment and Labour (Article 15), Corporate Governance Standards (Article 16), Investor Liability (Article 17), and Transparency of Contracts and Payments (Article 18). The Model BIT also addresses the rights of states and specifically addresses the Right of States to Regulate (Article 20) as well as the Right to Pursue Development Goals (Article 21).

#### D. Negotiate a "New Generation of BITs"<sup>375</sup>

What is needed is a comprehensive, strategic and reasoned approach to BITs rather than the present ad-hoc, haphazard approach. Undoubtedly, there are tough choices ahead for capital-receiving countries in Af-

371. See Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Communities, Dec. 3, 2007 O.J. (C 306) 1 [hereinafter Treaty of Lisbon], available at <http://www.consilium.europa.eu/uedocs/cmsUpload/cg00014.en07.pdf>.

372. *Does a Growing Africa Need a Foreign Investment Code?*, KNOWLEDGE@WHARTON (June 6, 2012), <http://knowledge.wharton.upenn.edu/article.cfm?articleid=3010> (reporting that, according to Coleman, such a code should cover issues such as local content, reciprocity, cultural and historic legacies, competition law, capital controls and liquidity, and regulatory oversight).

373. *About SADC*, SOUTH AFRICAN DEVELOPMENT COMM., <http://www.sadc.int/about-sadc/> (last visited May 13, 2013) (listing member states: Angola, Botswana, Democratic Republic of Congo, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe).

374. SOUTH AFRICAN DEVELOPMENT COMMUNITY, SADC MODEL BILATERAL INVESTMENT TREATY TEMPLATE WITH COMMENTARY, (2012), available at <http://www.iisd.org/itn/wp-content/uploads/2012/10/SADC-Model-BIT-Template-Final.pdf>.

375. See generally, UNCTAD, *Towards a New Generation of International Investment Policies: UNCTAD's Fresh Approach to Multilateral Investment Policy-Making*, IIA Issues Note No. 5 (2013).

rica considering negotiating BITs in the future. While negotiating BITs with China and other Southern partners, the goal should be to strike the right balance between the interests of investors and the public interest. Given the popularity of FDI, the real possibility that more Africa-South BITs will be negotiated in the future, the growing complexity and sophistication of BITs, and the importance of BITs in the global governance architecture of foreign investments, there is a need for countries in Africa to review their BIT goals, objectives and strategies. Moreover, given that BITs can impose serious constraints on policy making and are not traditionally designed to promote FDI in the areas that are most important for development, key questions must be asked by policymakers when considering the implementation of future BITs. For example:

1. How can countries in Africa best harness extractive and non-extractive FDI for development?
2. How can BITs be used, in conjunction with other policies, to capture the benefits and avoid the harms associated with FDI?
3. Are BITs that deviate from the standard models possible within the context of South-South cooperation?
4. Can BITs negotiated within the context of South-South economic cooperation be designed to serve Africa better? Can Africa-South BITs be designed to account for, and be better tailored to, individual countries' circumstances and needs?
5. Do Africa-South BITs have the potential to stimulate or promote FDI in the areas that are most important for development—such as infrastructure and downstream activities?

Additionally, in approaching BIT negotiations, several points must be borne in mind by the African countries involved.

1. There is little correlation between BITs and FDI inflow

The fact that among the regions of the South, Africa receives the smallest inflow of FDI may suggest the need for countries in Africa to conclude very liberal BITs.<sup>376</sup> However, African governments must be reminded that despite the proliferation of BITs, the existing literature is mixed on the impact of BITs on FDI flows to developing countries.<sup>377</sup> While some studies suggest that the conclusion of BITs could lead to

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376. ASIAN DEV. BANK, *supra* note 89.

377. South Centre, *supra* note 197, ¶ 88.

higher FDI inflows,<sup>378</sup> others suggest that the existence of BITs has no effect on FDI flows.<sup>379</sup>

For many countries, BITs appear to play a minimal role in stimulating FDI inflows.<sup>380</sup> China opened up to investment in 1978 and was found attractive as an investment destination long before the country adopted a liberal BIT policy.<sup>381</sup> Thus, even at the height of Beijing's hostility to BITs, China saw sizeable flow of investments from countries with which it had not concluded BITs. In Africa, Angola has not concluded a BIT with China and yet is the highest recipient of Chinese FDI in the region.<sup>382</sup>

The factors that affect FDI inflow are varied and include much more than just the existence of BITs: state of financial development, the quality of institutions and the investment climate, labor costs and labor quality,

378. E.g., Eric Neumeier & Laura Spess, *Do Bilateral Investment Treaties Increase Foreign Direct Investment to Developing Countries?* 33 *WORLD DEV.* 1567 (2005); Jeswald W. Salacuse and Nicholas P. Sullivan, *Do BITs Really Work? An Evaluation of Bilateral Investment Treaties and Their Grand Bargain*, 46 *HARV. INT'L L.J.* 67 (2005); Peter Eger & Michael Pfaffermayr, *The Impact of Bilateral Investment Treaties on Foreign Direct Investment*, 32 *J. COMP. ECON.* 789 (2004); Yoram Z. Haftel, *Ratification Counts: US Investment Treaties and FDI Flows into Developing Countries*, 17 *REV. INT'L POL. ECON.* 348 (2010); Karl P. Sauvant and Lisa E. Sachs, *BITs, DTTs, and FDI flows: An Overview*, in *THE EFFECT OF TREATIES ON FOREIGN DIRECT INVESTMENT: BILATERAL INVESTMENT TREATIES, DOUBLE TAXATION TREATIES, AND INVESTMENT FLOWS LX, LX-LXII* (Karl P. Sauvant and Lisa E. Sachs eds., 2009).

379. Mary Hallward-Driemeier, *Do Bilateral Investment Treaties Attract FDI? Only a bit. . . and they could bite* (World Bank, Research Paper WPS 3121, 2003); Jennifer Tobin & Susan Rose-Ackerman, *Foreign Direct Investment and the Business Environment in Developing Countries: The Impact of Bilateral Investment Treaties* (Yale Law School Center for Law, Economics and Public Policy, Research Paper No. 293, 2005).

380. Brazil does not have a single BIT in force, although it has negotiated about fifteen BITs. See *ICSID Database of Bilateral Investment Treaties*, INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES, <https://icsid.worldbank.org/ICSID/FrontServlet> (last visited May 13, 2013); United Nations Conference on Trade and Development, *Total number of Bilateral Investment Treaties concluded, 1 June 2011 (Brazil)*, (June 1, 2011) [http://unctad.org/Sections/dite\\_pcbp/docs/bits\\_brazil.pdf](http://unctad.org/Sections/dite_pcbp/docs/bits_brazil.pdf); *217 Million Reasons for Brazilian Companies to Structure Their Foreign Investments*, GOMM & SMITH INTERNATIONAL LEGAL CONSULTANTS, PA., (Aug. 2012) <http://smintl.com/blog/142217-million-reasons-for-brazilian-companies-to-structure-their-foreign-investments.html> (observing that Brazil has not ratified any bilateral investment treaties, and it is not a member of the Washington Convention).

381. According to UNCTAD, "China became the world's largest recipient of FDI inflows in the first half of 2012." United Nations Conference on Trade and Development, *Global Investment Trend Monitor*, at 2 (Oct. 23, 2012) [http://unctad.org/en/PublicationsLibrary/webdiaeia2012d20\\_en.pdf](http://unctad.org/en/PublicationsLibrary/webdiaeia2012d20_en.pdf). "The Equity Joint Venture Law passed in 1979 and other efforts by Beijing to liberalize FDI and facilitate FDI contributed to FDI inflows to China rather than the conclusion of BITs." Wenhui Fan, *Foreign Direct Investment in China: 1981-2000*, 2 (East-West Center Working Papers, International Graduate Student Conference Series No. 30, 2006) available at <http://www.eastwestcenter.org/sites/default/files/private/IGSCwp030.pdf>.

382. See *FDI Inflows to China 1984-2006*, CHINABILITY, <http://www.chinability.com/FDI.htm> (last visited May 12, 2013) (observing that during the Mao period (1949-1976), China spurned foreign investment, that FDI inflows grew steadily but remained relatively low in the 1980s, and that China saw an acceleration in GDP growth in the 1990s when restriction on wholly-owned subsidiaries of foreign companies was lifted).

personal relations a firm has with local partners and customers and even ethnicity and social connections. Rather than conclude questionable BITs, African countries could consider adopting targeted policies to attract investors to specific sectors needing foreign capital and associated know-how.

2. The growing complexity, breadth, and sophistication of BITs requires enhanced negotiation and legal skills

As their content becomes more sophisticated and complex, additional skills will be required to successfully negotiate and implement BITs and more expertise will also be needed to effectively evaluate the long-term practical and legal consequences of BITs. While there is much similarity in the basic provisions of BITs, there are considerable differences in their substantive details, hence the need for care and caution in negotiations.<sup>383</sup> This poses a problem for many countries in Africa and raises questions about the quality of BIT-related technical assistance that is presently available. While an increasing number of organizations offer assistance with BIT negotiations,<sup>384</sup> technical assistance must be evaluated for possible biases.

Before accepting technical assistance, countries should seek answers to a few questions. For example: What is the primary objective of the capacity-building assistance programs? Is the principal objective merely to facilitate the negotiation of traditional-style BITs or to enable countries to negotiate BITs that effectively balance rights and obligations and conclude BITs that are in their own interest? There is reason to question the motives behind past capacity-building programs. UNCTAD previously promoted an initiative on capacity-building in developing countries on issues related to international investment agreements.<sup>385</sup> According to UNCTAD, part of the initiative was to give developing countries “an opportunity to negotiate bilateral investment treaties for the promotion and protection of investment (BITs) and double taxation treaties (DTTs).”<sup>386</sup> In 2003, the UNCTAD Secretariat organized a round of BITs negotiations for a group of English-speaking African LDCs in Geneva, Switzerland.<sup>387</sup> The goal of the round was somewhat questionable. According to

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383. UNCTAD 2007, *supra* note 45, at xi (observing that “while all BITs limit the regulatory flexibility within which contracting parties can pursue their economic development policies, more recent BITs include a wider variety of disciplines affecting more areas of host country activity in a more complex and detailed manner”).

384. See, e.g., INTERNATIONAL INSTITUTE FOR SUSTAINABLE DEVELOPMENT, <http://www.iisd.org>; AFRICA INTERNATIONAL LEGAL AWARENESS, <http://www.aila.org.uk>; TRADE POLICY TRAINING CENTER IN AFRICA, [www.trapca.org](http://www.trapca.org). These organizations are playing an increasing role in technical assistance for BIT negotiations.

385. U.N. Conference on Trade & Dev., *Final Report: Round of Negotiations of Bilateral Investment Treaties for English-Speaking African Countries 5* (June 30–July 4, 2003).

386. *Id.*

387. *Id.* at 3. The round brought together the following LDCs: Botswana, Ethiopia, Ghana, Kenya, Lesotho, Malawi, Tanzania, Uganda and Zimbabwe.

UNCTAD, the principal objective of the round was “to facilitate the negotiation of BITs by LDCs with other developing and developed countries.”<sup>388</sup> The exercise resulted in the conclusion of 19 BITs.<sup>389</sup>

Interestingly, prior to the negotiations “the model texts of the United Kingdom of Great Britain and Northern Ireland and the Kingdom of Spain were passed on to the relevant negotiating teams,”<sup>390</sup> including negotiating teams from Africa. Also noteworthy was UNCTAD’s role, which was passive at best. The UNCTAD secretariat merely provided the assistance of resource persons for the facilitation and the organization of the round, helped parties exchange drafts and comments on the proposals, sent out invitations to participate, and prepared the negotiating matrix and the program for the round.<sup>391</sup> During the round, the Secretariat made conference and meeting facilities and secretarial backstopping available as well as background documentation for the negotiators to reference in case difficulties arose during negotiations.<sup>392</sup>

Today, UNCTAD is advocating a new generation of investment policies and appears to be offering assistance of a different kind.<sup>393</sup>

### 3. Broad stakeholder involvement in BIT negotiations will yield greater development dividends

There is still a lot that ordinary citizens in Africa do not know about Africa-South trade and investment and Africa-South BIT negotiations. BITs are frequently negotiated and concluded without public debate, discussion, or scrutiny. Worse, BITs and other investment agreements concluded with other developing countries are generally very difficult to access. Secrecy is especially damaging in the South-South context because presently civil society scrutiny is not particularly strong in this area and because most of the investment activities implicate the natural resource sector, where human rights violations and environmental pollution are rife and where long-term development goals can be compromised with a stroke of the pen.

### 4. Policymakers must ensure that rights secured under concluded BITs are not ceded in other types of international investment agreements

Policymakers in Africa must ensure that the rights and policy space secured under BITs are not ceded in subsequent FTAs and BITs. For example, it is not uncommon for a country to have a BIT that follows the admission clause model and then sign an FTA that includes a right of establishment in both service and non-service sectors.<sup>394</sup> Consequently, it is

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388. *Id.* at 5.

389. *Id.* at 3.

390. *Id.* at 4.

391. *Id.* at 5.

392. *Id.*

393. UNCTAD, World Investment Report 2012, *supra* note 93, at xxiii.

394. South Centre, *supra* note 197, at 21.

important that policymakers review market access commitments in future FTAs and ensure that they do not eliminate the flexibility retained in prior BITs.<sup>395</sup>

5. Studying how other developing countries approach BITs can enhance the negotiating positions of African countries

In many respects, China-Africa BITs share similarity with the BITs that China is negotiating with other non-African developing countries. Useful lessons may be learned by studying and observing from how other developing countries approach BIT negotiations, including negotiations concluded within the context of South-South cooperation. Studying how other developing countries approach BITs and FDI promotion more generally may help policymakers in Africa enhance their ability to negotiate development-sensitive BITs.

#### CONCLUSION

What conclusions can be drawn from the preceding analysis of China-Africa BITs? Are the provisions of Africa-China BITs markedly different from those of Africa-North BITs in terms of their objectives, coverage of investment issues, and development dimension? Although Africa-China BITs depart from model BITs used by Western States in some respects, they are not markedly different from those of Africa-North BITs in terms of their objectives, coverage of investment issues, and development dimension. China-Africa BITs are based on reciprocity and are geared towards providing maximum protection to investors. Interestingly, China's BITs with countries in Africa contain provisions which China, as a capital-importing nation, soundly rejected two decades ago. China-Africa BITs do not take into account the fact that most countries in Africa are at their early stages of development and that African LDCs are least likely to benefit from such agreements. Although the BITs reviewed do not explicitly circumscribe the ability of governments in Africa to take measures aimed at promoting domestic development objectives, in many respects they limit the capacity of governments in Africa to use policy instruments that China used in the past to regulate FDI in order to build up national industry.<sup>396</sup>

The broader lesson is that despite the rhetoric of mutual benefit and win-win outcomes that pervades South-South cooperation discourse, South-South BITs do not appear to offer a different legal framework for FDI. Like North-South BITs, South-South BITs are not designed to account for and adapt to each country's individual and changing circumstances and development needs. Countries in Africa must approach every BIT negotiation with caution. At the very least, this paper calls attention

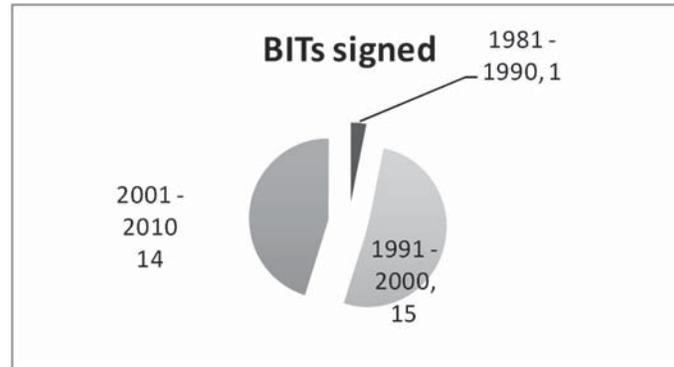
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395. *Id.* (noting in relation to EU FTAs with developing countries that the market access commitments in these agreements "are meant to 'fill a gap' in the BIT programmes of Capital Exporters by opening host economies to European investments in the manner of a US BIT").

396. South Centre, *supra* note 197, at 25.

to the need for transparency in BIT negotiations and the need for broad public and political national debate prior to the conclusion of all BITs, including those concluded with other developing countries.

## ANNEX 1

CHINA-AFRICA BITs BREAKDOWN BY DECADE (1980–2010)<sup>397</sup>

Country	Date of Signature
Ghana	10/12/89
Egypt	04/21/94
Morocco	03/27/95
Mauritius	05/04/96
Zimbabwe	05/21/96
Zambia	06/21/96
Algeria	10/17/96
Gabon	05/09/97
Cameroon	05/10/97
Sudan	05/30/97
DR Congo	12/18/97
South Africa	12/30/97
Cape Verde	04/21/98
Ethiopia	05/11/98
Congo	03/20/00
Botswana	06/12/00
Sierra Leone	05/18/01
Mozambique	07/10/01
Kenya	07/16/01
Nigeria	08/27/01
Côte d'Ivoire	09/23/02
Djibouti	08/18/03
Benin	02/18/04
Uganda	05/27/04
Tunisia	06/21/04
Equatorial Guinea	10/20/05
Namibia	11/17/05
Guinea	11/18/05
Madagascar	11/21/05
Mali	02/12/09

397. Author's Chart based on information available on UNCTAD's website. See UNCTAD, *Bilateral Investment Treaties Signed by China*, *supra* note 3.

## ANNEX 2

BILATERAL INVESTMENT TREATIES BETWEEN CHINA AND  
AFRICAN COUNTRIES<sup>398</sup>

CONCLUDED AS OF JUNE 1, 2010

## ALPHABETICAL LISTING

Country	Date of Signature	Date of Entry into Force	Document Available
Algeria	10/17/96	---	N
Benin	02/18/04	---	Y
Botswana	06/12/00	---	Y
Cameroon	05/10/97	?	Y
Cape Verde	04/21/98	01/01/01	N
Congo	03/20/00	---	N
Côte d'Ivoire	09/23/02	---	Y
Djibouti	08/18/03	---	Y
DR Congo	12/18/97	---	N
Egypt	04/21/94	04/01/96	Y
Equatorial Guinea	10/20/05	---	N
Ethiopia	05/11/98	05/01/00	Y
Gabon	05/09/97	02/16/09	N
Ghana	10/12/89	11/22/91	Y
Guinea	11/18/05	---	N
Kenya	07/16/01	---	N
Madagascar	11/21/05	06/01/07	Y
Mali	02/12/09	07/16/09	N
Mauritius	05/04/96	06/08/97	N
Morocco	03/27/95	11/27/99	Y
Mozambique	07/10/01	02/26/02	N
Namibia	11/17/05	---	N
Nigeria	08/27/01	---	N
Sierra Leone	05/16/01	---	N
South Africa	12/30/97	04/01/98	N
Sudan	05/30/97	07/01/98	N
Swaziland	03/03/98	?	Y
Tunisia	06/21/04	---	Y
Uganda	05/27/04	---	Y
Zambia	06/21/96	---	N
Zimbabwe	05/21/96	03/01/98	N

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398. UNCTAD, Bilateral Investment Treaties Signed by China, *supra* note 3.

## ANNEX 3

DOUBLE TAXATION TREATIES (DTTs) BETWEEN CHINA AND  
AFRICAN COUNTRIES<sup>399</sup>

CONCLUDED AS OF JUNE 1, 2010

## CHRONOLOGICAL LISTING

Country	Date of Signature	Document Available
Mauritius	08/01/94	Y
Sudan	05/30/97	Y
Egypt	08/13/97	N
South Africa	02/02/01	Y
Morocco	2002	N
Nigeria	April 2002	N
Tunisia	April 2002	N
Algeria	11/06/06	Y
Ethiopia	05/14/09	Y

DOUBLE TAXATION TREATIES (DTTs) BETWEEN CHINA AND  
AFRICAN COUNTRIES<sup>400</sup>

CONCLUDED AS OF JUNE 1, 2010

## ALPHABETICAL LISTING

Country	Date of Signature	Document Available
Algeria	11/06/06	Y
Egypt	08/13/97	N
Ethiopia	05/14/09	Y
Mauritius	08/01/94	Y
Morocco	2002	N
Nigeria	April 2002	N
South Africa	02/02/01	Y
Sudan	05/30/97	Y
Tunisia	April 2002	N

399. UNCTAD, Total Number of Double Taxation Agreements Concluded, June 1, 2011, <http://www.unctad.org/templates/Page.asp?intItemID=4505&lang=1>; see also *China Double Taxation Prevention Treaties*, [WWW.WORLDWIDE-TAX.COM](http://www.worldwide-tax.com), [http://www.worldwide-tax.com/china/chi\\_double.asp](http://www.worldwide-tax.com/china/chi_double.asp).

400. UNCTAD, Total Number of Double Taxation Agreements Concluded, *supra* note 399; see also *China Double Taxation Prevention Treaties*, *supra* note 399.

## ANNEX 4

CHINA-AFRICA BIT—DTT<sup>401</sup>

CONCLUDED AS OF JUNE 1, 2010

Country	BIT, signed	DTT, signed
Algeria	10/20/98	11/06/06
Benin	02/18/04	N
Botswana	06/12/00	N
Cameroon	05/10/97	N
Cape Verde	04/21/98	N
Congo	03/20/00	N
Côte d'Ivoire	09/23/02	N
Djibouti	08/18/03	N
DR Congo	12/18/97	N
Egypt	04/21/94	08/13/97
Equatorial Guinea	10/20/05	N
Ethiopia	05/11/98	05/14/09
Gabon	05/09/97	N
Ghana	10/12/89	N
Guinea	11/18/05	N
Kenya	07/16/01	N
Madagascar	11/21/05	N
Mali	02/12/09	N
Mauritius	05/04/96	08/01/94
Morocco	03/27/95	2002
Mozambique	07/10/01	N
Namibia	11/17/05	N
Nigeria	08/27/01	April 2002
Sierra Leone	05/18/01	N
South Africa	12/30/97	02/02/01
Sudan	05/30/97	05/30/97
Swaziland	03/03/98	N
Tunisia	06/21/04	April 2002
Uganda	05/27/04	N
Zambia	06/21/96	N
Zimbabwe	05/21/96	N

401. UNCTAD, *Bilateral Investment Treaties Signed by China*, *supra* note 3; UNCTAD, *Total Number of Double Taxation Agreements Concluded*, *supra* note 399; *China Double Taxation Prevention Treaties*, *supra* note 399.

