

Africa-China Investment Agreements: Trends, Tricks, and Traps – Implications for Broader Africa-South Economic Cooperation

By

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SYNOPSIS

The purpose of this paper 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). The paper 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 Africa-South BITs play a positive role in promoting development in sub-Saharan Africa any more than the Africa-North BITs? Are emerging economies in Asia and Latin America pursuing development-focused BITs with countries in Africa? The paper 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 depart from model BITs used by Western countries. Ultimately, it is hoped that the paper will assist policymakers in Africa to make informed decision about the BITs they may negotiate and/or ratify in the future.

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INTRODUCTION

Two decades ago bilateral investment treaties (BITs) were concluded primarily between developed and developing countries.¹ With the changing geography of trade and investment and resulting increase in South-South economic cooperation, developing countries are increasingly concluding BITs among themselves.² In the context of China-Africa trade, there has been a noticeable increase in the number of BITs and double taxation treaties (DTTs) that China has with countries in Africa. Starting from 1989 when China concluded its first BIT with an African country, the number of China-Africa BITs has grown to 31 as of June 1, 2010. One China-Africa BIT was concluded in the 1980s, 14 in the 1990s, and 16 since the year 2000 (See Annex 1, 2, 3, and 4). Although BITs are arguably the most important legal instrument 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, few appear to be paying attention to the legal instruments that form the bedrock of Chinese investment in the continent. This paper examines the trends, contours, and development implications of China-Africa BITs. This paper fills the gap in literature by identifying and analyzing the evolving normative framework for South-South investment relations. Several questions are raised and addressed:

- In engaging Africa, how is China using BITs and why?
- In the BIT it is concluding with countries in Africa, is China merely using the rules, norms, and models invented by the developed countries in the North or is China pursuing its own distinctive policies?³
- Do China-Africa BITs strike the right balance between protecting Chinese investors and safeguarding the public interest in Africa?
- What is the development implication 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 outcome that underscore South-South cooperation discourse?
- Ultimately, are BITs that account for and adapt to each country's individual and changing circumstances and each country's development needs possible in the context of South-South economic relations?

¹ See generally Dolzer, Rudolph and M. Stevens (1995). *Bilateral Investment Treaties* (The Hague, Boston and London: Martinus Nijhoff Publishers). See also Sornarajah, M. (2004). *International Law of Foreign Investment* (Cambridge: Cambridge University Press).

² United Nations Conference on Trade and Development, *South-South Cooperation in International Investment Arrangements. UNCTAD Series on International Investment Policies for Development* (2005)[hereinafter UNCTAD 2005].

³ 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."

Although a lot is known and has been written about North-South BITs, South-South BITs are still understudied. This is troubling for several 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.⁴ Second, with rising South-South FDI flows has come a related increase in the number of South-South investment agreements that have real implications for capital-importing countries and for individuals and groups within these countries.⁵ 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. For capital-importing nations, this false sense of security could prove very costly. Given some 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 paper is timely for several reasons. First, China’s FDI inflow into Africa has significantly increased in the last decade and is projected to grow in the years to come; it is therefore likely that Beijing will be concluding BITs with more countries in the region.⁶ China is very active in negotiating BITs and ranks second after Germany, on the list of the most active contracting parties to BITs worldwide. Second, 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. Third, there is evidence to suggest that for some countries in Africa, particularly the LDCs in the region, the touted benefits of South-South FDI may be exaggerated to the need for countries in Africa to carefully scrutinize all investment agreements they sign including those concluded in the context of South-South cooperation. 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.⁷ 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.”

There are several challenges to writing a paper on China-Africa BITs. First, many of the relevant BITs are not yet in force and have not generated any attention or scholarship; of the 31 BITs that China has 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 paper will focus on the six BITs that are available and in force (Ghana, Ethiopia, Swaziland, Egypt, Morocco, and

⁴ Luke Eric Peterson, *Bilateral Investment Treaties – Implications for Sustainable Development and Options for Regulation, Conference Report*, DIALOGUE ON GLOBALIZATION (Feb. 2007).

⁵ See generally United Nations conference on Trade and Development (2005b). *Investor–State Disputes Arising from Investment Treaties: A Review. UNCTAD Series on International Investment Policies for Development* (New York and Geneva: United Nations), United Nations publication, Sales No. E.06.II.D.1

⁶ If the goals of FOCAC are met, including goals articulated in the four plans of action adopted to date, Africa will likely see increase in Chinese OFDI in the region involving more countries.

⁷ UN LDC IV and OHRLLS, Background Paper “*Harnessing the Positive Contribution of South-South Co-operation for Least Developed Countries’ Development*” New Delhi, 18-19 February 2011 (hereinafter “Background Paper”).

Madagascar) as well as the 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 paper.

Section One provides an overview of BITs generally. Section Two focuses on South-South economic relations, South-South investment, and the growing number of South-South investment agreements. Section Three 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. Section Four 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 mechanism. Section Five offers a detailed development critique of China-Africa BITs. Section Six addresses important issues that are presently omitted from all China-Africa BITs. Human rights and environment are presently omitted in all the BITs China has concluded with countries in Africa. Section Seven 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 Section Eight.

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. In the absence of 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. 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.⁸ BITs have since become very popular. Since 1959 when the first BIT was signed, BITs have become the primary vehicle through which FDIs are regulated today. On their part, capital-importing nations sign BITs with the hope of attracting private foreign investments. 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. Despite the touted benefits of FDI, all FDIs are not the same and the impact of FDI on economic development varies from country to country and from region to region.

A. History of BITs

⁸ Jewald W. Salacuse and Nicholas P. Sullivan, *Do BITs Really Work?: An Evaluation of Bilateral Treaties and Their Grand Bargain*, HARVARD INTERNATIONAL LAW JOURNAL, Vol. 46, No. 1 (2006)

BITs rose in prominence to address the demise of the Hull Rule—the 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.⁹ From the early 1960s through the mid 1970s, attack on the Hull Rule from developing countries was fierce and sustained. 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. Declarations adopted in the UN during this period include the 1962 Resolution on Permanent Sovereignty over Natural Resources (Resolution 1803),¹⁰ the 1973 Resolution on Permanent Sovereignty over Natural Resources (Resolution 3171),¹¹ the 1974 General Assembly resolution declaring a New International Economic Order (Resolution 3201),¹² and the 1974 Charter of Economic Rights and Duties of States (Resolution 3281).¹³

Although the 1960s and 1970s movement to advance a new international economic order more or less failed and although most developing countries have since adopted liberal economic policies, BITs remain a popular instrument used by capital-exporting countries to protect their interest and to ensure that their investments abroad receive fair, equitable, non-discriminatory treatment and to secure special protection for investors. Western countries such as the U.S. typically use BITs to secure at a minimum six core rights for investors: (1) right 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 investor to select top managerial personnel.

BITs will likely be around for the foreseeable future given the demise of the Multilateral Agreement on Investment (MAI) and the fact that investment is not comprehensively addressed in any World Trade Organization (WTO)¹⁴ agreement and does not form part of the Doha Work

⁹ The Hull Rule was expounded in a diplomatic note that one-time U.S. Secretary of State, Cordell Hull send 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 3 Green H. Hackworth, *Digest of International Law* 228, at 655-59 (1942). See generally, Andrew Guzman, *Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties*, 38 VA. J. INT’L L. 639 (1998).

¹⁰ G.A. Res. 1803, U.N. GAOR, 17th Sess., Supp. No. 17, at 15, U.N. Doc. A/5217 (1962), reprinted in 2 I.L.M. 223 (1963).

¹¹ G.A. Res. 3171, U.N. GAOR, 28th Sess., Supp. No. 30, at 52, U.N. Doc. A/9030 (1974), reprinted in 13 I.L.M. 238 (1974).

¹² G.A. Res. 3201, U.N. GAOR, 6th Special Sess., Supp. No. 1, at 3, U.N. Doc. A/9559 (1974), reprinted in 13 I.L.M. 715 (1974).

¹³ G.A. Res. 3281, U.N. GAOR, 29th Sess., Supp. No. 31, at 50-55, U.N. Doc. A/9631 (1974), reprinted in 14 I.L.M. 223 (1975).

¹⁴ The Agreement on Trade-Related Investment Measures (“TRIMs Agreement”), one of the 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 GATT 1994. See http://www.wto.org/english/docs_e/legal_e/18-trims_e.htm. No consensus was reached at the Fifth Ministerial Conference in Cancun, Mexico regarding a possible agreement on investment. See Doha Declaration, Adopted 14 November 2001, WT/MIN(01)/DEC/1.

Program. 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 alternative normative framework for the regulation of FDIs.

B. Trends in the Use of BITs

Between 1959 and 1991, over 400 BITs were concluded; the number jumped to about 2,500 as at the end of 2005.¹⁵ Today, it is estimated that every country on the globe is a party to at least one BIT. Unlike the friendship, commerce, and navigation treaties of the nineteenth century, BITs are broader in scope, confer more rights on foreign investors, and contain binding investor-state dispute settlement clauses. In terms of their content, very little geographical or regional distinctions can be discerned. Rather, over the years, “[a] considerable degree of conformity has emerged in terms of the main content of BITs.”¹⁶ Most BITs offer a number of standard guarantees to foreign investors including, fair and equitable treatment, protection against unreasonable or discriminatory, protection from expropriation, free transfer of capital, and investor-state dispute settlement mechanism. Capital-exporting nations such as United States, United Kingdom negotiate BITs on the basis of their own "model" BIT. Some developing countries, for example India, have developed and now use their model BIT.

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 Netherlands, 21 each with United Kingdom (UK) and France, and 10 with the United States. Countries in Africa have concluded more BITs with China than with traditional partners such as the United States (U.S.), France, United Kingdom (UK) and the Netherlands. *See* Figure 1.

II. SOUTH-SOUTH INVESTMENT AND INVESTMENT AGREEMENTS?

The last decade witnessed two unprecedented and significant developments in the global economic landscape – the emergence of new major global players from among developing countries¹⁷ and the development of a sound, robust, deepening and widening economic activity between developing countries.¹⁸ Developing countries are trading with one another more than any other time in history. The South’s share of global trade is growing and the South now account for an increasing share of global demand. On the investment front, developing countries are reshaping the world’s investment architecture with the phenomenal increase in the depth of FDI by these countries into other developing countries. Even stronger South-South link is being pushed today.

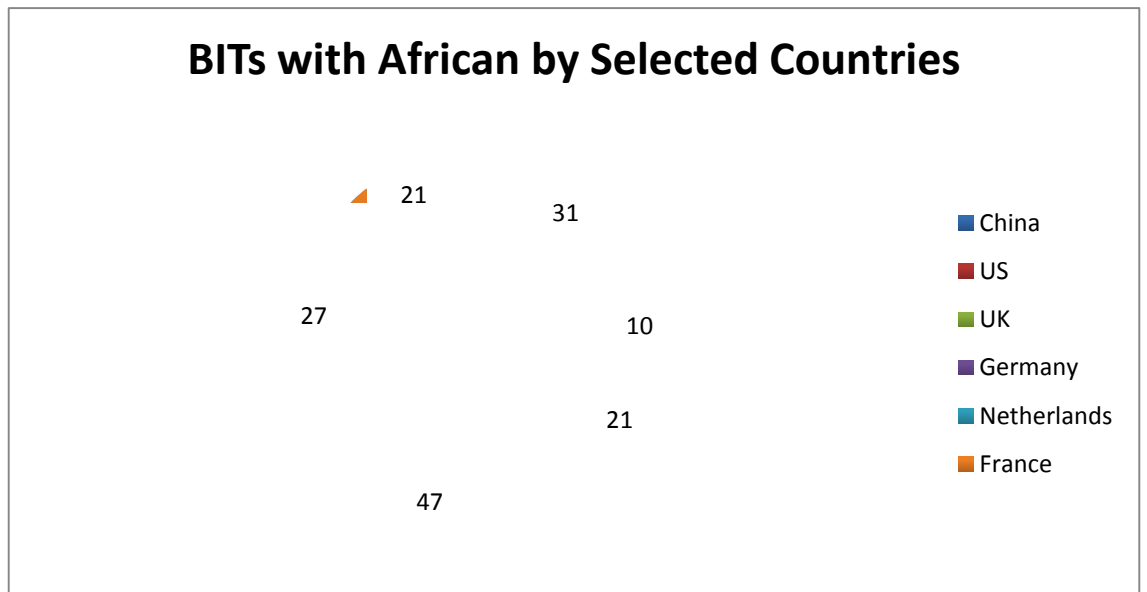
¹⁵ United Nations Conference on Trade and Development, BILATERAL INVESTMENT TREATIES 1995-2006: TRENDS IN INVESTMENT RULEMAKING 1 (2007)[hereinafter UNCTAD 2007].

¹⁶ *Id.*, at xi.

¹⁷ *See generally* Dominic Wilson and Roopa Purushothaman, *Dreaming With BRICs: The Path to 2050*, Goldman Sachs Global Economics Paper No: 99, (2003)

¹⁸ 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

Figure 1



A. South-South FDI

FDIs are very important to economies in the South to the extent that they bring advanced technology and fill investment gaps. The Asian Development Outlook 2011 concludes that “many developing Asian economies owe their high long-run growth profiles, in part, to such FDI and spillover effects.” Overall, FDI flow into the South and within the South is increasing.¹⁹ The South received 43% of global inflows in 2009, up from 16.8% in 1990. Outward FDI flows from countries of the South are increasing. In 1990, China’s outward FDI outflow stood at 0.8 billion USD in 1990 (0.34%) but jumped to 48 billion USD in 2009 (4.3%). India’s FDI outflow has also seen over 500-fold increase since 1990 and as at 2009 stood at account 14.8 billion USD (1.35%).²⁰ More remarkable is the surge in South-South FDI with the emergence of the South as an exporter of capital. As at 2008, annual South-South FDI flows stood at 187 billion USD up from around 12 billion USD in 1990. Also in 2009, South-South flows as a percentage of world total was 14%, up from 4% in 1998. South-South investment is increasing in absolute and relative terms and is increasing in sectors such as telecoms, tourism, finance, and agriculture. 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.²¹

B. Africa and South-South Investment

¹⁹ UNCTAD 2010 _Strengthening Productive Capacities: A South-South Agenda‘. www.unctad.org/templates/Download.asp?docid=14314&lang=1

²⁰ Background Paper, *supra* note 6.

²¹ The Long-Term Outlook for the BRICs and N-11 Post Crisis, December 2009, Goldman Sachs, <http://www2.goldmansachs.com/ideas/brics/long-term-outlook.html>

Africa is benefiting from the boon in South-South investment. For countries in Africa, including LDCs in the region, South-South FDI represent a significant opportunity for industrial development through their export and capital formation, potential knowledge transfer and spillover effects. 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%. 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). 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."²²

As noted, some LDCs in Africa have not been left out of the surge in South-South FDI. Although 2009 saw overall inward FDI to the LDCs decline by 14% to 28 billion USD, FDI inflows to LDCs had been rising year on year since 2001.²³ According to analysts, "FDI has been the most rapidly increasing resource flow to LDCs over the past decade" and the majority of FDI inflows have gone to LDCs in sub-Saharan Africa.²⁴ Between 2000 and 2009, the total value of foreign investors' capital and reserves in African LDCs increased by around 260%.

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.²⁵ 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. In Namibia, there are plans for the Brazilian oil and gas exploration company, High Resolution Technology (HRT), to drill for the black gold off the Namibian coast.²⁶ The company is investing 400 million dollar in Namibia. In Namibia, Brazil is also reportedly instrumental in setting up a navy equipped with Brazilian ships. In May 2011, mining company Vale opened a 1.7 billion dollars coal plant in n Mozambique. The plant is reportedly the largest once-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 dollars over the next five years. It is estimated that some 500 Brazilian companies are active in over 30 African countries; Angola alone hosts more than a 100 Brazilian companies. Indian investment is

²² UNCTAD 2005, *supra* note 2, at 81.

²³ Background Paper, *supra* note 6.

²⁴ Background Paper, *supra* note 6.

²⁵ *See generally*, Centre for Chinese Studies, CHINA'S INTEREST AND ACTIVITY IN AFRICA'S CONSTRUCTION AND INFRASTRUCTURE SECTORS (2006)

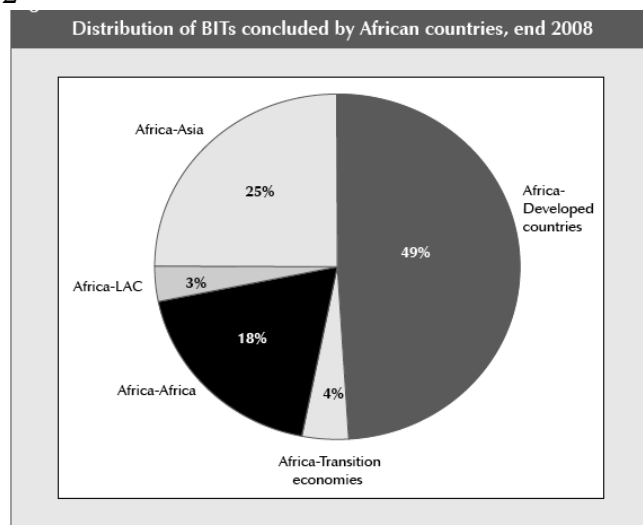
²⁶ Brazil and Africa ready to do the samba, 4 July 2011, <http://www.ips.org/africa/2011/07/trade-brazil-and-africa-ready-to-do-the-samba/>

expanding beyond its traditional base in the continent, Mauritius, and is now extending 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.²⁷

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 (PTIA). Thus, although BITs “have traditionally been signed between developed countries and developing countries,”²⁸ they are increasingly used in the context of South-South investment arrangements. According to UNCTAD, South-South BITs account for 25% of the all BITs and involve about 104 countries.²⁹ China is one of the top ten developing countries with the greatest number of BITs. 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 developing countries than with developed countries.³⁰ As noted earlier, increasingly, countries in Africa are concluding BITs with other non-African developing countries (See Figure 2). 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



Source: UNCTAD, Economic Development in Africa Report 2010.

²⁷ UNCTAD 2005, *supra* note 2, at 88 (nothing 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.).

²⁸ UNCTAD 2005, *supra* note 2, at 5.

²⁹ *Id.* Furthermore, 10% of all BITs are between developing countries and countries in transition, while 40% of all BITs are between developed and developing countries.

³⁰ UNCTAD 2005, *supra* note 2, at 8.

As pressures for stronger South-South links grows, as Southern-owned 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 even greater use of BITs and other investment agreements by capital-exporting developing countries.

In conclusion, the world is witnessing a changing geography of investment and sustained surge in South-South. The Asian Development Outlook 2011 suggests that South-South FDI may be more attractive to capital-receiving countries for two reasons. 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 even in low-income countries, thereby increasing employment and income levels.” Second, the longer term prospects appear to be better because they may be more stable and resilient to economic crisis. 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 their investments. Tough choices await capital-receiving developing countries considering negotiating BITs now or in the future. On the one hand is the need to attract capital from the new capital exporters in the South and on the other hand is to 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 1 September 2006, had concluded BITs with 112 countries. China now ranks second, after Germany, in terms of countries that have signed the most BITs. Today, about 74 percent of the destination of Chinese outward FDI is covered by BITs.³¹ In the 1960s and 1970s, as a capital-importing nation, Beijing criticized and rejected BITs. Over the years the number of BITs involving China has grown and Beijing’s views regarding BITs has evolved.

A. Evolution and Trends in China’s BIT

The last two decades witnessed a gradual move, by China, towards 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.³² 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, considerably less restriction on transfer of funds.³³ Early Chinese BITs

³¹ Cai Congyan, *Outward Foreign Direct Investment Protection and the Effectiveness of Chinese BIT Practice*, THE JOURNAL OF WORLD INVESTMENT AND TRADE, Vol. 7, No. 5, 639, 621-652 (2006).

³² Elodie Dulac and John Savage, *China: BITs*, THE ASIA PACIFIC ARBITRATION REVIEW 2007, Chapter 2: Country Overviews, <http://www.globalarbitrationreview.com/reviews/2/sections/4/chapters/19/china-bits/>

³³ Congyan, *supra* note 31, at 637.

“provided investors with little protection in practice”³⁴ and accorded host government considerable policy space.

Regarding dispute resolution, a marked feature of China's early treaties is the absence of effective investor-State dispute resolution provision. BITs that China signed in the 1980s and early 1990s either contained no investor-State dispute settlement provision or had very restrictive provisions. 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 on a case by case basis. Second was a requirement that investors exhaust domestic remedy before invoking international arbitration. Third was a provision that dispute settlement be in accordance with host country's laws. Fourth was the provision allowing exception to dispute settlement on the grounds of essential security interest of the State.³⁵ Fifth was a provision permitting investors to refer only certain cases (typically disputes over the amount of compensation payable following an expropriation) to arbitration.³⁶

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 Abroad" strategy. BITs have assumed increasing importance to Beijing as China's status change from that of a capital-importer to that of capital-exporter. Congyan argues that as a capital-exporting nation, "the effective implementation of OFDI policy to a great extent depends on whether effective investment protection is available to oversea investors."³⁷ To Congyan, China's protection of outward FDI is particularly important both because of the destination of Chinese investment (high-risk countries)³⁸ and the sector that Chinese investors typically invest in (natural resources).³⁹ 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."⁴⁰

The last decade saw a massive FDI inflow from China into Africa as trade between the two sides grew. Trade volume between China and Africa stood at US\$10 billion in 2000, US\$39.7 billion in 2005, and topped US\$106.8 billion in 2008. Annual trade between Africa and China is now in the region of US \$37.7 billion. Between 1995 and 2009, the China-Africa trade grew by 25 per cent. Regarding FDI, as of 2008, China's FDI in Africa totaled US\$ 990 million and the stock of China's direct investment in Africa totaled about US\$5 billion. In a recent speech delivered in Ghana titled China-Africa Cooperation, Chinese Ambassador Gong Jianzhong observed that "China is Africa's No.1 trading partner while Africa has risen to the

³⁴ *Id.*

³⁵ Chen, *Should the Four Great Safeguards in Sino-Foreign BITs Be Hastily Disbanded? – Comments on Provisions Concerning Dispute Settlement in Model U.S. and Canadian BITs*, THE JOURNAL OF WORLD INVESTMENT & TRADE, Vol. 7, No. 6, 899-934 (2006).

³⁶ Dulac and Savage, *supra* note 32.

³⁷ Congyan, *supra* note 31, 631 (noting on p. 635 that "OFDI protection is an important part of China's emerging overseas interests protection system as a whole.")

³⁸ *Id.*, at 635 (noting that China is engaged in developing countries some of which are in the transitional period, unstable political situation, and with rule of law problems).

³⁹ *Id.* (noting that natural resource projects involve huge investments and long construction and return periods.).

⁴⁰ Dulac & Savage, *supra* note 31.

fourth largest destination of outbound Chinese investment.”⁴¹ BITs with countries in Africa are important to China because of the high risk nature of most of Chinese investments in the continent and because Chinese investors are entering into countries that Western investors consider dangerous and unsafe. The projects China invests in in Africa are primarily in the manufacturing, processing, resources exploitation, transportation, and agriculture sectors.⁴² According to the Chinese Ambassador Gong Jianzhong, in recent years, China's investment in Africa has shown new characteristics in the form of: rapid growth,⁴³ wide distribution, wide range of areas, multiform methods,⁴⁴ and diverse investors.⁴⁵ China's investment in Africa is distributed in 49 African countries, the Ambassador claims.

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

China has concluded 31 BITs and 9 DTTs with countries in Africa (see figure 3, p. 14; Table 1, p. 15). China has also concluded trade agreements or economic cooperation agreements with all but two countries (Mauritius and Seychelles) in the continent (see Annex 1). Nine countries in Africa have concluded both a BIT and a DTT with China (see Annex 2). Twelve BITs are reviewed in this section. These include six BITs that are available and in force (Ghana, Ethiopia, Swaziland, Egypt, Morocco, and Madagascar) as well as six BITs that are available but not yet in force (Botswana, Djibouti, Benin, Uganda, Tunisia, Côte d'Ivoire). 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 FOCAC, China has pushed countries in Africa to conclude BITs. Almost all the key FOCAC documents call on participating countries to conclude BITs and DTTs. 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.”⁴⁶ 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.⁴⁷ In the *Addis Ababa Plan of Action* adopted in 2003, both sides resolved to “take concrete measures to continuously promote investment in both

⁴¹ *Speech at GIBS Seminar By H. E. Amb. Gong Jianzhong* 21 March, 2011. Available at: <http://www.fmprc.gov.cn/eng/wjz/zwjg/zwbd/t808586.htm>

⁴² China Year Book 2009.

⁴³ *Speech at GIBS Seminar By H. E. Amb. Gong Jianzhong*, *supra* note 41 (“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”).

⁴⁴ *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.”).

⁴⁵ *Id.* (“State-owned large and medium-sized enterprises, private enterprises and individuals have all invested and started business in Africa.”).

⁴⁶ The Programme for China-Africa Cooperation in Economic and Social Development adopted in 2000, Para. 3.1.

⁴⁷ *Id.* Para. 3.2.

directions.”⁴⁸ 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.”⁴⁹ 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.”⁵⁰ Finally, in the *Sharm El Sheik 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.”⁵¹ 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 Africa-China BITs

In general, key features of China-Africa BITs are: broad asset-based definition of investments; absolute standards of treatment (e.g. fair and equitable treatment) clauses; relative standards of treatment (e.g. 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 (Annex 5). Noticeably absent from China-Africa BITs are provisions pertaining to human rights, labor rights, environmental protection or 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.

1. Temporal Scope of Application

The temporal scope of a BIT is one element that affects its scope. Some BITs apply only to investments made after the entry of the BIT while others apply also to investments made prior to the BIT’s entry. 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; (ii) 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 (iii) BITs that stipulate that the treaty shall apply only to investments made after a specific date.

China-Ghana BIT	China-Benin BIT	China-Tunisia BIT
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⁴⁸ Forum on China-Africa Cooperation Addis Ababa Action Plan 2004-2006, Adopted December 2000, para. 4.2.

⁴⁹ *Id.*, at 4.3.2

⁵⁰ Forum on China-Africa Cooperation Beijing Action Plan 2007-2009, Adopted November 2006, Para.3.2.2

⁵¹ Sharm El Sheik Plan of Action, para. 4.2.2.

Article 8	Article 10	Article 12
<p>“This Agreement shall apply to investments which are made prior to or after its entry into force by investors of either Contracting State in accordance with the laws and regulations of the other Contracting State in the territory of the latter.”</p>	<p>“This Agreement shall apply to investment made prior to or after its entry into force by investors of one Contracting Party in the territory of the other Contracting Party in accordance with the laws and regulations of the Contracting Party concerned, but not apply to the dispute arose before its entry into force.”</p>	<p>“This Agreement shall apply to investments, which are 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. However the Agreement shall not apply to any dispute concerning an investment which arose before its entry into force.”</p>

2. Duration

All the China-Africa BITs have 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-Swaziland BIT
<p>Article 14</p> <p>1. This Agreement shall ... remain in force for a period of ten years</p> <p>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.</p>	<p>Article 16</p> <p>1. This Agreement shall ... remain in force for a period of ten years.</p> <p>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.</p>	<p>Article 12</p> <p>Final Clauses</p> <p>(2) This Agreement shall remain in force for a period of ten years. Thereafter it shall continue in force until the expiration of twelve months from the date on which either Party shall have given written notice of termination to the other.</p>

3. Definition of Investment

The definition of the investment covered by a BIT is another element that determines the scope of the 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.” 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 as well as other rights such as mortgages, liens or pledges,” “claims to money, or to any performance under contract having an economic value,” “shares in and stock and debentures of a company and any other form of interest in a company,” “concessions conferred by law or under contract permitted by law, including concessions to search for, or exploit natural resources,” and “intellectual and industrial property rights.”⁵² Some BITs (e.g. China-Tunisia) go on to state that “Any change in the form in which assets are invested shall not affect their character as investments.” Regarding intellectual property, while some BITs (e.g. China-Ghana) cover only the main types of intellectual property – copyrights, industrial property, know-how, and technological process – other BITs (e.g. China-Swaziland) appear to cover every type of intellectual and industrial property.

China-Ghana BIT	China-Swaziland BIT	China-Tunisia BIT
<p>Article 1</p> <p>For the purpose of this Agreement,</p> <p>The term “investment” 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:</p> <p>(i) Movable and immovable property and other property rights;</p> <p>(ii) shares in companies or other forms of interest in such companies;</p> <p>(iii) a claim to money or to any performance having economic value</p> <p>(iv) copyrights, industrial</p>	<p>Article 1</p> <p>For the purposes of this Agreement:</p> <p>(a) “investment” means every kind of asset and in particular, though not exclusively, includes:</p> <p>(i) movable and immovable property as well as other rights such as mortgages, liens or pledges;</p> <p>(ii) shares in and stock and debentures of a company and any other form of interest in a company;</p> <p>(iii) claims to money, or to any performance under contract having an economic value;</p> <p>(iv) intellectual and industrial property rights, in particular copyrights, patents, utility-model patents, registered designs, trade-marks, trade-names, trade and business</p>	<p>Article 1</p> <p>For the purpose of this Agreement:</p> <p>(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:</p> <p>(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;</p> <p>(c) claims to money or to any other performance having an economic value;</p> <p>(d) intellectual property rights, including copyrights, patents, trade marks, trade names, technological process, know-</p>

⁵² China-Swaziland BIT, Article 1(a)(i).

<p>property, know-how, and technological process;</p> <p>(v) concessions conferred by law, including concessions to search for or exploit natural resources.</p>	<p>secrets, technical processes and know-how, goodwill;</p> <p>(v) rights or permits conferred by law or under contract, including concessions to search for, cultivate, extract or exploit natural resources</p>	<p>how and good will;</p> <p>(e) concessions conferred by law or under contract permitted by law, including concessions to search for, or exploit natural resources.</p> <p>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.</p>
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3. Obligation to Promote Investment

Almost all the 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.⁵³ 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.

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 work permit to nationals of the other Contracting State</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>....</p> <p>5. Subject to its laws and regulations, one Contracting Party shall provide assistance</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.</p> <p>....</p>

⁵³ China-Ethiopia BIT, Article 2.

to or in the territory of the former in connection with investment and activities associated with such investments.	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.	
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4. Admission of Investment

China-Africa BITs adopt the “admission clause” model meaning that investors do not enjoy market access rights but only post-establishment protection. In other words, admission and establishment of investment is subject to the domestic laws of the host country and investors do not enjoy any right of establishment. Article 2 of China-Ghana BIT requires each Contracting State to admit covered investment “in accordance with its laws and regulations.” Similar provision can be found in the China-Botswana BIT (Article 2(1)), China-Cote d’Ivoire BIT (Article 2(1)), and China-Djibouti BIT (Article 2(1)). The implications 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.”⁵⁴

5. General/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 and activities associated with the investments of the investors. 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.⁵⁵

Some of the BITs (for example, China-Ghana) reference one or more of the standards and others reference all four standards. 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

⁵⁴ South Centre, THE EUROPEAN UNION AND THE UNITED STATES’ APPROACH TO INTERNATIONAL INVESTMENT AGREEMENTS WITH DEVELOPING COUNTRIES: FREE TRADE AGREEMENTS AND BILATERAL INVESTMENT TREATIES, para. 52 (2010).

⁵⁵ See generally Dolzer, Rudolph (2005a). “Fair and equitable treatment: A key standard in investment treaties”, THE INTERNATIONAL LAWYER, 39, pp. 87–106.

“equitable treatment and shall enjoy protection in the territory of the other Contracting state.”⁵⁶ 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.⁵⁷ The China-Ghana BIT is also benched on the MFN standard.

China-Ghana BIT	China-Swaziland 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.</p>	<p>Article 3</p> <p>1. Investments and returns of investors of either Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection in the territory of the other Party. Neither Party shall in any way impair, by adopting unreasonable or discriminatory measures, the management, maintenance, use, enjoyment or disposal of investments in its territory of investors of the other Party.</p>	<p>Article 2</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.</p>

6. National Treatment Provision

National treatment provision is considered a standard feature of BITs. Under the 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 of their own investors. 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. First, some

⁵⁶ China-Ghana BIT, Article 3(1).

⁵⁷ China-Swaziland BIT, Article 3(1); China-Ethiopia BIT, Article 3(1).

of the earlier BITs do not have national treatment provisions (e.g. China-Ghana BIT and the China-Ethiopia BIT). Second, some BITs lack a national treatment provision but incorporate a general non-discrimination principle (e.g. China-Swaziland and China-Tunisia). Third, other BITs have national treatment provisions that are qualified and apply to established investments only. For BITs containing a national treatment provision, the clause typically applies to investors and “activities associated with investments.” The national treatment provisions appear to apply to all sectors and industries.

China-Swaziland BIT	China-Uganda BIT	China-Cote d’Ivoire BIT
<p>Article 3</p> <p>“.... Neither Party shall in any way impair, by adopting unreasonable or discriminatory measures, the management, maintenance, use, enjoyment or disposal of investments in its territory of investors of the other Party.</p>	<p>Article 3</p> <p>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.</p>	<p>Article 3</p> <p>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.</p>

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, the non-discrimination clauses are typically not made subject to host countries laws and regulation as is the case with the national treatment provisions. Does Article 3 of the China-Swaziland BIT allow the Government of Swaziland to treat citizens of Swaziland more favorably than foreign investors and to what extent? The answer is not entirely clear.

7. Most Favored Nations Clause

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 other third country.⁵⁸ All China-Africa BITs provide for the MFN standard at the post-establishment phase. Variations exist, however. First, in some of the BITs (e.g. China-Ghana BIT), the MFN standard is limited to certain principle such as the “fair and equitable” principle.⁵⁹ Second, some BITs have independent MFN clauses that are not tied to any particular

⁵⁸ UNCTAD 2007, *supra* note 14, at 38.

⁵⁹ China-Ghana BIT; China-Ethiopia BIT.

principle or set of principles. Third, a few BITs (China-Uganda) contain exceptions to the MFN standard that go before the standard exceptions.

China-Ghana BIT	China-Swaziland BIT	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.</p>	<p>Article 3</p> <p>(2) Each Party shall in its territory accord investments and returns of investors of the other Party treatment not less favorable than treatment which it accords to investments and returns of investors of any third State.</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>....</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.</p>

8. Expropriation

Although all the BITs reviewed contain expropriation clauses, a difference between the early BITs and more recent BITs can be discerned. 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 the older BITs, the focus is strictly on expropriation and nationalization or “similar measures.” More recent BITs, by contrast, are broader in scope and extend to “measures having effects equivalent to expropriation or nationalization.” By and large, to be lawful, all the BITs require that expropriation meet one or more of the following four conditions: (i) public interest purpose;⁶⁰ (2) non-discriminatory basis; (3) due process of law; and (4) compensation.

⁶⁰ The China-Ghana BIT allows expropriation on grounds of national security – a phrase that can be subsumed under the “public interest” category.

China-Ghana BIT	China-Swaziland BIT	China-Uganda BIT
<p>Article 4</p> <p>Either Contracting State may, for the <i>national security and public interest</i>, <i>expropriate, nationalize or take similar measures</i> against investment of investors of the other contracting State in its territory. But subject to the following conditions:</p> <p>(a) Under domestic legal procedure;</p> <p>(b) Without discrimination;</p> <p>(c) Payment of compensation.</p>	<p>Article 5</p> <p>(1) Investments of investors of either Party shall not be nationalized, expropriated or subjected to measures having effects equivalent to nationalization or expropriation []hereinafter referred to as "expropriation" in the territory of the other Party except in the public interest, under due process of law, on a non-discriminatory basis and against prompt, adequate and effective compensation.</p>	<p>Article 4</p> <p>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.</p>

Furthermore, although the conditions required to make expropriation lawful are almost the same in all the treaties, there are variations in terms of the time of when compensation should be paid and whether interests 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 to the position most developing countries took in the 1970s and 1980s regarding compensation.⁶¹ Although the 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 market 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 older BITs are silent on the issue and do not address accrued interest at all, more recent typically BITs address this issue.

China-Ghana BIT	China-Swaziland BIT	China-Uganda BIT
Article 4	Article 5	Article 4

⁶¹ See generally Sornarajah, M., INTERNATIONAL LAW OF FOREIGN INVESTMENT (2004).

<p>....</p> <p>2. “The compensation ... shall be equivalent to the value of the expropriated investments at the time when the expropriation is proclaimed, be convertible and freely transferable,”</p>	<p>1.... Such compensation shall amount to the <u>market value</u> of the investment expropriated <u>immediately before the expropriation or before the impending expropriation</u> became public knowledge, <u>whichever is earlier</u>, shall include interest at a normal commercial rate until the date of payment, shall be made without delay, and be effectively realizable.⁶²</p>	<p>....</p> <p>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.</p> <p>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.</p>
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According to the China-Swaziland BIT, such compensation “shall *include interest at a normal commercial rate until the date of payment*, shall be made without delay, and be effectively realizable. 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 accords more protection on this front. Article 5(2) of the China-Swaziland BIT stipulates:

“The investor affected thereby shall have a right, under the law of either Party making the expropriation, to prompt review, by judicial or other independent authorities of the Party in accordance with the procedures established by the law of that Party, of his or its case and of the valuation of his or its investment in accordance with the principles set out in this Article.”

Altogether, most of 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

⁶² China-Benin BIT, Article 4(2).

include “interests at normal commercial rate; and (4) including provision according investors the right to judicial review in the event of expropriation.”⁶³

9. War Clauses

All the BITs have provisions directed at protecting investors from discrimination in the event of property damage as a result of war or other civil strife.⁶⁴ There are variations in the scope and content of this clause. In terms of scope, all the BITs cover man-made disturbances and none addresses 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, while some of the BITs grant MFN treatment as regards restitution, indemnification, compensation and other settlements, others accord MFN and national treatment protection.

China-Ethiopia BIT	China-Cote d'Ivoire BIT	China-Benin BIT
<p>Article 5</p> <p>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, <u>if it takes relevant measures</u>, treatment no less favorable than that accorded investors of a third State.</p>	<p>Article 5</p> <p>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.</p>	<p>Article 5</p> <p>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,</p>

⁶³ China-Benin BIT, Article 4(1).

⁶⁴ UNCTAD 2007, *supra* note 14, 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.”).

		whichever is more favorable to the investor concerned.
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Some BITs go a step further and impose an absolute obligation on the host government to compensate the foreign investor if and when a listed event occurs. In other words, the obligation to compensate is not tied to national treatment or MFN. The China-Swaziland BIT provides that investors of one Contracting Party who owing to war, a state of national emergency, armed conflicts, insurrection, riot or other similar events, 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 the necessity of the situation,” shall be accorded restitution or reasonable compensation.⁶⁵

10. Repatriation of Funds

All the BITs reviewed provide for the repatriation of capital and returns. All provide that each Contracting State shall “subject to its laws and regulations,” guarantee the transfer of investment and returns held within its territory.⁶⁶ 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 (e.g. China-Uganda BIT, China-Cote d’Ivoire BIT, China-Tunisia BIT). Second, some BITs include more investor guarantees such as the provision that transfers shall be made in “a freely convertible currency”⁶⁷ and the provision 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.”⁶⁸ 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.”⁶⁹ Third, some BITs (e.g. China-Swaziland BIT) make the rights accorded investors subject the laws and regulations of the host country.

China-Swaziland BIT	China-Uganda BIT
<p>Article 6</p> <p>Each Party shall allow, in accordance with its laws and regulations, investors of the other Party the <i>free transfer of payments relating to their</i></p>	<p>Article 7</p> <p>1. Each Contracting Party shall guarantee to the investors of the other Contracting Party the transfer of their investments</p>

⁶⁵ Article 5(2).

⁶⁶ China-Ghana BIT, Article 5; China-Benin BIT, Article 5.

⁶⁷ China-Benin BIT, Article 6(3).

⁶⁸ China-Benin BIT, Article 6(3) and (4). See also China-Ghana BIT.

⁶⁹ China-Ghana BIT, Article 6 (1). Article 6(2) permits market rate to be used “if no official exchange rate is available.”

<p><i>investments and returns</i>, including compensation paid pursuant to Article 4 and 5. Unless otherwise agreed by the investor, transfers shall be made at the rate of exchange applicable on the date of transfer subject to the exchange regulations in force, <u>transfers shall be effected without delay in any convertible currency at the market rate of exchange applicable on the date of transfer.</u></p>	<p>and returns held in its territory, including:</p> <ul style="list-style-type: none"> (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. <p>2. Nothing in Paragraph 1 of this Article shall affect the free transfer of compensation paid under Article 4 and 5 of this Agreement.</p> <p>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.</p>
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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 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.

Overall, while some BITs cover only transfers of fund out of the host country, majority use language suggesting they apply to both inbound and outbound transfers. However, none of

the BITs reviewed explicitly address whether they apply to both inbound and outbound transfers of funds. A few BITs (China-Djibouti BIT and China-Swaziland BIT) have provisions subjecting the guarantee to the domestic legislation of the host country.⁷⁰ 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) provides for some specific exceptions to the transfer of funds obligation.

11. Investor-State Dispute Settlement

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

i. Type of Dispute Ripe for Arbitration

One issue addressed is the types of dispute that may be submitted to an arbitral tribunal. Under the older BITs, 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. By contrast, the China-Benin BIT applies to “Any 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.⁷¹

ii. What Type of Tribunal?

A second issue addressed concerns the type of tribunal that can hear an investment dispute. Most of the BITs grant the investors choice of submitting a dispute to a competent court of the Contracting State that is party to the dispute or to international arbitration. Regarding international arbitration, the International Center for Settlement of Investment Disputes (ICSID) is not always explicitly mentioned. Thus, Article 9(3) of the China-Benin BIT provides that in the event of a dispute, such a dispute “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.” 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. Another variation found in the China-Tunisia BIT (Article 8(2)) and China-Ghana BIT (Article 10(1)) 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.

iii. Applicable Law

⁷⁰ UNCTAD 2007, *supra* note 14, at 59 (observing that numerous BITs “do not subject the guarantee to the domestic legislation of the host country” and suggesting that this approach “reduces the level of investment protection considerably” and “might also generate uncertainty among investors.”).

⁷¹ Article 9(1).

There is also variation in the provision 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 a more expanded list of applicable rules. Article 10(5) of the China-Ghana BIT 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.” 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.”

iv. Finality of Arbitral Award:

All the BITs stipulate that arbitral decisions shall be “final” and “binding.” Article 9(6) of the Chinese-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.” Similar provisions are found in China-Botswana BIT Article 9(6.), China-Tunisia BIT Article 8(6) and China –Uganda BIT, Article 9(5).

v. Enforcement Obligations

Under most of the BITs, Contracting States undertake to enforce arbitral decisions. Some variations exist, however. First, some BITs (e.g. China-Uganda BIT) make no reference to enforcement of arbitral awards. Second, under some of the BITs (e.g. China-Djibouti), Contracting Parties commit themselves to enforce arbitral awards. Third, in some BITs (e.g. China-Ghana), Contracting Parties commit themselves to the enforcement of arbitral decisions “in accordance with their respective domestic laws.”

12. Umbrella Clauses

Under the so-called “umbrella” clause, host country typically agrees to respect other obligations it has regarding the investment of investors of the other Contracting Party arising from other agreements. UNCTAD estimates that about 40 percent of existing BITs contain an umbrella clause.

China-Djibouti BIT	China-Cote d’Ivoire BIT	China-Uganda BIT
Article 10	Article 10	Article 11
1, If the legislation of either Contracting Party or international obligations	1, If the legislation of either Contracting Party or international obligations	1. Investments made pursuant to a specific agreement concluded between one Contracting Party and investors of the other Party

<p>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.</p>	<p>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.</p> <p>ARTICLE</p>	<p>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.</p>
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C. Conclusion. Africa-China 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? Africa-China BITs departs 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,⁷² have a limited transparency clause, 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 Africa-China BITs include limited exceptions to some of the obligations.

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

- 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;

⁷² 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.

- 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 favored by China;
- do not affirm the state’s right to development, its right to regulate in the public interest, or 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 Section V.

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

This section analyzes the development dimension of China-Africa BITs focusing on the structure of the BITs, the substantive provisions of the agreements, as well as their implementation mechanism.⁷³

A. Structure of the BITs

Does the structure of the China-Africa BITs suggest sensitivity to the need to allow governments flexibility in addressing domestic problems? Any noticeable difference between the BIT China has with developing African countries and least developing countries (LDCs) in the continent?

i. 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.”⁷⁴ 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.

As already noted, the preambles of the BITs reviewed were not crafted with a view to providing necessary flexibility and policy-space for capital-importing countries. Admittedly, the admission clause model adopted in all China-Africa BITs allow countries in the region to regulate the entry and establishment of foreign investment.⁷⁵ The admission model allows a host

⁷³ See generally Patrick Robinson, *Criteria to test the development friendliness of international investment agreements*, TRANSNATIONAL CORPORATIONS, vol. 7, no. 1 (April), pp. 83–89 (1998).

⁷⁴ UNCTAD 2007, *supra* note 14, at 37.

⁷⁵ South Centre, *supra* note 54, at para. 20 (observing that the implications of the admission is 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.”).

country to, for example, 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.

ii. 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 LDC. All the BITs including those concluded with LDCs are highly reciprocal in terms of the commitment assumed by the Contracting Parties. The BITs concluded by the African LDCs did not contain any phased-in commitments or specially tailored undertaking suggesting sensitivity to their status as LDCs. This is not unique to China-Africa BITs; 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. Surprising, no country in Africa made use of this tool in their negotiations with China.

B. Substantive Provisions

The substantive provisions of international investment agreement are “particularly important in reflecting the development dimension, and the overall balance of rights and obligations arising out of a treaty.”⁷⁶ 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. Suggesting sensitivity to development dimension are:

- 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 (e.g. US-Rwanda BIT, Article 8)
- The absence of non-derogation clauses (e.g. US-Rwanda BIT, Article 16)
- War clauses that do not extend to acts of God
- The absence of national treatment obligation in some of the earlier BITs
- The use of exceptions in some BITs (e.g. China-Uganda)
- The absence of extensive transparency requirements (e.g. US-Rwanda BIT, Article 11)

On the other hand, some provisions suggest lack of sensitivity to development dimension including:

- Broad assets-based definition of investments
- No direct reference to “economic development,” “sustainable development,” or the right to development

⁷⁶ UNCTAD 2007, *supra* note 14, at 40.

- The absence of differentiated obligations to take into account different levels of economic development
- Vague investment promotion clause
- The use of standard national treatment provision
- War clauses that cover “state of national emergency” regardless of the reason why national emergency was declared
- Broad and potentially expansive definition 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 implication are only best guesses. Terms such as “full protection and security,” “fair and equitable” treatment, or “measures having effects equivalent to nationalization or expropriation” 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. As Peterson notes, investment arbitration “can be plagued by a troubling lack of consistency,” and tribunals can reach widely divergent conclusions in parallel cases.⁷⁷ 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 retrospective effect. It is important that future BITs are clear on whether or not they apply to pre-existing investments and perhaps, should expressly declare that they apply only to investments made after the entry into force of the BIT. 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.”

2. Broad Asset-based Definition of Investment

The broad asset-based definition of investment is a concern, although the most common definition adopted in BITs worldwide.⁷⁸ In some China-Africa BITs, the asset based definition is qualified by the clause stipulating that the BIT applies only to investments made in accordance with the laws and regulations of the host country (see China-Ghana BIT and China-Swaziland BIT). There are other options available to host countries including a closed-list definition of investment⁷⁹ and a definition that expressly excludes specific types of assets and transactions. Whether a closed-list or an open-list, the key is for host country negotiators to pay attention to the details of the agreement in order to avoid an overly broad concept of investment and ensure that certain types of assets and transactions are excluded from the definition. For example, some

⁷⁷ Peterson, *supra* note 3, at 27.

⁷⁸ UNCTAD 2007, *supra* note 14, at 8.

⁷⁹ 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.

BITs exclude property not acquired for the purpose of economic benefit and used for non-business purposes⁸⁰ 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.⁸¹

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, might stronger investment promotion clauses be advisable? Some new BITs require Contracting States to exchange information on investment opportunities available in their territory.⁸² The contours of an investment promotion clause could be fleshed out by inserting provisions requiring Contracting Parties to exchange information regarding investment opportunities, provisions requiring Contracting Parties to facilitate the granting of work permits, visas and licenses, provisions requiring Contracting Parties to provide incentive as a way to promote investment,⁸³ and even provisions requiring Contracting Parties to facilitate the establishment of representative offices.⁸⁴ Given asymmetries in information and the poor job done by African states in terms of providing business development services particularly to small and medium enterprises in the continent, the private sector in Africa need information to better access Chinese markets for trade or investment opportunities and a strengthened investment promotion clause may work to their advantage.

4. General/Absolute Standards of Treatment

The four standards typically covered under the absolute standard of treatment clause raise concerns: “full and complete protection 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 the terms is a problem and raise 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 the 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;⁸⁵ (2) make the standards contingent

⁸⁰ See e.g. Belarus-Czech Republic BIT, Article 1 states 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 ...”

⁸¹ UNCTAD 2007, *supra* note 14, at 13.

⁸² UNCTAD 2007, *supra* note 14, at 27; Mexico-Argentina BIT of 1996, Article 7.

⁸³ Article 2 of Finland-Kuwait BIT of 1996.

⁸⁴ Article 2, Croatia-Denmark BIT (2000).

⁸⁵ UNCTAD 2007, *supra* note 14, 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

on the domestic legislation of the host country,⁸⁶ and (3) make the standards more precise by defining what the terms mean. With respect to latter, countries must be careful to avoid an overly broad definition that go well beyond 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, this is such 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.” 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 domestic laws of each Contracting Party.” A third option is to create a blanked exception shielding host countries activities relating to certain specified sectors. The first option is the most frequently utilized option 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 not clear why governments in Africa limit themselves to one option instead of exercising all three options.

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.⁸⁷ To further broaden the policy space of States, several options exist. First, States could consider conditioning their MFN obligation on domestic legislation; such BITs are rare, however.⁸⁸ Second, States should

principles of international law, which would include customary international law on State responsibility in respect of aliens.”).

⁸⁶ Article IV of the 1997 BIT between Caribbean Common Market and Cuba states “*Each Party shall ensure fair and equitable treatment of Investments of Investors of the other Party under and subject to national laws and regulations*”).

⁸⁷ Like most BITs, China-Africa BITs contain some standard exceptions to the MFN obligation: (i) 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* Article 3(4) of the China-Uganda BIT, Article 3(3) of the China-Ghana BIT, and Article 3(3) of the China-Benin BIT.

⁸⁸ UNCTAD 2007, *supra* note 14, at 38. 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 [...].”

state which substantive obligations are subject to the MFN standard and which are not. Does the MFN standard apply to all the substantive provisions including the provision relating to dispute settlement? All the BITs reviewed do not explicitly state to which substantive obligation the MFN provision apply. This omission could spell trouble for a host government in the light of *Maffezini v. the Kingdom of Spain* case.⁸⁹ In *Maffezini*, the MFN clause between Argentina and Spain expressly applied “In all matters subject to this Agreement.” Based on the broadly worded MFN clause, Mr. Maffezini was able to bypass some restrictions in the dispute resolution provision in the Argentina-Spain BIT and to import a more favorable dispute resolution clause from the Chile-Spain BIT of 2003.⁹⁰ Third, negotiators could consider creating some exceptions to the MFN clause. A good example can be found in the China-Uganda BIT and the China-Benin BIT. A final option is to specifically narrow the terms and scope of the MFN obligation to certain activities. For example, the Canada-Thailand BIT limits the scope of the MFN standard to investors, “as regards their management, use, enjoyment or disposal of their investments or returns.”

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.</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</p>

7. War Clause

War clauses are arguably unavoidable in BITs involving African countries given the number and intensity of active civil strife in the region. However, such clauses can be extremely broad. For example, BITs that afford protection to foreign investors in situations of national

⁸⁹ Emilio Agustin Maffezini v. Kingdom of Spain (ICSID No. Apr/97/7). Decision on Jurisdiction of 25 January 2000 and Award of the Tribunal of 13 November 2000.

⁹⁰ 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.

emergency could be problematic given the vagueness of the term. Will every state of emergency come within the ambit of such a clause? Will such a clause be limited to state of emergency within the context of a conflict?⁹¹ To provide more flexibility, a host country could seek to condition the provision of national treatment to the domestic legislation as is the case in the 1999 Argentina-New Zealand BIT.⁹² Risk for capital-importing countries is 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, the important point is to strike the right balance between the interest of the 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. Second, 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 BIT.

To accord more policy space to capital-importing countries, negotiators may consider including some specific exceptions that will provide room for policy makers to address financial crisis when they arise. For example, the China-Uganda BIT includes an exception relating to the balance of payment (BoP) crisis. Other exceptions are possible, however. A provision found in Article 6 of the 2000 Mexico-Republic of Korea BIT allows the host country to apply laws relating to bankruptcy, criminal or administrative violations, trading in securities or ensuring the satisfaction of judgment in adjudicatory proceedings. Furthermore, it may be wise to include a provision that allows a host government to address the problem created by speculative capital inflow. Ad Article 4 of the protocol of the BIT between Austria and Chile states that “*Capital can only be transferred one year after it has entered the territory of the Contracting Party unless its legislation provides for a more favourable treatment. [...]*”

9. Expropriation

With expropriation, 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, 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. 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

⁹¹ UNCTAD 2007, *supra* note 14, at 53.

⁹² Article 7.

is that routine regulatory acts may be construed to amount to indirect expropriation⁹³ and that the expropriation clauses coupled with investor-State dispute settlement clause allows international arbitrators to pass judgment on the legitimate scope of regulatory oversight in sensitive areas such as water provision.⁹⁴

Useful lesson could be learned from the of *Biwater Gauff Ltd. v. United Republic of Tanzania* (involving water and sewage management) and the case of *Piero Foresti, et al. v. The Republic of South Africa*. The case against the South African government that was initiated by three Italian mining firms (Marlin Holdings Ltd, Marlin Corporation and Red Granti Pty Ltd.) and arose from the entry into force of the Mineral and Petroleum Resource Development Act of 2002; implicated in this case is South Africa's policy of black economic empowerment.

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 “constitutes one of the key elements in diminishing the country risk.”⁹⁵ Thus, the issue is usually not whether a BIT should provide for dispute settlement but the nature and scope of the dispute settlement clause in a given BITs. 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. It is interesting that the dispute settlement provisions of the BITs reviewed lack the four major safeguard that China used in the 1980s and early 1990s to protect its interest against 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 clause of BITs.⁹⁶ Although in the past Chinese investors did not utilize international investment arbitration, this has changed.⁹⁷ On 12 February 2007, the International Centre for the Settlement of Investment Disputes (ICSID) received what is considered the first case by a Chinese investor against host government (Republic of Peru) for alleged breach of obligations under a 1994 China-Peru BIT.⁹⁸

⁹³ Some recent arbitral decisions suggest that routine regulatory acts do not usually amount to expropriation. See, for example, *S.D. Meyers v. Canada*, UNCITRAL, First Partial Award of 13 November 2000; *Marvin Roy Feldman v. The United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award on Merits of 16 December 2002.

⁹⁴ Peterson, *supra* note 3, at 16.

⁹⁵ UNCTAD 2000, p. 99.

⁹⁶ UNCTAD 2007, *supra* note 14, 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.).

⁹⁷ Dulac & Savage, *supra* note 32.

⁹⁸ 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 19 June 2009, the ICSID Tribunal issued a Decision on Jurisdiction, holding that the Tribunal has jurisdiction on and is competent to hear the case.

A recent case involving Tanzania and another involving South Africa teach that dispute settlement provisions of BITs can be used to internationalize disputes between foreign investors and regulators in sensitive sectors such as water⁹⁹ and to remove such dispute from the reach of applicable domestic laws and domestic courts. This problem is complicated by the fact that none of the BITs reviewed takes 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 interest 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 in cooperation with other developing countries may consider exploring the possibility of designing alternative and more meaningful and effective mechanisms for settling investment disputes. Peterson estimates that the average costs of hiring arbitrators for ICSID arbitration to be close to US\$500,000 with fees for legal counsel possibly running into millions of dollars.¹⁰⁰ Investment law is also an area where asymmetries of information is profound, many countries in Africa lack relevant knowledge, and local expertise is yet to be developed thus increasing the uncertainty and cost associated with investment arbitration.

11. Performance Requirements

None of the BITs reviewed explicitly restricted the use of performance requirements. Does this mean that Contracting Parties are free to impose any discipline on performance requirements?¹⁰¹ 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, stimulating domestic production or boosting exports.¹⁰² In the future, 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 requirement, it is important that they:

- avoid attempts to indirectly include disciplines on performance requirements;
- ensure that whatever disciplines they accept do not go beyond the level of obligations in the Agreement on Trade-Related Investment Measures (TRIMS) of the World Trade Organization (WTO);
- exercise the right to introduce exceptions and make use of reservation to introduce some flexibility in the obligation they accept; they may consider inserting some general exception,¹⁰³

⁹⁹ Petereson, *supra* note 3, at 22.

¹⁰⁰ Peterson, *supra* note 3, at 25.

¹⁰¹ UNCTAD 2007, *supra* note 14, at 64.

¹⁰² 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 distorting effect on global trade.

¹⁰³ Such exceptions may be used to exempt some sensitive sectors or to exempt existing non-conforming measures.

- ascertain whether the new disciplines applies to pre- and post-establishment phase of an investment;
- ascertain whether the discipline is limited to mandatory performance requirements or whether they apply to performance requirements used as a condition for granting advantage or incentive.
- determine whether the discipline 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 may be a better option.

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. Furthermore, some provisions could prove problematic to the extent that they constrain the ability of governments to

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 provision relating to the environment, labor rights or human rights, none impose any obligation on foreign investors or the host state of the investors, none, specifically mentions “sustainable development,” “environmental protection,” labor rights” or “human rights” as an objective, and none allows for block sectoral exemptions to some obligations.

A. Objectives/Preambles

Do China-Africa BITs reference “development” as an objective? None of the China-Africa BITs reviewed set out development as a direct objective and none explicitly acknowledged that the host country has any right to development.¹⁰⁴ The primary purpose of all the BITs is to create favorable conditions for investment. Development is neither mentioned in the preambles to the BITs nor in the substantive provisions of the agreements. Furthermore, the fact that China and 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 is that the Contracting Parties are at the same level of development and will reap equal benefit from the agreements. 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.”

China-Ghana BIT	China-Benin BIT	China-Uganda BIT
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¹⁰⁴ China-Africa BITs are not unique in this respect as most BITs do not set out development as their central objectives. See Luke Eric Peterson, *Bilateral Investment Treaties and Development Policy-Making* 4 (2004) (observing that “references to development are exceedingly rare in treaties pushed by a number of Western governments with developing countries.”).

<p style="text-align: center;"><u>Preamble</u></p> <p>The Government of the People’s Republic of China and the Government of the People’s Republic of Ghana.</p> <p>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.</p>	<p style="text-align: center;"><u>Preamble</u></p> <p>The Government of the People's Republic of China and the Government of the Republic of Benin</p> <p>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....</p>	<p style="text-align: center;"><u>Preamble</u></p> <p>The Government of the People's Republic of China and the Government of the Republic of Uganda</p> <p>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....</p>
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Under the Vienna Convention on the Law of Treaties, preambles do not create legally binding rights. However, they constitute part of the context of an agreement and can become important in the event a particular treaty is interpreted.¹⁰⁵ It is therefore troubling that existing China-Africa BITs do not emphasize key development policy objectives such as the goal of environmental conservation or the goal of sustainable development. A good example of this is the BIT between the Republic of Korea and Trinidad and Tobago in which Contracting States expressed conviction that the objectives of creating favorable conditions for investment “can be achieved without relaxing health, safety and environmental measures of general application.” In the same vein, in the fifth preambular paragraph of the 2008 US-Rwanda BIT, Contracting Parties expressed 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.”¹⁰⁶

B. Labor Rights

¹⁰⁵ UNCTAD 2007, *supra* note 14, 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.”).

¹⁰⁶ See generally *Treaty Between the Government of the United States of America and the Government of the Republic of Rwanda Concerning the Encouragement and Reciprocal Protection of Investments, 2008*.

The implication of the activities of corporations from other developing countries on labor rights in Africa is a concern. With increased FDI into Africa from other developing countries, new foreign players and employers are appearing on the scene. Unfortunately, many countries in the continent lack the capacity to effectively assess the employment and labor law implications of Africa-South arrangements. Anecdotal evidence suggests that labor rights violations are occurring. A baseline study by the International Labor Organization (ILO) of labor practices on construction sites in the United Republic of Tanzania involving eleven large construction projects found that three of the four projects found to have exceptionally low labor standards, with long working hours, low pay, low standard of occupational safety and health (OSH) and a poor record on workers' rights were operated by Chinese contractors.¹⁰⁷

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. Countries in Africa must also explore how BITs can be used to protect labor rights. Although arguably very weak and ambiguous,¹⁰⁸ the U.S. Rwanda BIT nonetheless contains a provision relating to labor rights. In Article 13, the Parties “recognize that it is inappropriate to encourage investment by weakening or reducing the protections afforded in domestic labor laws.” 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 adherence to the internationally recognized labor rights ... as an encouragement for the establishment, acquisition, expansion, or retention of an investment in its territory.”

C. Environmental Protection

Africa-South economic cooperation is orchestrating new activities in the extractive industry, is spurring infrastructure development in Africa on a scale never seen before, and may also spur industrialization in the continent in the near future. China has become a major player in the development of hydropower in Africa and its investments are generally concentrated in environmentally sensitive sectors. These developments raise serious questions about the environmental consequences of Africa-South cooperation. Environmental concerns in the context of Africa-South cooperation are heightened by the fact that many of the activities in the extractive industry and the construction sector involve hitherto unknown corporations – companies that are typically not on the radar of civil society organizations and are yet to develop credible environmental policies. The last decade Troubling projects of the past decade include:

- the Belinga mine project in Gabon, a US\$3.5 billion dam construction project involving a Chinese company which threatened the destruction of the Kongou Fall in the Inwindo National Park;

¹⁰⁷ The nationalities of the main contractors that were part of the study are Chinese (4), Japanese (2), South African (1), Kuwaiti (1), Danish (1) and Indian (1). The study found that three projects – two with South Africa contractors and one with Norwegian contractor - had consistently high standards. See International Labour Organization, Baseline Study of Labour Practices on large construction sites in the United Republic of Tanzania, Working Paper 225 84-85 (2005)

¹⁰⁸ For example, labor law is narrowly defined to mean statutes and regulations “directly related” to specified internationally recognized labor rights.

- the Merowe Dam in Sudan, a US\$519 million project approved by the China Ex-IM Bank and credited for displacing more than 50,000 Sudanese from the Nile Valley into desert locations;
- the Gibe 3 Dam in Ethiopia, 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. The dam threatens the livelihood of 500,000 indigenous, according to environmental groups; and

In the last decade China has improved its environmental laws, policies and institutions¹⁰⁹ and Chinese investors and financiers have adopted new environmental guidelines.¹¹⁰ 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. Article 12 of the US-Rwanda BIT addresses environmental issues. 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.” 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 protections afforded in those laws as an encouragement for the establishment, acquisition, expansion, or retention of an investment in its territory.”

VII. LESSONS LEARNED: TOWARDS AN AFRICAN BIT PROGRAM ?

Despite the rhetoric of mutual benefit, win-win outcome and solidarity that pervade South-South discourse, Africa-China BITs appear to mirror Africa-North BITs and do not deviate from the standard model that have developed over time to any significant degree. There is presently no evidence to suggest that FDI and BIT negotiated within the framework of South-South cooperation will not fail Africa as previous FDI have. There is also 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 those of capital-importing countries. Investors need assurance that their property is safe in the countries that they invest in. Given intense competition for foreign sources of development capital, capital-importing countries use BIT if not to attract FDI at least to signal their willingness to create a safe environment for foreign investment. Like Western nations, capital-exporting developing countries need as much assurance about their investment in Africa. Arguably, South-South

¹⁰⁹ China created a Ministry of Environmental Protection, strengthened environmental regulations, and adopted a green credit policy. State-owned Assets Supervision and Administration Commission of the State Council (SASAC) publicly issued CSR Guideline for State-Owned Enterprises.

¹¹⁰ 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* <http://www.eastafricaforum.net/2010/06/08/ethiopia-dam-blot-on-chinas-aid-record/>

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.¹¹¹ From the perspective of China, therefore, argument could be made that BITs with African countries are not only very important but are absolutely essential. Most of the countries in Africa are considered high risk destinations. Additionally, China's involvement in Africa is primarily in the natural resource sector – a sector that is very volatile and a continuous source of conflict. Indeed, Congyan questions whether China's existing BITs are effective in protecting Chinese FDI¹¹² 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.”

For Africa, the continent's failure to attract FDI and the failure of FDIs 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.¹¹³ In a 2005 Decision, the Executive Council of the Africa 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 activities.”¹¹⁴ Thus for Africa, the fact that foreign investment and foreign aid are often the only sources of financing for the continent,¹¹⁵ the fact that compared to other regions, Africa still attracts the least FDI, and the fact that available data indicates that the continent is one of the riskiest region to do business,¹¹⁶ all combine to put pressure on African governments to hastily negotiate and ratify very liberal BITs without due regard to their development implications.

Undoubtedly, there are tough choices ahead for capital-receiving countries in Africa considering negotiating BITs in the future. In negotiating BITs with China and other Southern partners, the goal should be to strike the right balance between the interest of the investors and public interest. Given the popularity of FDIs, the real possibility that more Africa-South BITs will be negotiated in the future, the growing complexity and sophistication of BITs, and the

¹¹¹ 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).

¹¹² Congyan, *supra* note 31, at 639 (arguing that although 74% of the destination of Chinese OFDI are covered by Sino-foreign BITs but that this does not mean that existing BITs are 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.).

¹¹³ Africa Union, *Decision on Trade Facilitation*, DOC.EX.CL/188 (VII), Executive Council, Seventh Ordinary Session, 28 June – 2 July 2005.

¹¹⁴ Africa Union, *Decision on Trade Facilitation*, DOC.EX.CL/188 (VII), Executive Council, Seventh Ordinary Session, 28 June – 2 July 2005.

¹¹⁵ 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).

¹¹⁶ World Bank, 2010 DOING BUSINESS INDICATORS (2010).

importance of BITs in the global governance architecture of foreign investments, there is 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, when considering BITs key questions must be asked. For example:

1. How can countries in Africa best harness extractive and non-extractive FDI direct investment for development?
2. How can BITs be used, in conjunction with other policies, to capture the benefits and avoid 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.

1. 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.¹¹⁷ However, African government must be reminded that despite the proliferation of BITs, existing literature is mixed on the impact of BITs on FDI flows to developing countries.¹¹⁸ While some studies suggest that the conclusion of BITs could lead to higher FDI inflows,¹¹⁹ others studies suggest that the existence of BITs have no effect on FDI flows.¹²⁰ For many countries, BITs appear to play no role in stimulating FDI inflows. China opened up to investment in 1978 and was found attractive as an investment destination long before the country adopted a liberal BIT policy. Thus, even at the height of Beijing's hostility to BITs, China saw sizeable flow of investments from countries

¹¹⁷ Asia Development Bank, ASIA DEVELOPMENT OUTLOOK 2011 65 (2011).

¹¹⁸ South Center, *supra* note 54, at para. 88.

¹¹⁹ *See generally* Neumeyer, Eric and Laura Spess, *Do Bilateral Investment Treaties Increase Foreign Direct Investment to Developing Countries?* WORLD DEVELOPMENT, vol. 33, no. 10, pp. 1567–1585 (2005); J. Salacuse and N. Sullivan, *Do BITs Really Work? An Evaluation of Bilateral Investment Treaties and Their Grand Bargain*, HARVARD INTERNATIONAL LAW JOURNAL, 46, 67-130 (2005); Peter Egger and Michael Pfaffermayr, *The Impact of Bilateral Investment Treaties on Foreign Direct Investment*, JOURNAL OF COMPARATIVE ECONOMICS 32(4): 788–804 (2004); Yoram Haftel, *Flatification Counts: US Investment Treaties and FDI Flows into Developing Countries*, REVIEW OF INTERNATIONAL POLITICAL ECONOMY 17(2): 348–377 (2010); Karl P. Sauvant and Lisa E. Sachs, eds., *THE EFFECT OF TREATIES ON FOREIGN DIRECT INVESTMENT: BILATERAL INVESTMENT TREATIES, DOUBLE TAXATION TREATIES, AND INVESTMENT FLOWS* (Oxford: Oxford University Press, 2009).

¹²⁰ M. Hallward-Driemeir (2003) *Do Bilateral Investment Treaties Attract FDI ? Only a bit... and they could bite*, World Bank Policy Research Paper WPS 3121; Jennifer Tobin and Susan Rose-Ackerman (2005) *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

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. Factors that affect BIT inflow are varied and include: state of financial development, the quality of institutions and the investment climate, labor costs and labor quality, personal relations a firm has with local partners and customers, and even ethnicity and social connections. Rather than conclude questionable BITs, countries could consider adopting targeted policies to attract investors to specific sectors needing foreign capital and associated know-how.

2. BITs are no substitute for good legal and institutional framework

BITs are not substitutes for weak domestic institutions.¹²¹ Rather than limit/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.¹²² 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.¹²³ Improving Africa's investment climate will enhance the continent's competitiveness and does not carry the costly tradeoff associated with BITs. Many accepted conditions for solid and sustained economic growth are presently absent in many countries in Africa. These include sound macroeconomic policies, 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. Not only has Brazil been successful at attracting FDI, but it has attracted investment in capital and technology-intensive sectors – sectors in Africa dire need of foreign capital.¹²⁴

3. Growing complexity, breadth, and sophistication of BITs require enhanced negotiation and legal skills yet need to question capacity-building technical assistance available

As their content become 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 the BITs. While the main contents of BITs are similar, there could be considerable differences in their substantive detail hence the need care and caution in negotiations.¹²⁵ This poses a problem for many countries in Africa and raises questions about the quality of BIT-related technical assistance that is presently

¹²¹ See Matthias Busse, Jens Königer, and Peter Nunnenkamp, *FDI Promotion Through Bilateral Investment Treaties: More Than a Bit?* REVIEW OF WORLD ECONOMICS 146(1): 147–177 (2008)(finding that BITs may even substitute for weak institutions in developing countries.).

¹²² *Id.*, para. 30 (noting that BITs do not perform their primary function – investor protection – in the absence of good domestic institutional quality.”).

¹²³ Johnson, Emory Law Journal 921 (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.).

¹²⁴ South Center, *supra* note 52, at para. 92.

¹²⁵ UNCTAD 2007, *supra* note 14 (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.”).

available. What is the primary objective of the capacity-building assistance programs that are currently available? Is the principal objective merely to facilitate the negotiation of traditional-style BITs by developing countries? The UNCTAD secretariat has an initiative on capacity-building in developing countries on issues related to international investment agreements. According to UNCTAD, part of the initiative is to give developing countries “an opportunity to negotiate bilateral investment treaties for the promotion and protection of investment (BITs) and double taxation treaties (DTTs).”¹²⁶ In 2003, the UNCTAD Secretariat organized a round of BITs negotiations for a group of English-speaking African LDCs in Geneva (Switzerland).¹²⁷ The goal of the round is somewhat questionable. According to UNCTAD, the principal objective of the round was “to facilitate the negotiation of BITs by LDCs with other developing and developed countries.” The exercise resulted in the conclusion of 19 BITs. 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.”¹²⁸ Also interesting was UNCTAD’s role which was passive at best. The UNCTAD secretariat 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, prepared the negotiating matrix and the programme for the round. During the round, the Secretariat made available conference and meeting facilities, secretarial backstopping and background documentation to enable negotiators to consult in case of difficulties arising from the negotiations.¹²⁹

4. Comprehensive assessment of benefits and costs of BITs

African countries as a whole might consider suspending the negotiation of new BITs until they have comprehensively assessed the costs and benefits of existing instruments, developed more skills at negotiation, and analyzed how best to balance the rights of investors with the public interest. Recently, Ecuador took a very controversial steps to suspend negotiation of new BITs, denounce some existing and in-force BITs, force renegotiation of old BITs, and withdraw consent to the jurisdiction of ICSID over certain investment disputes.¹³⁰ The paper does not suggest that countries in Africa follow Ecuador’s path but rather calls for more measured approach to BIT negotiations in the future. What is needed is a comprehensive, strategic and reasoned approach to BITs rather than the present ad-hoc, haphazard approach.

5. Broad stake-holder involvement in BIT negotiations will yield more development-dividend

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

¹²⁶ UNCTAD, *Final Report: Round of Negotiations of Bilateral Investment Treaties for English-Speaking African Countries*, 30 June - 4 July 2003.

¹²⁷ *Id.* The round brought together the following LDCs: Botswana, Ethiopia, Ghana, Kenya, Lesotho, Malawi, Tanzania, Uganda and Zimbabwe.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ South Center, *supra* note 54, at para. 100.

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 and because most of the investment activities implicate the natural resource sector, a sector where human rights and environmental pollution are rife and where long term development goals can be compromised with a stroke of the pen.

6. Ensure that rights secured under concluded BITs are not ceded in other types of international investment agreements

Policy makers in Africa must ensure that 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 BITs that follow the admission clause model and then sign an FTA that include a right of establishment in both service and non-service sectors.¹³¹ Consequently, it is important that policy makers review market access commitments in future FTAs and ensure that they do not eliminate flexibility retained in prior BITs.¹³²

7. Study how other developing countries approach BITs

In many respects, China-Africa BIT 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 policy makers in Africa enhance their ability to negotiate development-sensitive BITs.

CONCLUSION

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? Although Africa-China BITs departs 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

¹³¹ South Center, *supra* note 54, at 21.

¹³² *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).

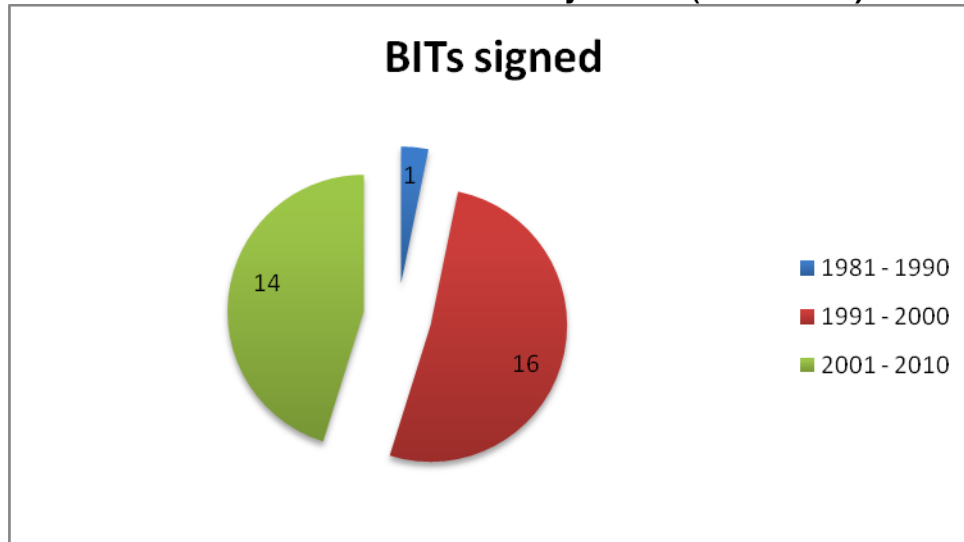
instruments which China used in the past to regulate FDI in order to build up national industry.¹³³

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

¹³³ South Center, *supra* note 54, at 25.

Annex 1

China-Africa BITs breakdown by decade (1980 - 2010)



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
Swaziland	03/03/98
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

Annex 2

Bilateral Investment Treaties between China and African Countries¹³⁴ 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

¹³⁴ Source: United Nations Conference on Trade and Development (available at: http://www.unctad.org/sections/dite_pcbp/docs/bits_china.pdf)

Annex 3

Double Taxation Treaties (DTT s) between China and African Countries¹³⁵ 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	? UNCTAD
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	? UNCTAD

Double Taxation Treaties (DTT s) between China and African Countries Concluded as of June 1, 2010 Alphabetical Listing

Country	Date of Signature	Document Available
Algeria	11/06/06	Y
Egypt	08/13/97	? UNCTAD
Ethiopia	05/14/09	? UNCTAD
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

¹³⁵ Source: Source: United Nations Conference on Trade and Development (available at: <http://www.unctad.org/templates/Page.asp?intItemID=4505&lang=1>), worldwide-tax.com (available at: http://www.worldwide-tax.com/china/chi_double.asp)

Annex 4

China – Africa BIT – DTT 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

Annex 5

Country, BIT signed	NT	MFN	Absolute standard of treatment: 1 – fair & equitable, 2- full protection, 3- no unreasonable treatment, 4 – no discrimination	Investor – State dispute resolution: 1- Negotiations 2 - Host state's court, 3 –ICSID, 4 – Ad hoc., 5- ICC, 6 – Arbitrator.	Expropriation	Compensation. Equivalent to the value of property: 1 - before expr., or 2 - at the time of expr.	Transfer of Funds	Compensation for losses due to war/ civil strife Application of: 1 – NT 2 – MFN + IF the state take any measures	Environment	Labor/ HR	IP/Tech. 1- Special provisions, 2 – Covered under the definition of investment.
Ghana, 10/12/89	NO	YES. Post admission model.	1, 2	3	YES	YES, 2	YES	YES, 2 IF	NO	NO	2
Egypt, 04/21/94	YES. Post admission model.	YES. Post admission model.	1, 2, 3, 4	1, then 2, 4 (only for compensation)	YES	YES, 2	YES	YES, 2 IF	NO	NO	2
Swaziland, 03/03/98	NO	YES. Unrestricted.	1, 2, 3, 4	1, then 5 or 4 or 6	YES	YES, 1	YES	YES, 1, 2	NO	NO	2
Ethiopia, 05/11/98	NO.	YES. Post admission model.	1, 2	1 then either 2 or (3 or 4)	YES	YES, 2	YES	YES, 2 IF	NO	NO	2
Botswana, 06/12/00	YES. Post admission model.	YES. Post admission model.	1, 2, 3, 4	1, then 2 or 3 or 4	YES	YES, 1	YES	YES, 1, 2	NO	NO	2
Sierra Leone, 05/18/01	YES. Post admission model.	YES. Post admission model.	1, 2, 3, 4	1, then 2 or 3 or 4	YES	YES, 1	YES	YES, 1, 2	NO	NO	2
Cote d'Ivoire, 09/23/02	YES. Post admission model.	YES. Post admission model.	1, 2, 3, 4	1, then 2 or 3 or 4	YES	YES, 1	YES	YES, 1, 2	NO	NO	2
Djibouti, 08/18/03	YES. Post admission model.	YES. Post admission model.	1, 2, 3, 4	1 then either 2 or (3 or 4)	YES	YES, 1	YES	YES, 1, 2 IF	NO	NO	2
Benin, 02/18/04	YES. Post admission model.	YES. Post admission model.	1, 2, 3, 4	1 then either 2 or 3, or 4 (1 choice)	YES	YES, 1	YES	YES, 1, 2	NO	NO	2
Uganda, 05/27/04	YES. Unrestricted.	YES. Unrestricted.	1, 2, 4	1 then 2 or 3	YES	YES, 1	YES	YES, 1, 2	NO	NO	2
Tunisia, 06/21/04	YES. Post admission model.	YES. Post admission model.	1, 2, 3, 4	1 then 2 or 3 or 4	YES	YES, 1	YES	YES, 1, 2	NO	NO	2

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