THE FUTURE OF BILATERAL INVESTMENT TREATIES BETWEEN CHINA AND AFRICA

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Introduction

At present the negotiation of and research into Bilateral Investment Treaties (BITs) in China focus on the China-US BIT and the China-EU BIT. However, more recently the investment status of African countries in relation to the world's major economies has gained renewed importance. Concluding new BITs with African countries seems to have become a race amongst the world's larger economies: Canada-Africa BITs have flourished over the past three years;[1] the US has nine effective BITs with African countries.[2] Besides these BITs the US has more International Investment Agreements (IIAs), that is, Trade and Investment Framework Agreements (TIFAs) with African countries and regions than any other major economic power.[3] The TIFAs laid the foundations for future negotiations on promoting and protecting US-Africa investment. Remarkably, the US has resumed exploratory BIT discussions with a number of African countries, for example, Ghana, and at present the US is negotiating a high-standard BIT with Mauritius.[4]

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1 This conclusion can be evidenced by the BITs concluded with Benin, Burkina Faso, Cameroon, Côte d'Ivoire, Guinea, Mali, Nigeria, Senegal, Tanzania: see 'Canada, Bilateral Investment Treaties (BITs)', available at http://investmentpolicyhub.unctad.org/IIA/CountryBits/35#iiaInnerMenu (accessed 22 December 2016).

2 These are BITs with Cameroon, the Democratic Republic of the Congo, the Republic of the Congo, Egypt, Morocco, Mozambique, Rwanda, Senegal, Tunisia: see 'United States of America, Bilateral Investment Treaties (BITs)', available at http://investmentpolicyhub.unctad.org/IIA/CountryBits/223#iiaInnerMenu (accessed 22 December 2016).

3 'United States of America, Other Investment Agreements (Other IIAs)', available at http://investmentpolicyhub.unctad.org/IIA/CountryOtherlias/223#iiaInnerMenu (accessed 22 December 2016).

4 See 'Office of the United States Trade Representative, Ghana', available at https://ustr.gov/countries-regions/africa/west-africa/ghana (accessed 13 April 2016); see 'Office of the United States Trade Representative, United States and Mauritius Launch Investment Treaty Talks', available at https://ustr.gov/about-us/policy-offices/press-office/press-releases/2009/august/united-states-and-mauritius-launch-investment-treat (accessed 22 December 2016).

European countries have always had many BITs with African countries due to their historically-close economic relations. In addition, the EU and African countries are either implementing Economic Partnership Agreements (EPAs) with BIT-equivalent provisions or have concluded EPA negotiations as complementary regimes to BITs.[5] However, the successful implementation of these EPAs has been fraught with obstacles.[6]

Comparatively, Chinese investments in Africa face greater risks than investments by other countries. China has eighteen effective BITs with African countries at present and most of these have shortcomings as they are early-generation BITs. A further sixteen signed BITs have not come into force according to the authority of the Ministry of Commerce of China.[7] This situation does not adequately reflect the expansion of China's outward investment into Africa and the economic relationship (especially investment relationship) between China and African countries which is becoming increasingly important.

This paper introduces an overall picture of China-Africa BITs and briefly reviews the important clauses of China-Africa BITs by selecting four examples from four generations of China-Africa BITs. Then, by correlating the transformation of international investment law and the recent development of African BITs, the paper argues that the optimal BIT for the balancing of interests between the investors and the host states on the basis of South-South co-operation can be explored.

General observations concerning Bilateral Investment Treaties between China and African countries

There are a total of eighteen effective Bilateral Investment Treaties between China and African countries: they are with Ghana, Egypt, Morocco, Mauritius, Zimbabwe, Algeria, Gabon, Nigeria, Sudan, Cape Verde, South Africa, Ethiopia, Tunis, Equatorial Guinea, Madagascar, Mali, Tanzania and the Democratic Republic of the Congo (DRC) respectively. Among them, one BIT was concluded in the 1980s, ten were concluded in the 1990s, and seven BITs came into force in the 2000s. Correspondingly, only nine BITs include the International Centre

5 'Overview of EPA negotiations' (updated February 2016), available at http://trade.ec.europa.eu/doclib/docs/2009/september/tradoc_144912.pdf (accessed 13 April 2016).

6 'EPAs tumble as three West African states refuse to sign' *NewsGhana* (1 March 2016), available at http://www.ocnus.net/artman2/publish/Africa_8/EPAs-Tumble-As-Three-West-African-States-Refuse-To-Sign.shtml (accessed 4 November 2016).

7 'China's Bilateral Investment Treaty', available at tfs.mofcom.gov.cn/aarticle/Nocategory/201111/20111107819474.html (accessed 22 December 2016).

for Settlement of Investment Disputes (ICSID) arbitral clause: they are the BITs with Morocco, Gabon, Tunisia, Ethiopia, Equatorial Guinea, Madagascar, Mali, Tanzania and the DRC. The other nine effective BITs include provisions of *ad hoc* arbitration only. Further, except for the BITs with Equatorial Guinea, Madagascar, Mali, Nigeria, Tanzania and the DRC, only disputes concerning the amount of compensation for expropriation may be submitted to an international *ad hoc* arbitral tribunal in the other twelve effective BITs.

The remaining sixteen BITs have yet to enter into force due to various reasons submitted by China's counterparts. Most of the inactive BITs are earlier two generations of BITs which may not ever come into effect as they are now arguably obsolete. Other BITs awaiting entry into force are third-generation BITs which refer to investment protection. Whether these BITs will enter into force remains to be seen. China has not concluded any BITs with the remaining twenty African countries even though these, such as Angola, include important investment destinations for Chinese investors. In contrast, some countries, such as Senegal and Rwanda, have effective BITs with the US but not with China.

Looking back at the history of the Chinese Model BITs, we find four generations of Model BITs: the 1984 Chinese Model BIT, the 1989 Chinese Model BIT, the 1997 Chinese Model BIT,[8] and the 2010 Draft Chinese Model BIT.[9] Accordingly, BITs concluded by China can be classified into four generations: the first generation (1982–1989), the second generation (1990–1997), the third generation (1998–2009), and the BITs concluded on the basis of the 2010 Draft Chinese Model BIT could be considered fourth-generation BITs. An alternative classification is based on these criteria: 1993 (when China acceded to the ICSID Convention), 1998 (when China signed a BIT with Barbados), 2012 (when China concluded a BIT with Canada) and future China-US BITs. However, to analyse China-Africa BITs this paper adopts the former classification.

A closer look at the specific provisions of BITs between China and African countries shows that using a chronological classification is not always accurate for China-Africa BITs. For example, the China-South Africa

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8 With respect to the three Model versions, see N Gallagher & WH Shan *Chinese Investment Treaties: Policies and Practice* (2009) 423–439 (Appendices). Here, 1984, 1989 and 1997 are only approximate times.

9 As concerns the 2010 Chinese Model BIT Version IV, see XT Wen 'Comments on the Draft China Model BIT (I)' (2011) 18(4) *Journal of International Economic Law* (Chinese) 169; XT Wen 'Comments on the Draft China Model BIT (II)' (2012) 19(1) *Journal of International Economic Law* (Chinese) 132; and XT Wen 'Comments on the Draft of China's Model BIT (III)' (2012) 19(2) *Journal of International Economic Law* (Chinese) 57.

BIT was concluded on 30 December 1997. However, in comparison with the provisions of the 1997 Chinese Model BIT and the China-Barbados BIT of 1998, it appears to belong to the third-generation BIT. Conversely, although the China-Ethiopia BIT and the China-Cape Verde BIT were concluded on 11 May 1998 and 21 April 1998 respectively, according to their provisions they are part of the first-generation BITs.

Generally speaking, different generations of BITs reflect their corresponding Model BIT and have different features. The first-generation BITs and the 1984 Chinese Model BIT emphasise the regulatory sovereignty of the host states. The second-generation BITs and the 1989 Chinese Model BIT give a little more investment protection but show no significant changes from the first-generation BITs. The third-generation BITs and the 1997 Chinese Model BIT give preference to the protection of the benefits of the investors; and the fourth-generation BIT and 2010 Draft Chinese Model BIT attempt to balance the benefits between investors and the host states.

Therefore, the present effective first-generation BITs include eight BITs with Ghana, Egypt, Mauritius, Zimbabwe, Algeria, Sudan, Cape Verde and Ethiopia; the effective second-generation BITs include two BITs with Morocco and Gabon; the effective third-generation BITs cover seven BITs with Nigeria, South Africa, Equatorial Guinea, Madagascar, Tunisia, Mali and the DRC; the only effective fourth-generation BIT is the China-Tanzania BIT.

On the whole, the BITs between China and African countries have a very low effectiveness rate. Most of the effective BITs are first- and second-generation BITs with a low protection level for investors. A typical feature in these treaties is that, at most, only the amount of compensation for expropriation may be submitted to an *ad hoc* international arbitral tribunal. As for other investment disputes, the host state reserves the right to give consent to international arbitration on a case-by-case basis and the exhaustion of local remedies may be required. In addition, according to the first-generation BITs, the investors and their investments cannot enjoy even 'national treatment', which accords the investors and their investments no less favourable treatment than that accorded to the host state's own investors and their investments in like circumstances. Africa is an important investment destination but with a big risk for China[10] as the first- and second-generation BITs play only a limited role in

[10] For example, the nationalisation and expropriation of the Zimbabwe mining sector and especially the diamond sector have already damaged the interests of the Chinese overseas investors. Chinese-run Anjin Investments challenged the government ban on diamond-mining operations at the High Court in March 2016. See M Dzirutwe et al 'Zimbabwe's Mugabe says government will take over

protecting the benefits of Chinese investors. African investment in China has become increasingly dynamic and could also benefit from promotion and protection through BITs.

The third-generation China-Africa BITs offer a higher level of protection to investments. The investor enjoys substantive protection such as national treatment, most-favoured-nation treatment (MFN treatment), fair and equitable treatment, and in particular enjoys the procedural right to take investment disputes to international investment arbitration. However, it is necessary that updated BITs, which can balance the interests of all parties involved, be concluded between China and African states.

Exemplification of features and trends of China-Africa BITs

Unlike the US-style BITs which are intricate, lengthy and hold the parties to high standards, BITs between China and African countries are simple and succinct, and each has only twelve to fourteen provisions, including the preamble, definitions, and provisions on the promotion and protection of investments, investment treatments, expropriation and compensation, compensation for losses, transfers, subrogation, settlement of disputes between contracting parties, settlement of disputes between investors and states, entry into force, application, duration and termination. At most, eighteen provisions are included in the China-Tanzania BIT which introduces and draws on the new development of BITs.

This section deals with the selected China-Ghana BIT (the first-generation BIT based on the 1984 Chinese Model BIT), the China-Gabon BIT (the second-generation BIT based on the 1989 Chinese Model BIT), the China-Madagascar BIT (the third-generation BIT based on the 1997 Chinese Model BIT) and the China-Tanzania BIT (the fourth-generation BIT based on the 2010 Draft Chinese Model BIT), and a selection of four kinds of key treaty provisions to represent and expound the four generations of BITs between China and African countries, thus showing the progress of China-Africa BITs. After surveying all BITs between China and Africa, these examples best reflect the trends and limitations of BITs between China and African countries. Further, this research takes a textual analysis approach in view of the fact that there is no case precedent between China and African countries at present. In addition, except for the preamble, the structure of the sections under each specific subtitle (below) will follow the order of the four selected BITs in order to make the narration clear.

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all diamond operations' (4 March 2016), available at www://www.reuters.com/article/us-zimbabwe-diamonds-idUSKCN0W52J3 (accessed 17 April 2016).

Preamble

The preamble declares the value orientation, guides the concrete provisions of the treaty, and helps in interpreting the treaty. The language used in the preambles of all four BITs shows that one point remains particularly consistent: the 'promotion and protection of investment' which is the major common feature of all BITs. In addition, economic co-operation 'on the basis of equality and mutual benefit' embodies one of the Five Principles of Peaceful Coexistence under which China deals with foreign relations. The China-Ghana BIT specially emphasises 'sovereignty', which is also one of the Five Principles of Peaceful Coexistence. Besides desiring to intensify the co-operation of both states 'on the basis of equality and mutual benefit', the China-Gabon BIT intends to create favourable conditions for investment through the BIT and increase prosperity in both states accordingly. The China-Madagascar BIT desires to intensify the investment relation between the two countries and recognises that the BIT 'will be conducive to transfers of operational capital and technology in both states'. The China-Tanzania BIT further emphasises economic sovereignty. However, the most outstanding and modern features of the preamble to the China-Tanzania BIT are the goals of 'encouraging investors to respect corporate social responsibilities' and 'promoting healthy, stable and sustainable economic development, and to improve the standard of living of nationals'. Admittedly, these points reflect the efforts of protecting the host state and its people and promoting a balance of interests between the investors and the host state.

In sum, it is clear from the preambles discussed above that China considers investment relations with Africa to be a kind of economic co-operation on the basis of equality, mutual benefit and mutual respect for sovereignty and also an embodiment of friendly international relations. However, contemporary fourth-generation China-Africa BITs also reflect the most recent developments of international investment law.

Protection and treatment standards of investments

China-Ghana BIT [11]

Under the provisions of the China-Ghana BIT we find that it was concluded on the basis of the 1984 Chinese Model BIT. The treatments

[11] See Agreement between the Government of the People's Republic of China and the Government of the Republic of Ghana Concerning the Encouragement and Reciprocal Protection of Investments (China-Ghana BIT), available at http://tfs.mofcom.gov.cn/aarticle/h/aw/201002/20100206778950.html (accessed 22 December 2016), arts 3, 12.

which shall be awarded to the investments are 'equitable treatment' and 'MFN treatment', with equitable treatment being not less favourable than the MFN treatment. However, national treatment cannot be guaranteed to the investments. Finally, preferential treatment shall be applicable when the laws and regulations of the host state award the investments more favourable treatment than that of the BIT. Thus, the host state enjoys the sovereignty to grant better treatment to the investments.

China-Gabon BIT [12]

Compared to the China-Ghana BIT, as a second-generation BIT, the China-Gabon BIT provides that the investment shall enjoy fair and equitable treatment as well as adequate and full protection. In addition, fair and equitable treatment should not be less than national treatment or MFN treatment. The treaty also provides that investments should be free from unjustified or discriminatory measures from the other side. Thus, relatively speaking, the investor enjoys a higher level of protection and more rights.

China-Madagascar BIT

The China-Madagascar BIT emphasises the protection of investments more than the first two BITs. Concerning the treatment of investments, firstly, fair and equitable treatment is stressed as an international law principle, which shall not be impeded in law or in fact, and the legal or *de facto* obstacles to fair and equitable treatment are illustrated;[13] secondly, MFN treatment or national treatment is offered and upheld depending on which treatment is more favourable;[14] thirdly, preferential treatment according to the domestic law of either contracting party or international obligations existing at present or established in the future should be applied.[15] The BIT also states that the investments shall enjoy full and comprehensive protection and security.[16]

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12 See Agreement between the Government of the People's Republic of China and the Government of the Republic of Gabon for the Promotion and Reciprocal Protection of Investments (China-Gabon BIT), available at http://tfs.mofcom.gov.cn/aarticle/h/aw/201002/20100206778962.html (accessed 22 December 2016), arts 2.2, 3.1 and 3.2.

13 See Agreement between the Government of the People's Republic of China and the Government of the Republic of Madagascar for the Reciprocal Promotion and Protection of Investments (China-Madagascar BIT), available at http://tfs.mofcom.gov.cn/aarticle/h/aw/201002/20100206785042.html (accessed 22 December 2016), arts 3.1, 3.2.

14 See China-Madagascar BIT, art 4.1.

15 Id art 9.

16 Id art 5.1.

China-Tanzania BIT [17]

The China-Tanzania BIT points out that each contracting party shall protect the investments of the other contracting party 'in accordance with its laws and regulations'. The investors and their investments shall enjoy national treatment, MFN treatment, and fair and equitable treatment. However, unlike the previous BITs between China and other African countries, the applicable scope of these treatments is clarified and limited. The national treatment applies only to the operation, management, maintenance, use, enjoyment, and the sale or disposal of the investments. Aside from these aspects, MFN treatment applies to the establishment, acquisition and expansion of investments, which, in fact, is the provision of admission of the investment and reflects a degree of liberalisation of investment, but is not so ambitious as to include national treatment of admission of the investment. The fair and equitable treatment is clarified to include three aspects: fair judicial proceedings, no obviously discriminatory or arbitrary measures and full protection and security, which require that the host state takes reasonable and necessary police measures.

Some exceptions as limitations are attached to the three treatments. For national treatment, the host state can grant 'incentives or preferences to its nationals for the purpose of developing and stimulating local entrepreneurship provided that such measures shall not significantly affect the investments and activities of the investors'. For MFN treatment, besides the traditional exception of regional economic integration organisation and taxation arrangements, it also excludes the dispute settlement provisions in order to prevent the MFN treatment clause from being abused. For fair and equitable treatment, it is stressed that a breach of any article of the China-Tanzania BIT or an article of another agreement does not constitute a breach of fair and equitable treatment; therefore, fair and equitable treatment is not an 'Empire Clause' anymore in the China-Tanzania BIT.[18]

In summary, it is evident that investment protection and treatment standards are intensified gradually from the China-Ghana BIT and China-

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17 See Agreement between the Government of the People's Republic of China and the Government of the United Republic of Tanzania concerning the Promotion and Reciprocal Protection of Investments (China-Tanzania BIT), available at http://tfs.mofcom.gov.cn/aarticle/Nocategory/201111/20111107819474.html (accessed 22 December 2016), arts 3, 4 and 5.

18 A German scholar likened the fair and equitable treatment standard in the international investment law to the *bona fide* principle in the civil code, that is, an 'Empire Clause'. See R Dolzer 'Fair and equitable treatment: A key standard in investment treaties' (2005) 39 *The International Lawyer* 87 91.

Gabon BIT to the China-Madagascar BIT. However, the China-Tanzania BIT tries to reduce the rights of the investor and reinforce the regulatory power of the host state, thus achieving the balancing of interests. The general trend of these BITs is to spell out the rights and obligations more and more clearly, thus legal certainty is enhanced.

Provisions on expropriation and losses

China-Ghana [19]

The China-Ghana BIT makes an affirmative statement as to expropriation or nationalisation, that is: 'Either Contracting State may, for the national security and public interest, expropriate, nationalize or take similar measures.' Such actions are subject to the following requirements: (a) under domestic legal procedure; (b) without discrimination; and (c) payment of compensation. In addition, the host state reserves the power to judicially review disputes related to expropriation or nationalisation measures.

The BIT provides MFN treatment to investors of one contracting state who suffer losses in respect of their investments in the territory of the other contracting state owing to war or other similar events on condition that 'the host state takes relevant measures'. It should be said that this provision is not demanding on the host state because it depends on whether the host state takes relevant measures and only MFN treatment is required.

China-Gabon BIT [20]

In a fundamental change the China-Gabon BIT takes a negative stance towards expropriation or nationalisation, which is shown in the expression: 'Neither Contracting Party shall take any measures of expropriation, nationalization or any dispossession having effect equivalent to nationalization or expropriation.' The expropriation or nationalisation, as a kind of exception, must be subject to four conditions: (a) for the public interest; (b) under domestic legal procedure; (c) without discrimination; and (d) against compensation.

Similarly, MFN treatment shall be accorded to investors who suffer losses owing to war or other similar events in the territory of the host state. MFN treatment in this context can take the form of restitution, indemnification, compensation or other settlement, if any.

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19 See China-Ghana BIT, art 4.

20 See China-Gabon BIT, arts 4.1, 5.

China-Madagascar BIT

This BIT not only takes a negative stance towards expropriation or nationalisation, but provides that expropriation must meet more rigorous requirements, such as '(a) adopting measures for the public interests under *good* legal framework; (b) without discrimination and *not contrary to the commitments* of the contracting parties; (c) against *fair* compensation when adopting measures'.[21] Nevertheless, the measures taken for reasons of security, public order, health, ethical and environmental protection and other reasons shall not be regarded as obstacles to fair and equitable treatment.[22]

Finally, investors who suffer losses owing to war or other similar activities in the territory of the host state shall be accorded MFN treatment and national treatment as well, as regards restitution, indemnification, compensation, or other settlement.[23]

China-Tanzania BIT [24]

The expropriation clause in the China-Tanzania BIT indicates specific factors to consider when deciding whether a measure constitutes expropriation so as to avoid the abuse of discretion by the arbitral tribunals. These factors include economic effects, the extent of discrimination, the extent of interference with reasonable expectation, the character and purpose of a measure or a series of measures, and proportionality. Aside from legal expropriation and illegal expropriation, the expropriation clause also clarifies the boundary between expropriation and non-expropriation, and clearly defines the measures for maintaining reasonable public welfare, for example, protecting public health, safety and the environment, provided that these active measures are non-discriminatory and proportionate and constitute legitimate regulatory measures instead of expropriation.

Article 10.2 of this BIT echoes and complements the above non-expropriation clause, and provides that 'nothing in the Agreement shall be construed to prevent a Contracting Party from adopting or maintaining environmental measures necessary to protect human, animal or plant life or health', 'provided that such measures are not applied in an arbitrary or unjustifiable manner, or do not constitute a disguised restriction on international investment'.

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21 See China-Madagascar BIT, art 5 (emphasis added).
22 Id art 3.2.
23 Id art 6.
24 See China-Tanzania BIT, art 6.7.

As for compensation for damages and losses owing to an armed conflict or other similar event in the territory of the host state, the investors and their investments shall enjoy national treatment or MFN treatment, whichever is more favourable to the investor concerned. However, in view of the fact that these two treatment standards are relative treatment standards, it is not necessary for the investor to receive compensation. However, as for losses suffered in the territory of the host state resulting from the acquisition or destruction of an investment by the host state's armed forces or authorities, which were not due to combat action or required by the necessity of the situation, restitution or reasonable compensation is a legal obligation of the host state. As a new provision, it reflects a new concern for the need to protect investors.

In short, it can be seen that the requirements for expropriation or the limitation on the power of the host state are becoming increasingly demanding from the first-generation China-Africa BIT to the third-generation China-Africa BIT. In addition, they differentiate only between legal expropriation and illegal expropriation. However, the fourth-generation BIT further clarifies and subdivides the regulatory action of the host state into legal expropriation, illegal expropriation and legitimate exercising of regulatory power, thus keeping open necessary regulatory space for the host state and also establishing clear limitations on expropriation. As for losses owing to war or other similar activities in the host state, the former two generations of BIT provide only for MFN treatment, but the third-generation BIT offers the investor MFN treatment or national treatment. The fourth-generation BIT accords the investor more favourable treatment than MFN treatment and national treatment. More importantly, the requisition or destruction of an investment by the host state authorities shall be indemnified under the fourth-generation BIT.

Investor-State Dispute Settlement (ISDS)

China-Ghana BIT [25]

Under the China-Ghana BIT, only a dispute concerning the amount of compensation for expropriation may be submitted to an international *ad hoc* arbitral tribunal, and in the ICSID Convention arbitration is not mentioned, for at that time China was not a contracting state of the ICSID Convention. It is obvious that this BIT reserves sovereignty for the host state, free from the jurisdiction of international investment arbitral tribunal proceedings, except for disputes concerning the amount of compensation for expropriation. The substantive law that shall be applied

[25] See China-Ghana BIT, art 10.

is the law of the host state, including its rules on the conflict of laws, the provisions of the BIT, as well as the generally recognised principles of international law accepted by both contracting states.

China-Gabon BIT

If the dispute cannot be settled through negotiations within six months under the China-Gabon BIT, the investor may choose and submit the dispute to (a) a competent court of the host state or (b) the ICSID tribunal. Since China ratified the ICSID Convention in 1993, it is not unexpected that the China-Gabon BIT would include an ICSID arbitration clause. Even so, the parties agreed that only a dispute with respect to the amount of compensation in the case of expropriation is subject to the tribunal's jurisdiction. All other disputes submitted to the tribunal shall be in terms of the mutual consent of both contracting parties.

China-Madagascar BIT [26]

Under the China-Madagascar BIT the investor can choose either the arbitral tribunal or judicial procedures within the territory of the host state or the ICSID tribunal to settle *any investment dispute* if the dispute cannot be settled through negotiations within six months. Therefore, the investor has a choice amongst many different fora to settle *any investment dispute*. Although the host state involved in the dispute may require the investor concerned to complete the domestic administrative review procedures specified by the laws and regulations of that host state before submission to international arbitration, it cannot impede the investor from filing the case with the ICSID tribunal.

China-Tanzania BIT [27]

For any legal dispute between an investor and the host state, if the dispute cannot be settled through negotiation and conciliation within six months, the investor can choose among a domestic judicial approach, ICSID arbitration, *ad hoc* arbitration under the United Nations Commission on the International Trade Law (UNCITRAL) Arbitration Rules and any other institutional arbitration or *ad hoc* arbitration agreed to by the disputing parties, although domestic administrative reconsideration may be requested by the host state before the arbitration. However, the above legal approaches are limited to apply to articles 2–9 and article 14.2 of the BIT.

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[26] See China-Madagascar BIT, art 10.

[27] See China-Tanzania BIT, art 13.

Article 10 (health, safety and environmental measures) and article 11 (denial of benefits) are excluded from the domestic judicial forum and international arbitration procedure. The exclusion of article 10 makes certain omissions of the host state on health, safety and environment under article 10.1 lose justifiability or arbitrability and, in turn, a dispute arising from article 10.1 can be settled only through consultation between the two states. That is to say, if China considers that the host state has offered an encouragement measure under article 10.1, it may only request consultation with the host state.

In addition, both the fork-in-the-road clause (once the investor chooses the domestic judicial channel or international arbitration procedure the choice shall be deemed final) and the prescribed period for arbitration (three years) play a role in restricting access to international arbitration. The specific forms of compensation awarded by the arbitration award and the finality of an arbitration award are also defined and only the final and effective arbitration award is legally binding and thus can be enforced. Finally, the arbitral tribunal can determine that one of the disputing parties shall bear a higher proportion of the costs than the other in order to punish the disputing party who instituted frivolous or unreasonable arbitration.

On the whole, according to the above survey of the four generations of China-Africa BITs, from the first generation to the third generation there is a shift away from the host state wielding undue power. Therefore, under the third-generation BIT the investor enjoys far-reaching protection and treatment standards, upsetting the investor-state balance of interest. In addition, sustainable development objectives and other non-economic values were not included in the former three generations of China-Africa BITs.

Comparatively, the fourth-generation China-Africa BIT, taking the China-Tanzania BIT as an example, should define the future direction of China-Africa BITs because it optimises the balance between the investor and the state. The China-Tanzania BIT adds new provisions such as article 10 (health, safety and environmental measures), article 11 (denial of benefits), article 16 (consultations), and article 17 (interpretation). It further clarifies and refines many other provisions. Thus, the interests of the host state are protected and some important values, such as health, safety and environment, corporate social responsibility and sustainable development, are given due consideration.

It is especially important to note that under article 10.1, a failure of the host state to act in respect of health, safety and environmental measures cannot be taken to arbitration by the investor. Simultaneously, however, the protections on investment are expanded, for example, certain portfolio investments which were not included in the earlier

BITs are now covered in the definition of investment, and the enterprise investors, owned or controlled by a private person or the government, are qualified investors; thus, the protection is extended to state-owned enterprises. Therefore, the fourth-generation BIT tries to guarantee the policy space of the host state whilst it reinforces the protection afforded to the investor.

Transformation and modernisation of BITs and China's practices

The transformation of international investment law is evident in the new development of international investment agreements and the readjustment of arbitration practices. The common trend is to rebalance the rights and obligations between the host state and the investor through both substantive law and procedural provisions. The transformation is inspired by reflections on neo-liberal economic theory and practice by states,[28] and the change of attitude and stance towards BITs and the ICSID Convention by countries such as Indonesia, India, South Africa, and especially by some Latin American countries, which is a reminder to other countries to review their BIT policies and to take into account the critiques of the international investment system by many scholars and non-governmental organisations (NGOs).[29]

The 2010 Draft Chinese Model BIT and the fourth generation of Chinese BITs, which already have been or will be concluded, represent a transformation of Chinese investment policy. Besides the original objectives, such as the 'promotion and protection of investment', 'economic cooperation on the basis of equality and mutual benefit', and general 'mutual respect for sovereignty', some new elements are introduced. These are 'respecting economic sovereignty', 'promoting a healthy and stable economy and sustainable development', 'raising the living standards of citizens' and 'corporate social responsibility'.

As for substantive provisions, the 2010 Draft Chinese Model BIT not only provides guidelines for national treatment, MFN treatment and fair

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[28] See JE Alvarez 'Why are we "re-calibrating" our investment treaties?' (2010) 4 *World Arbitration & Mediation Review* 143 144; 'Gillard Government trade policy statement: Trading our way to more jobs and prosperity, Investor-State Dispute Resolution', available at www.dfat.gov.au/publications/trade/trading-our-way-to-more-jobs-and-prosperity.html (accessed 13 December 2015).

[29] See, for example, SW Schill 'The public law challenge: Killing or rethinking international investment law?', available at www.vcc.columbia.edu/content/public-law-challenge-killing-or-rethinking-international-investment-law#_ftnref5 (accessed 14 December 2015); GV Harten 'Public statement on the international investment regime' (31 August 2010), available at www.osgoode.yorku.ca/public_statement (accessed 5 November 2015).

and equitable treatment, and expropriation provisions, but attaches to them some limitations, especially regarding the following four aspects.

First, national treatment does not apply to establishments, acquisitions and expansions of investments.

Second, dispute settlement procedures in other agreements cannot be invoked by the investor under MFN treatment provisions, thus excluding dispute settlement procedures from MFN treatment.

Third, full protection and guarantee does not equal the need to offer more preferential treatment than for the nationals of the contracting party, and the violation of other provisions of the treaty and provisions of the other treaties does not amount to the violation of fair and equitable treatment.

Fourth, the article on expropriation becomes more meticulous. Besides expropriation being treated as an exception, it must conform to four requirements: a) in the public interest; b) under domestic legal procedure or relevant due process; c) without discrimination; and d) subject to the payment of compensation. Further, indirect expropriation must be decided on the facts and on case-by-case evaluations according to the proportionality principle. The most important change is the insertion of the exception of expropriation to provide that with the exception of rare circumstances, for example, when a measure adopted goes beyond the necessary measures for maintaining legitimate public welfare, the following situations do not constitute indirect expropriations: non-discriminatory regulatory actions by a party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment.

As for procedural provisions, under the 2010 Draft Chinese Model BIT the ISDS provision becomes lengthier and more restrictions are imposed on the rights of the investors. The main differences and the new elements relate to the following: a) the determination of the disputes that the investor can lodge before the domestic courts, the ICSID tribunal, and *ad hoc* tribunals established under the UN Commission on Trade Law (UNCITRAL) rules, or other arbitral agencies or *ad hoc* arbitral tribunals in terms of articles 2–9 or 14; b) the immutability of the forum choice once it has been made; c) the rule that domestic administrative review procedures must be exhausted before an international arbitration may be invoked; d) the three years' limitation of a right to institute an arbitration; e) the prevalence of the law chosen by the parties as the applicable law; f) the rule that an arbitral award must result in monetary compensation and interest, if applicable, and/or restitution; g) the clarification of what constitutes a final and enforceable arbitration award; and h) the burden of arbitration costs which the arbitral tribunal may in its discretion

apportion according to different percentages between the winner and the loser.

On the basis of the 2010 Draft Chinese Model BIT, to varying degrees China has concluded the China-Tanzania BIT (2013), the China-Uzbekistan BIT (2011), the China-Canada BIT (2012) and the China-Japan-Korea Tripartite Investment Agreement (2012). As stated, the China-Tanzania BIT was concluded after the 2010 Draft Chinese Model BIT, therefore, it reflects the transformation of China's BIT practices. The China-Uzbekistan BIT is extraordinarily similar to the China-Tanzania BIT. The China-Canada BIT and the China-Japan-South Korea Tripartite Investment Agreement have developed higher standards, and go further than the 2010 Draft Chinese Model BIT; they represent a further important transformation of the Chinese BIT regime but fall into the fourth-generation BITs. The China-US BIT and the China-EU BIT, which are currently being negotiated, will be more ambitious, especially with respect to the negative list that covers sectors and industries prohibiting or restricting the foreign investment and national treatment of pre-establishment to the foreign investment in sectors and industries not on the negative list — so-called 'New Issues' in the 21st Century — and on account of the fact that state of the art rules of investment protection will be included. Besides BITs, China finalised some important Free Trade Agreements (FTAs), such as the China-Korea FTA and the China-Australia FTA,[30] and a second-stage negotiation between China and Korea, aimed at adopting the newest outcomes of the China-US BIT, has been scheduled. The China-Australia FTA includes detailed ICSID provisions, and will introduce the negative list and national treatment of pre-establishment once the China-US BIT negotiations have been concluded. Up till 22 December 2016 China concluded over 130 BITs, of which 104 are in force,[31] a number ranking China just after Germany.

The state practice and policy of China on international investment protection is consistent with the international trend that focuses on the balancing of rights and obligations and a contemporary view of investment protection and liberalisation. China adopts a proactive attitude to international investment law and embraces international investment law and is bringing its foreign investment law into conformity with it despite some states reacting negatively to the BIT approach. Even

30 The detailed provisions of these two BITs can be found on the Service Network for China's Free Trade Area, available at http://fta.mofcom.gov.cn/index.shtml (accessed 20 April 2016).

31 See 'China's Bilateral Investment Treaty', available at http://tfs.mofcom.gov.cn/aarticle/Nocategory/201111/20111107819474.html (accessed 22 December 2016).

within the BRICS nations, China's performance on BITs is unique.[32] Further, China differentiates between BITs with developed states and those that are concluded with developing states, as will be shown below.

Recent developments in African BITs and the African attitude to international investment law

Some African countries are currently reviewing or have recently revised their model BITs.[33] At the same time, some countries in Africa have more readily signed BITs with other countries during the last three years (2013–2016). The most salient case is the BITs signed between African countries and Canada: in total, nine BITs have been signed with Canada, as mentioned above. In addition, three countries signed a Cooperation and Facilitation Investment Agreement (CFIA) with Brazil in 2015: the Malawi-Brazil CFIA (25 June 2015), Angola-Brazil CFIA (1 April 2015), and Mozambique-Brazil CFIA (30 March 2015). Furthermore, South Africa, Algeria, Morocco, and Tunisia are nearing the conclusion of CFIA negotiations with Brazil. The CFIAs 'establish an institutional framework, thematic agendas for investment co-operation and facilitation and mechanisms for risk mitigation and dispute prevention'.[34] Additionally, the Côte d'Ivoire-Singapore BIT (27 August 2014), the Burkina Faso-Singapore BIT (27 August 2014) and the Ethiopia-United Arab Emirates BIT (23 February 2016) have been signed. Finally, Mauritius and the United Arab Emirates signed a BIT on 20 September 2015. BITs are emerging within African countries, such as the Mauritius-Zambia BIT which was signed on 14 July 2015, the Angola-Mozambique BIT signed on 9 November 2015 in Luanda,[35] the Mauritius-Egypt BIT signed on 25 June 2014, and the Mauritius-Gabon BIT signed on 18 July 2013.[36]

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32 Brazil, the Russian Federation, India, China and South Africa comprise the BRICS partnership. In December 2010, South Africa, at the invitation of China, became a member of the alliance. Among the BRICS members China is the most active actor in international investment law.

33 For example, Botswana and Namibia are currently reconsidering their approaches to BITs. See UNCTAD *World Investment Report 2015: Reforming International Investment Governance* (2015) 108, 110.

34 UNCTAD General Hub News 'Brazil and Mozambique signed CFIA' (1 April 2015), available at http://investmentpolicyhub.unctad.org/News/Hub/Archive/287 (accessed 13 December 2015).

35 'Angola and Mozambique sign investment promotion agreement', available at http://allafrica.com/stories/201511110181.html (accessed 22 December 2016).

36 UNCTAD 'International investment agreements: Most recent IIAs', available at http://investmentpolicyhub.unctad.org/IIA/MostRecentTreaties#iiaInnerMenu (accessed 20 April 2016).

South Africa has not followed this trend and has decided not to renew expiring BITs and to refrain from concluding new agreements.[37] It seems that the China-South Africa BIT and other BITs with African countries will be discontinued when they expire and will face the same fate as the BITs between South Africa and EU member states that have been abrogated. Subsequent to the Promotion and Protection of Investment Draft Bill, 2013 and the Promotion and Protection of Investment Bill, 2015,[38] the Protection of Investment Act 22 of 2015 was enacted on 15 December 2015.[39] The Act regulates foreign investment in South Africa exclusively through the national rule of law, instead of the international rule of law, that is, BITs and other IIAs.

It is clear from the above that African countries, with the exception of South Africa, do not oppose or reject ratifying or updating old BITs and concluding new BITs. Under these circumstances China should make every effort to cause existing China-Africa BITs to come into effect or to be updated and negotiate new BITs with African countries.

It is clear from state practice in Africa that African countries do not oppose investment protection or object to investor-state investment arbitration, according to their internal IIAs or BITs. On the contrary, African states acknowledge the need for appropriate investment protection and ISDS.

Firstly, the Southern African Development Community (SADC) Protocol on Finance and Investment (PFI) is an effective investment treaty among SADC members. It stipulates that investments and investors enjoy fair and equitable treatment in the territory of any State Party and this treatment shall be no less favourable than that granted to investors of the third state, which indicates MFN treatment for investors within SADC. The Protocol encourages its members to accede to the ICSID Convention and other multilateral agreements related to investments and it provides: 'State Parties may conclude bilateral investment treaties with third States'.[40] As

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37 The Department of Trade and Industry Republic of South Africa *Policy statement: The South African government's approach to future international investment treaties* (July 2010).

38 See Ministry of Trade and Industry Promotion and Protection of Investment, 2013, draft Bill (*GG* 36995 of 1 November 2013), available at http://www.tralac.org/files/2013/11/Promotion-and-protection-of-investment-bill-2013-Invitation-for-public-comment.pdf (accessed 1 October 2015); Ministry of Trade and Industry Promotion and Protection of Investment Bill, 2015, B18-2015 (28 July 2015), available at http://www.gov.za/sites/www.gov.za/files/150728Bill_28Jul2015.pdf (accessed 16 June 2015).

39 See Protection of Investment Act 22 of 2015 (*GG* 39514 of 15 December 2015), available at https://www.thedti.gov.za/gazzettes/39514.pdf (accessed 20 April 2016).

40 See SADC Protocol on Finance and Investment (SADC Protocol), Annex I

for ISDS, the investor or the State Party concerned in a dispute may refer the dispute to the SADC Tribunal, an ICSID Convention arbitral tribunal, the ICSID Additional Facility arbitration, or an international arbitrator or *ad hoc* arbitral tribunal under UNCITRAL Arbitration Rules.[41] Although the SADC Tribunal has suspended jurisdiction over investor-state disputes after several judgments ruling against the Zimbabwean government, other international arbitrations have not yet been cancelled.[42] Certainly, nobody knows the future of the PFI after it is revised.

Secondly, from the Investment Agreement for the Common Market for Eastern and Southern Africa (COMESA) Common Investment Area of 2007, evidence of an open and liberal practice relating to IIAs within Africa can be seen. The Agreement offers fair and equitable treatment, national treatment and MFN treatment to the investor and compensation for expropriation and losses as a result of war etc, or caused by requisition or destruction of the investment. In article 6 it encourages the member states to accede to the ICSID Convention and other multilateral agreements related to investment. The mechanism of ISDS is provided for in article 28. Under this article the arbitral proceeding provisions embody a high level of transparency and a roster of qualified arbitrators shall be maintained from which parties to disputes may select arbitrators. Additionally, the host state is vested with the right of counterclaim.[43]

Thirdly, the Mauritius-Egypt BIT is one of the latest BITs concluded between African countries. Under this BIT, judicial action in the host state is not a compulsory procedure before international arbitration is initiated because the text declares that either party to the dispute 'shall be entitled to' instead of 'shall initiate' judicial action in the host state. Subject to the fork-in-the-road requirement, the arbitral clause lists the Cairo Regional Centre for International Commercial Arbitration, the London Court of International Arbitration-Mauritius Arbitration Centre in Mauritius (LCIA-MIAC), the ICSID and other arbitral tribunals for the disputing party to choose from. It should be mentioned that the limitation of action is five years instead of three years, which is the more general standard in BITs.[44]

(Co-operation on Investment), signed on 18 August 2006 and came into force on 16 April 2010, arts 6, 21, 26, available at http://investmentpolicyhub.unctad.org/Download/TreatyFile/2730 (accessed 20 April 2016).

41 See SADC Protocol, art 28.

42 See Southern African Development Community 'Towards a common future, SADC tribunal', available at http://www.sadc.int/about-sadc/sadc-institutions/tribun/ (accessed 20 April 2016).

43 See 'Investment Agreement for the COMESA Common Investment Area', signed on 23 May 2007, available at http://investmentpolicyhub.unctad.org/Download/TreatyFile/3092 (accessed 20 April 2016).

44 See 'Agreement between the Government of the Republic of Mauritius and the

The new generation of South-South BITs cannot be said simply to conform to a lower level of investment protection. The new generation of African BITs (the Mauritius-Egypt BIT as a typical example) tend to balance the interests of investors and the host state. In contrast, the Mauritius-South Africa BIT (as a typical example of an older BIT) shows lopsided protection to the foreign investor. As a modern BIT, the Mauritius-Egypt BIT includes the essence and the most recent elements of BITs, such as sustainable development, environmental protection and regulatory space. In addition, the drafting standard of the Mauritius-Egypt BIT is concise and delicate and more nuanced or detailed than the older-generation African BITs.

On the whole, African countries still support international investment law and their principal concern is to keep a balance. Egypt has a positive attitude to IIAs as it aims 'to see an IIA regime that protects investors effectively, but that also protects the state against frivolous and unfounded claims' and it emphasises sustainable development objectives and the balance of investor rights and obligations.[45] Zambia also wants to 'retain sufficient policy space to promote economic development, without undermining the effectiveness of IIA'.[46] Nigeria objectively realises that 'IIAs definitely provide some comfort for investors in various sectors', but is also concerned about the state's right to regulate in the public interest and in terms of public policy.[47] Even though South Africa shifted its stance to BITs in 2010, it also declared that 'a new National Investment Act should incorporate, codify and interpret core international law concepts'.[48] Indeed, the Protection of Investment Act mentions the concepts of 'international law' and 'customary international law'.[49]

Government of the Arab Republic of Egypt on the Reciprocal Promotion and Protection of Investments', signed on 25 June 2014, art 10, available at http://investmentpolicyhub.unctad.org/Download/TreatyFile/3285 (accessed 20 April 2016).

45 WS Ibrahim (presentation at *World Investment Forum 2014: Investing in sustainable development*, 16 October 2014), available at http://unctad-worldinvestmentforum.org/wp-content/uploads/2014/10/Li.pdf (accessed 22 December 2016).

46 T Mulimbika (presentation at *World Investment Forum 2014: Investing in sustainable development*, 16 October 2014), available at http://unctad-worldinvestmentforum.org/wp-content/uploads/2014/10/Mulimbika.pdf (accessed 22 December 2016).

47 P Okala (presentation at *World Investment Forum 2014: Investing in sustainable development*, 16 October 2014), available at http://unctad-worldinvestmentforum.org/wp-content/uploads/2014/10/Okala.pdf (accessed 22 December 2016).

48 *The South African government's approach to future international investment treaties* (note 37 above).

49 See Protection of Investment Act 22 of 2015 (note 39 above).

China-Africa BITs based on South-South co-operation

Among African BITs around 70 per cent of BITs are concluded with developed countries and around 30 per cent are South-South BITs with developing countries.[50] It can be predicted that African BITs with developing countries will increase as the emerging countries forge ahead. It is clear that BITs are the outcome of contradictions occurring in relations between the South and the North. At the beginning they were used to satisfy the need to protect outward foreign direct investment (FDI) from the United States and European countries, but BITs have been used between developing countries since 1964.[51] As an important part of the international rule of law BITs should play an important role in promoting and protecting investment between all economies, including the developing economies, so as to help improve the living standards of people.

Although academic research does not confirm unanimously that BITs can help to promote or increase FDI, UNCTAD concludes: 'The impact of BITs on investment flows into developing countries is confirmed by investor surveys'.[52] In the author's opinion the BIT is only one of several determinants in attracting foreign investment and alone is not sufficient, but in most cases BITs will promote the economic interests of both the contracting parties as well as demonstrate a political intention to promote economic relations and to enhance friendly political relations between the contracting parties.

The effectiveness of these treaties is evidenced by the fact that currently there are about 2 926 BITs in force globally and more BITs are being negotiated.[53] It is possible to say that China's rapid development as the world's second highest recipient of FDI inflows and the world's third largest exporter of FDI outflows is assisted by its BITs. Arguments that China's BITs 'do not seem to have increased FDI flows into China's developing country treaty partners' and 'China's BITs with other developing countries may serve primarily political, rather than economic purposes' are premature considering the relatively short time during which Chinese outward investments, including outward investments

50 United Nations Economic Commission for Africa *Assessing regional integration in Africa (ARIV V): Towards an African continental free trade area* (2012) 133.

51 See UNCTAD *South-South Cooperation in International Investment Arrangements: UNCTAD series on international investment policies for development* (2005) 5.

52 UNCTAD *The Role of International Investment Agreements in Attracting Foreign Direct Investment to Developing Countries: UNCTAD series on international investment policies for development* (2009) 111.

53 UNCTAD *World Investment Report 2015* (note 33 above) 106.

in Africa, have become a reality.[54] China's FDI 'outflows are expected to surpass its inflows within two to three years'.[55] BITs are expected to facilitate and secure the success of this growth because they are an important part of a safe investment environment.

It has been argued, especially in South Africa, that a country should rather protect foreign investment through its general domestic legal system, which should reflect the international standard of protecting foreign investment.[56] However, in an international community of globalisation, the international rule of law has become one of the most important means of governance, making it more appropriate to protect foreign investment through both domestic laws and international treaties. In addition, importing international standards into domestic law is an ideal that is difficult to achieve, as South Africa's Protection of Investment Act demonstrates.[57] Most importantly, unlike BITs, domestic law cannot specifically protect bilateral investments, leaving South African investors without protection when their investments may be violated in other countries.

It has been suggested that the norms in most South-South BITs are only repetitions of the traditional North-South template because of limited capacity to negotiate original legal instruments, and the main difference between South-South and North-South BITs should be seen in the prevalence in South-South BITs of provisions intended to reserve more regulatory power to the host states and exclude national treatment, market access and protection and security provisions.[58] However, if some substantive provisions, implementation provisions, or important treatments, such as national treatment are not granted to the investor, what exactly is the significance of an entirely conditional BIT? In effect the more recent North-South BITs also emphasise the reservation of

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54 About this premature conclusion, see K Hadley 'Do China's BITs matter? Assessing the effect of China's investment agreements on foreign direct investment flows, investors' rights, and the rule of law' (2013) 45 *Georgetown Journal of International Law* 255.

55 UNCTAD *World Investment Report 2014: Investing in the SDGs: An action plan* (2014) xix.

56 M Masamba 'Africa and bilateral investment treaties: To "BIT" or not?' (16 July 2014), available at http://www.consultancyafrica.com/index.php?option=com_content&view=article&id=1697:africa-and-bilateral-investment-treaties-to-bit-or-not&catid=82:african-industry-a-business&Itemid=266 (accessed 22 December 2016).

57 See Protection of Investment Act 22 of 2015 (note 39 above).

58 M Malik 'South-South bilateral investment treaties: The same old story?' *Annual Forum for Developing Country Investment Negotiators Background Papers* (New Delhi, 27–29 2010), available at http://www.iisd.org/pdf/2011/dci_2010_south_bits.pdf (accessed 22 December 2016).

rights or particular flexibility in order to balance the interests of the investor and the host state. For example, the China-Canada BIT includes many exceptions: the MFN treatment exception, the national treatment exception, the expropriation exception, the regulation exception, the taxation exception, the general exceptions (including prudent finance), and the national security exception.[59] Similarly, the 2012 US Model BIT also lists a large number of exceptions, and this design aims at dealing with the contradiction between 'keeping rights in the hand' of the host state and 'strengthening the protection' of the investor.

UNCTAD indeed pointed out in 2005 that 'to a large part, South-South IIAs are similar to North-South IIAs'.[60] Beyond a doubt, the pursuits of South-South BITs and North-South BITs are converging. Both North-South BITs and South-South BITs must strive to attain the best balance between rights and obligations. However, the level of balance of the South-South BITs is different from North-South BITs. In other words, the level of the former is lower or not too demanding and the latter is higher. For example, China-Africa BITs never include a national treatment clause of pre-establishment. Comparatively, the US-Rwanda BIT requests that the national treatment shall be applied to the stage of market access, i.e. with respect to the establishment, acquisition and expansion of investment.[61] The nine BITs signed between Canada and African countries require a national treatment of pre-establishment too.[62] Therefore, the developed countries do not differentiate by identity against the other contracting party. According to China's contracting practices, however, as mentioned above, the China-Canada BIT, China-Japan-Korea Tripartite Investment Agreement, China-US BIT, and China-EU BIT differ from the China-Uzbekistan and China-Tanzania BITs. In terms of scope, issues, protection level, and investment liberalisation, the former far outweigh the latter.

On the whole it is easier for China to pursue a balanced BIT policy due to its 'hybrid identity' of being both a capital-exporting and capital-

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59 See 'Agreement between the Government of Canada and the Government of the People's Republic of China for the Promotion and Reciprocal Protection of Investments' arts 5(3), 8, 10, ANNEX B.10, 14, 33, ANNEX D.34, available at www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/china-text-chine.aspx?lang=en&view=d (accessed 16 April 2016).

60 See UNCTAD *South-South Cooperation in International Investment Arrangements* (note 51 above) 45.

61 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 Investment, signed on 19 February 2008 and came into effect on 1 January 2012, art 3, available at http://investmentpolicyhub.unctad.org/Download/TreatyFile/2241 (accessed 16 April 2016).

62 UNCTAD 'International investment agreements: Most recent IIAs' (note 36 above).

importing country. Concretely, China-Africa BITs should seek to balance the interests of investors and the host state, and conform to the different development levels of the developing countries. Due to the weakness of many existing China-Africa BITs, the conclusion of updated China-Africa BITs similar to the China-Tanzania BIT will be necessary if the investor is to benefit from better protection and the host state is to be granted more regulatory power for legitimate purposes and free from the 'chilling effect', which means the inhibition or discouragement of the legitimate exercise of legal rights by the threat of legal sanction.

When discussing the prospects of a new generation of investment policies the World Investment Reports of 2012, 2014 and 2015 stress responsible investment and sustainable development.[63] The ideas reflected in the reports should be considered and accepted in earnest by China and African countries. Therefore, the investor should be made to assume certain obligations and social responsibilities such as the protection of the environment and labour rights even though this type of clause in current BITs is 'soft' rather than 'hard'.

At the opening ceremony of the Annual Conference of International Economic Law, an academic seminar held on 3 November 2012 in China, Chenggang Li, who was then the deputy leader of the Department of Treaty and Law in the Ministry of Commerce of the People's Republic of China, in his keynote speech significantly pointed out that

> When Chinese enterprises in Africa and South America are confronted with local trade unions and labour disputes occur frequently, how should we deal with the labor issue in our future investment treaties; When the green mountains and waters are becoming Badlands, reviewing the painful lesson of environmental deterioration in the process of China's economic development, how should we deliberate environmental issues in the future investment treaties?[64]

The official attitude to environmental protection and labour issues in Africa will affect future China-Africa investment treaties: article 6.3, article 10 and the preface of the newest China-Tanzania BIT respond to this point clearly. South-South co-operation, epitomising the co-operation between developing countries based on equality and mutual benefit, mutual respect for sovereignty, non-interference in internal affairs, and without requiring any privilege or political condition, is the declared

63 UNCTAD *World Investment Report 2012: Towards a New Generation of Investment Policies* (2012) 161–162; UNCTAD *World Investment Report 2014: Investing in the SDGs* (note 55 above) ii; *World Investment Report 2015* (note 33 above) xii, xi.

64 See CG Li 'Review of China's international economic legal practice in 2012' (2012) 19 *Journal of International Economic Law* (in Chinese) 1 11.

cornerstone of China-Africa relations. Although different scholars hold different opinions on China's status, it undoubtedly is still a developing country in reality. Sovereign equality is thus fundamental in South-South co-operation and investment relations between China and African countries. The Chinese government has declared

> As a developing country, it desires to carry out extensive and in-depth cooperation with southern countries in economy, science and technology education and culture and so on, through adhering to equality and mutual benefit, pursuing practical results, taking various forms, and promoting common development.[65]

It has been cautioned that the 'South-South BITs do not appear to offer a different legal framework for FDI' from South-North BITs, so 'countries in Africa must approach every BIT negotiation with caution' when the other contracting party is China.[66] It has also been argued that China claims a 'South' identity, but its pursuits bear all the hallmarks of the 'North', rendering ambiguous China's position in China-Africa BITs.[67] These arguments can be countered if we compare the existing China-Africa BITs with the BITs between China and Canada, and with the BITs between Canada and African countries. In order to advance and promote the China-Africa BIT regime China must encourage the entry into force of reasonably signed BITs following the example of the China-DRC BIT, which was signed on 20 March 2000 and came into effect on 1 July 2015. China and its African counterparts have every interest in making greater efforts to update or agree on new BITs so as to promote and protect investment better and foster each other's sustainable development and prosperity.

As a rule, the text of the preamble to China-Africa BITs in future will emphasise sustainable development (including sustainable economic, social and environmental development), the goals of improving the people's livelihood and broadening economic co-operation.

Furthermore, specific provisions should embody the latest standards of international investment rule-making, for example, on the part of the investor and the home state, environment and labour concerns, or broadly, public policy concerns should be embraced and reflected in the BIT and the investor should be encouraged to assume social responsibilities if

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65 'China's position on South-South cooperation', available at www.fmprc.gov.cn/chn/pds/ziliao/tytj/zcwj/t3468.htm (accessed 30 April 2016).

66 See UE Ofodile 'Africa-China Bilateral Investment Treaties: A critique' (2013) 35 *Michigan Journal of International Law* 131 207.

67 See W Kidane 'Reflections on China-Africa BITs, China-Africa investment treaties and dispute settlement: A piece of the multipolar puzzle' *American Society of International Law Proceedings* (3–6 April 2013) 228.

only in terms of 'soft law' in case it risks creating investment barriers. Such commitments would still provide a value orientation to the BIT.

For some African countries, special clauses may have to be provided: a case in point is the China-South Africa BIT. It provides that the investments of foreign investors enjoy national treatment

> with the exception of any domestic legislation relating wholly or mainly to taxation or programs and economic activities specifically aimed to promote, protect and advance persons and groups of persons that have been disadvantaged as a result of past discriminatory practices in the Republic of South Africa.[68]

In addition, the provision of special and differential treatment 'for less developed partners in an agreement' is considered a 'structural element of an IIA's development dimension'.[69]

As for the controversial issue of whether the investor-state arbitral clause should be kept in the BIT, for lack of any better alternative it is necessary to keep it, improve it and consider it as an outcome of the international rule of law. We find that most countries agree to rules to manage investor-state disputes after reviewing their BIT policy, that is, investor-state dispute settlement with increased transparency, accountability and predictability is considered a necessary component of a BIT. Even if the ICSID originally was designed to protect the investment of western countries in the host states, nevertheless it could serve as a good forum for the resolution of disputes arising from China-Africa BITs.[70]

At present China is actively participating in and promoting the economic integration and cross-regional co-operation of the African Union (AU). China has continually intensified co-operation with regional organisations in Africa and institutionalised and systematised co-operation. In 2011, China signed the 'Framework Agreements on Economic and Trade Cooperation' with the East African Community (EAC) and the Economic Community of West African States (ECOWAS). The agreements specifically involve co-operation on direct investment. In the future, the multi-lateralisation or regionalisation of the legal relationship on investment between China and African countries will complement the BITs. The multi-lateralisation of IIA is supported by China in view of the fragmentation of the existing international investment law regime.[71]

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68 China-South Africa BIT, art 3.3.

69 UNCTAD *South-South Cooperation in International Investment Agreements* (note 51 above) 37.

70 See W Kidane 'The China-Africa factor in the contemporary ICSID legitimacy debate' (2014) 35 *University of Pennsylvania Journal of International Law* 559 619.

71 See YJ Li 'UNCTAD WIF statements by China: Towards comprehensive and

Chinese investment in Africa benefits from a safe and sustainable model which leads to a win-win result. To this end the international legal framework, that is BITs and other IIAs are essential. Governing and regulating the investment relationships between China and African countries will guarantee their smooth development.

Conclusion

In view of the present situation of China-Africa investments and BITs, the transformation and modernisation of international investment law and the stances held by China and African countries respectively towards BITs, China and African countries should continue to approach China-Africa BITs positively.

China and African countries have proclaimed a new type of strategic partnership featuring economic win-win co-operation.[72] The strategies and principles invoked guarantee a mutually beneficial and culturally appropriate China-Africa BIT practice to promote South-South co-operation. China-Africa BITs should maintain a balance between the benefit to the host state and the benefit to foreign investors, as and when new BITs are concluded and older BITs are updated. China-Africa BITs must focus on a practical approach and take into account the prevailing circumstances and situations of China and African countries, and avoid becoming too ambitious or aiming at exceedingly high standards, such as found in BITs concluded by the US or Canada with African countries. China's BITs with African countries differ from those between African countries and developed countries because China-Africa economic relations are uniquely different. The special nature of the economic relations between China and Africa will not change simply as a result of China's current stance towards BITs shifting from conservative to liberal.

China-Africa BITs as an articulation of South-South co-operation, however, should consider some advanced factors embodied in other agreements and give preference to the specificity of the provisions so that they conform better to the reality of the most recent developments

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balanced IIA regime' (presentation at *World Investment Forum 2014: Investing in sustainable development*, 16 October 2014), available at http://unctad-worldinvestmentforum.org/wp-content/uploads/2014/10/Li.pdf (accessed 22 December 2016).

72 'Declaration of the Beijing Summit of the Forum on China-Africa Cooperation' (5 November 2006), available at www.fmprc.gov.cn/eng/zxxx/t279852.htm (accessed 14 December 2015). With the transformation of the Chinese economy since the 1990s, and to maintain the sustainable development of China-Africa co-operation, trade and investment has become the more general co-operation model beyond traditional foreign aid. Reflecting on the history, only South-South co-operation on the basis of common development is sustainable.

in the international rule of law. For this purpose, the UNCTAD Investment Policy Framework for Sustainable Development (IPFSD) and SADC Model Bilateral Investment Treaty Template provide valuable references.[73] In the future, the multi-lateralisation of the legal relationship on investment between China and African countries will be a further important axis of co-operation to explore in view of the currently slow progress of the evolution of BITs between China and African countries.

[73] UNCTAD *World Investment Report 2012* (note 63 above); SADC *Model Bilateral Investment Treaty Template with Commentary* (July 2012), available at www.iisd.org/itn/wp-content/uploads/2012/10/SADC-Model-BIT-Template-Final.pdf (accessed 14 December 2015).

Appendix: BITs between China and African Countries (as of 22 December 2016)[74]

No.	Partner state	Date of signature	Date of entry into force	Characterisation according to the four successive Chinese Model BITs
1	Ghana	12 October 1989	22 November 1990	first-generation BIT
2	Egypt	21 April 1994	1 April 1996	first-generation BIT
3	Morocco	27 March1995	27 November 1999	second-generation BIT
4	Mauritius	4 May 1996	8 June 1997	first-generation BIT
5	Zimbabwe	21 May 1996	1 March 1998	first-generation BIT
6	Zambia	21 June 1996		first-generation BIT
7	Algeria	17 October 1996	28 January 2003	first-generation BIT
8	Gabon	9 May 1997	16 February 2009	second-generation BIT
9	Nigeria	12 May 1997		second-generation BIT
		27 August 2001	18 February 2010	third-generation BIT
10	Sudan	30 May 1997	1 July 1998	first-generation BIT
11	Cameroon	10 May 1997		second-generation BIT
12	Democratic Republic of the Congo	18 December 1997		first-generation BIT
		11 August 2011		The text is unavailable
13	South Africa	30 December 1997	1 April 1998	third-generation BIT
14	Cape Verde	21 April 1998	1 October 2001	first-generation BIT
15	Ethiopia	11 May 1998	1 May 2000	first-generation BIT
16	Republic of the Congo	20 March 2000	1 July 2015	third-generation BIT
17	Botswana	12 June 2000		third-generation BIT
18	Sierra Leone	16 May 2001		third-generation BIT
19	Kenya	16 July 2001		third-generation BIT
20	Mozambique	10 July 2001		third-generation BIT
21	Côte d'Ivoire	30 September 2002		third-generation BIT
22	Djibouti	18 August 2003		third-generation BIT
23	Benin	18 February 2004		third-generation BIT
24	Uganda	27 May 2004		third-generation BIT
25	Tunisia	21 June 2004	1 July 2006	third-generation BIT
26	Equatorial Guinea	20 October 2005	15 November 2006	third-generation BIT
27	Namibia	17 November 2005		third-generation BIT
28	Guinea	18 November 2005		The text is unavailable
29	Madagascar	21 November 2005	1 July 2007	third-generation BIT
30	Seychelles	10 February 2007		third-generation BIT
31	Mali	12 February 2009	16 July 2009	third-generation BIT
32	Chad	26 April 2010		third-generation BIT
33	Libya	4 August 2010		third-generation BIT
34	Tanzania	24 March 2013	17 April 2014	fourth-generation BIT

[74] This table has been compiled by the author after analysing all China-Africa BITs that are available from the website of the Ministry of Commerce of the People's Republic of China.