

## ‘Africa for the Chinese’? Revisiting Sino-African Bilateral Investment Treaties

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**Abstract:** In the 19th Century, Francis Galton made a case for framing British policy on Africa in terms of the replacement of Africa’s ‘negro’ population with the ‘China man’ because the China man- had every desirable trait. This policy may never have materialised but today, the relationship between Africa and China has taken the form of expanded trade and economic relations with a huge influx of Foreign Direct Investment (FDI) from China to African states. This paper examines this burgeoning economic relationship through the lens of Bilateral Investment Treaties (BITs) entered into between China and African states. This paper examines some of the typical challenges posed by standard BITs and then examines how current China-Africa BITs have addressed those challenges.

**Keywords:** BITs, FDI, China, Africa, investment, dispute resolution, ICSID, UNCITRAL, sustainability, human rights

### 1. INTRODUCTION

There was a time when the thoughts of western policymakers skirted around encouraging the displacement of Africa’s ‘negro’ population by the ‘good-tempered, frugal, industrious, saving, commercially inclined, and extraordinarily prolific’ Chinese.<sup>1</sup> Centuries later, China has rediscovered Africa by herself and bearing these same qualities,<sup>2</sup> China and Chinese investments have made extensive foray into Africa, forming strategic partnerships with the countries on the continent and steadily setting itself up to become the leading player in Foreign Direct Investment (FDI) on the continent.<sup>3</sup> Investment from the West may not necessarily have slowed, but China is increasingly making inroads into the continent, not only providing capital for infrastructural development<sup>4</sup> but also bringing in its corporations, which carry out the infrastructural development or operate in diverse sectors of the economies in States as small and medium scale enterprises (SMEs).<sup>5</sup>

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<sup>1</sup> Africa for the Chinese (2017) Link 1.

<sup>2</sup> Commenting on the comparative advantage which China has over the west, Suisheng Zhao points out that ‘Chinese managers and workers are not only very diligent and disciplined but also normally do not ask for the comfort and expenses that Western expatriates often demand....’ see Zhao (2014) 1036.

<sup>3</sup> See generally, Vadi (2012) 708 (suggesting that the growing Foreign Direct Investment [FDI] of China ‘confirms its economic rise as an active and influential player in international relations’).

<sup>4</sup> According to the Chinese Ministry of Commerce (MOFCOM), the value of the contracts for infrastructural projects signed by Chinese firms in Africa hit US\$65.2 billion in 2016. See MOFCOM, Business Review XXVI (2017) Link 2.

<sup>5</sup> According to MOFCOM, the non-financial direct investment flow from Chinese enterprises to Africa increased 25% (by more than US\$3 billion). MOFCOM, Business Review XXVI (2017) Link 2.

Perceptions matter and it is interesting to see how China and its engagement with the continent is perceived by Africans. Many African States hold a favourable view of China, according to a 2015 survey of Global Attitudes by Pew Research.<sup>6</sup> This favourable view of China by African States has been considered a consequence of Chinese positive engagement with the continent.<sup>7</sup> In fact, it is largely believed that the motivation for China's burgeoning investment in Africa is without guile and is undergirded by a mutuality of benefits that result from the engagement.<sup>8</sup> Besides, China's diverse engagements within the continent has warmed its way to the heart of African leaders as a strategic partner but also through donations, one of such being the magnificent structure which now serves as the headquarters of the African Union.<sup>9</sup>

It does appear that the above arguments primarily focus, on the economic benefits that inure to the state parties. It is also of immense importance that this blossoming economic relations is examined first in the context of how it measures against prior FDI on the continent and also in the context of Africa's sustainable development and human rights concerns. Framing the Sino-African economic relations in the context of sustainable development and human rights demands a benchmark and the Bilateral Investment Treaty (BIT) offers this benchmark. The choice of the BIT as a benchmark is instructive and it will be shown in the paper that BITs have become the chief instrument by which FDI emanating from capital exporting nations are protected.<sup>10</sup> Presently, there are 35 BITs signed between Africa's 54 countries with China.

The focus on China-Africa BITs is three-fold. Not too long ago, China was more of a recipient of foreign direct investment and during this period, the BITs entered into by China reflected this position and, as pointed out by scholars, these Chinese BITs provide the investors with little protection in practical terms.<sup>11</sup> It also granted China as the host government ample flexibility for its policy direction.<sup>12</sup> It makes sense to see how much its BITs balance in favour of developmental interests of its counterparty African states especially with the adoption of the Chinese 'going abroad' policy and China's new role as a major exporter of capital to many an African state.

<sup>6</sup> Pew Research Centre (2017) Link 3. See also, 'Views of China and Its Increasing Influence', 2007 Pew Research Centre Survey (2017) Link 4 (showing that a number of Sub-Saharan African countries held highly favourable opinion of Chinese involvement in Africa).

<sup>7</sup> Chen et al (2016) 2 (suggesting that the favourable view of China owes to the 'positive impact of China's engagement on African growth').

<sup>8</sup> Dambisa Moyo, 'Beijing, A Boon for Africa' *New York Times*, June 27, 2012. (arguing that investment by China in Africa is given in exchange for the much-needed resources in Africa. In the authors words: '[t]o satisfy China's population and to prevent a crisis of legitimacy for their rule, leaders in Beijing need to keep economic growth rates high and continue to bring hundreds of millions of people out of poverty. And to do so, China needs arable land, oil and minerals.')

<sup>9</sup> See for instance, Erin Conway-Smith, 'African Union's new Chinese-built headquarters opens in Addis Ababa, Ethiopia' *Global Post* (2012) Link 5 (reporting that 'China's state-run Xinhua news agency said the new AU headquarters 'is not only a new landmark in Addis Ababa but also the latest landmark in the long friendship between China and Africa.'')

<sup>10</sup> See Part II below.

<sup>11</sup> Axel Berger, 'China's New Bilateral Investment Treaty Programme: Substance, Rational and Implications for International Investment Law Making, The Politics of International Economic Law: The Next Four Years' (2008) Link 6.

<sup>12</sup> Ofofile (2014) 156.

Secondly, in addition to Chinese SOEs, the continent has a huge influx of private investments which have found African states as attractive investment destination. Admittedly, this attractiveness of Africa as investment destination may have been motivated by many factors,<sup>13</sup> the least of which may be the existence of BITs between their host nation and China. Until now, there has been no reported case of dispute for which any African state has been held liable. However, these do not preclude the chances that disputes may arise in the future especially as the BITs are characteristically for long term. In addition, as more and more Chinese investors become aware of the rights and protections afforded them by the treaties, there may well be an increased reliance on the treaties in the resolution of investment disputes. In the light of this, it is important that African states are more circumspect in the (re)negotiation of BITs with China in the future to account for provisions that reflect the growing international consensus on the resolution of investment disputes, given the public interests that such disputes characteristically involve.

Thirdly, given the present engagement of China on the African continent and all the rhetoric of mutual benefits, it should be expected that the modus of engagement in Africa should be different from what the continent has known over the years – especially regarding standard BITs which, demonstrated a bias in favour of investment and investors, at the expense of developing states. In more general terms, it will be more interesting to see how much China has deviated from the criticisms that trailed standard North-South BITs.

China-Africa trade scholars do not agree on whether there is a discernible pattern in Chinese-African BITs which suggests that China is exploiting the use of BITs to pursue economic ends on the African continent.<sup>14</sup> Whether this is the case is not the primary purpose of this paper. Instead, the paper examines the state of Chinese-African BITs and sees how much they have departed from the North-South BITs and the concrete terms how they contribute to local economic development but also importantly, sustainable development.

The paper briefly examines the origins of BITs in Section II and how this origin has influenced perceptions which are characterized in this paper as challenges of standard BITs. Section III builds on the criteria characterized as challenges, to see whether Chinese BITs have deviated from these standard BITs which were characteristic of North-South BITs. The China-Tanzania BIT is chosen as basis for comparison, given the sheer size of the BITs. It may not be representative of all the BITs negotiated between China and African states but at the time of publication, this agreement is the most recent. It is largely representative of the progressive trend in China's bilateral engagement with African states and it also represents a snapshot of Chinese attitude on the core issues of sustainable development, in its engagement with Africa. This recent China-Tanzania BIT reflects certain concerns of countries of the Global South and it is argued that sustainable development and human right concerns now necessarily should be a part of the BIT discourse in Africa.

<sup>13</sup> Gu (2009) 571 (the author highlights three reasons that have hitherto motivated the investment of Chinese firms in Africa. First is the starting up of development assistance project, the discovery of niches in the market culminated into investment; others were motivated by the possibility of increased sales and the circumvention of US and EU protective trade restriction policies; finally, some were motivated by the resource prospecting for onward export to China).

<sup>14</sup> See Kidane (2016) 175 ('Although some of the BITs have the hallmarks of the traditional North-South BITs, there is no evidence that China is systematically using BITs to push purposefully a particular economic agenda in Africa'). For a contrary view, Ofodile (2014) 205-6 (the author generally treats BITs in the South-South context with skepticism, especially as most of the 'investment activities implicate the natural resource sector...')

## 2. BILATERAL INVESTMENT TREATIES AS FDI VEHICLE AND CHALLENGES IN THE AFRICAN CONTEXT

Bilateral Investment Treaties (BITs) have been recognized as the chief instrument by which countries outline the rules that govern the investment of their nationals in individual states.<sup>15</sup> A BIT is a formally concluded and ratified agreement entered into between two states, the essence of which is to guarantee investors from one state – a given level of treatment when they invest in the other state.<sup>16</sup> Their emergence as the choice means of investment protection began to gain prominence following two interrelated events that dominated foreign investment in the 1960s and 1970s<sup>17</sup> Firstly, capital exporting nations began to experience aggressive and continued attacks on the interests of their nationals abroad, marked by the expropriation of their interests.<sup>18</sup> These aggressive and sustained attacks had begun to whittle down the influence of the Hull Rule which was hitherto a rule of customary international law which provided foreign investors from expropriation.<sup>19</sup> These aggressive attacks resulted in great uncertainties regarding the settlement of the growing cases of expropriation.

Secondly, the growing cases of expropriation was further exacerbated by the process of decolonization which saw western nations 'letting go' of their colonies and as they began to relinquish political authority over their colonies, it was necessary to protect both their investments and investors, who have interests within the colonies.<sup>20</sup> The Hull Rule had begun to lose its influence as former colonies began to emerge as new autonomous and independent states. The convergence of states around the Hull Rule was predicated on the role played by colonial masters in driving the state policy of their colonies. These colonies, as sovereign states, as well as other developing countries soon asserted themselves,<sup>21</sup> claiming not only the 'right to determine how they would treat investors', but also, 'the

<sup>15</sup> Salacuse and Sullivan (2006) 67.

<sup>16</sup> See Sheffer (2011) 484.

<sup>17</sup> Some scholars have linked the origin of BITs to the evolution of the investment protection function of formal treaties known as the Treaties of Friendship, Commerce and Navigation, which came into exist Post World War 2. See for e.g. Sheffer (2011) 485.

<sup>18</sup> These attacks came in the form of nationalization programs embarked upon by many 'underdeveloped' nations. See for instance, Dias (1970) 59 (analyzing the methods, motives and benefits of the nationalization of foreign owned interests undertaken by the Tanzanian government).

<sup>19</sup> Early in the 20<sup>th</sup> Century, principal nations of the world held the opinion that the investment of an alien was entitled to the protection of international law, so that an expropriation by the nation hosting the investment must be compensated promptly, adequately and effectively. This sums up the Hull Rule which derived its name from diplomatic exchanges between the then US Secretary of States Cordell Hull and the Mexican Minister of Foreign Affairs, in respect of the seizure of properties of foreigners by the Mexican government between 1915 and 1940. See generally, Guzman (1998) 644–45.

<sup>20</sup> Guzman (1998) 644–45.

<sup>21</sup> Developing states took advantage of their dominance of the United Nations General Assembly to pass several resolutions which helped to seriously undermined the value of the Hull Rule as a rule of customary international law. Some of the resolutions include: resolution 1803 (XVII) on the 'Permanent Sovereignty Over Natural Resources'; resolution 3171 (XXVIII) also on the 'Permanent Sovereignty over Natural Resources'; resolution 3201 (S-VI) on 'Declaration on the Establishment of a New International Economic Order'; and resolution 3281 (XXIX) being the 'Charter of Economic Rights and Duties of States'.

standard of compensation that should apply if that treatment is sufficiently harmful.’<sup>22</sup> Investment protection measures became imperative when decolonization, coupled with the wave of nationalization hit feverish pitch. BITs, as a way around the lack of an internationally recognized rule for investor protection,<sup>23</sup> increasingly began to fill this void.<sup>24</sup> In essence, the BITs serve the purpose of providing stability to the investment environment of the host states as well as providing for an alternative to the existing legal regimes in the host countries which may not adequately protect FDI.<sup>25</sup>

It has however been considered a paradox, that countries of the developing world which so stoutly opposed the now defunct Hull Rule, as a norm of international law, willingly warmed up to the embrace of BITs, which offered to foreign investors, more protection than the Hull Rule.<sup>26</sup> The expectation on the part of many developing countries was, and still is, to give ‘credibility to commitments made to investors.’<sup>27</sup> Knowing that it does require some level of confidence on the part of foreign investors to invest in another country, the BITs serve as binding tokens of commitment to protect the investments, and thereby attract FDI.<sup>28</sup> However, the foregoing discussion suggests that the circumstances of its original use focused on the protection of the interests of developed states in developing ones that play hosts to investments of the former in the latter.<sup>29</sup>

In the light of their origins, certain criticisms have been levelled against traditional BITs which turn on their general outlook and provisions. These criticisms, are characterized as challenges of standard BITs and are examined below.

### **A. Power Relations in Negotiation and Ratification of BITs**

BITs were, usually by their nature, between a country of the developed world and one from the developing world and presupposed a contractual relationship between a strong and weak party.<sup>30</sup> This power relation has been said to have consequences especially for the

<sup>22</sup> Guzman (1998) 641.

<sup>23</sup> See for instance the opinion of the International Court of Justice in *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain) 1970 I.C.J. 3, 46–47 (Feb.5)*, lamenting the absence of an internationally accepted rule on foreign investment. The august court opined: Considering the important developments of the last half-century, the growth of foreign investments and the expansion of the international activities of corporations False and considering the way in which the economic interests of states have proliferated, it may at first sight appear surprising that the evolution of law has not gone further and that no generally accepted rules in the matter have crystallized on the international plane.

<sup>24</sup> Salacuse and Sullivan (2006) 70 (‘For all practical purposes, BIT law has become the fundamental source of international law in the area of foreign investment.’).

<sup>25</sup> Johnson (2010) 925 (‘Thus, BITs reduce the expected risks to FDI in two ways: first, they stabilize a host country’s existing investment environment; 38 and second, they provide substitutes for weak domestic laws and institutions that are often ill-equipped to protect FDI.’).

<sup>26</sup> Guzman (1988) 642.

<sup>27</sup> Wells (2005) 444.

<sup>28</sup> Tobin and Busch, (2010) 4 (the authors reasoned that ‘the hope for BITs is that, if they boost investor confidence, they are likely to result in greater inflows of FDI.’).

<sup>29</sup> See Ofodile (2014) 138 (‘BITs were specially designed by Western nations in the wake of decolonization in the 1950s and 1960s to protect their investors and the investment of their investors in developing countries.’).

<sup>30</sup> For instance, the United States has entered into roughly about 42 BITs. None of the listed parties to the BITs may be categorized as developed country. For a list of US BITs, see Link 7.

developing nations. Firstly, the developing nations negotiated and entered into the BITs without the requisite experience to fully understand the dangers the agreements posed to their national interests and how it is very much skewed to benefit the foreign investors.<sup>31</sup> This realization has led some countries of the developing world to commence the review of their BITs. One such example is South Africa. In a position paper at the end of the noughties, their Department of Trade and Industry pointed out the issues arising from the inexperience that accompanied the signing of majority of the BITs and how it has resulted in divergence between protection afforded under South African law and under the BITs. To this extent, the Department proposed closer scrutiny and review of the BITs.<sup>32</sup> In fact, pursuant to this scrutiny and review, the government of South Africa as at 2013, had followed through with the termination of several expiring BITs, in order to protect and strengthen its investment regime, and also preserve its sovereign right to pursue policy objectives.<sup>33</sup> This policy objectives shall be returned to in the paper.

The need to protect foreign investments from unconscionable and arbitrary interference by the governments of host countries cannot be discounted, especially in the light of the nationalizations of the 1970s. There was however a problem. The weaker position occupied by these developing countries may have led them to pursue FDI by competing with other developing countries. This engendered regulatory competition that meant loosening their investment regulation regime.<sup>34</sup> Loosening investment regulation regime implied the acceptance of constraints with regard to the powers of these developing countries to undertake public interest objectives and creating a leeway for the possible abuses of human rights.<sup>35</sup>

Finally, although the language of the BITs presuppose that the parties enjoy reciprocal rights, this in reality is hardly ever of any serious consequence for the host states, given the unidirectional flow of investment i.e. from the developed to the developing economy. Developing countries hardly ever benefit from the elaborate provisions of rights and the ideal would therefore be to balance these rights against obligations on the part of the investors. However, these BITs hardly ever provided for investors' obligations. This accounts for the much talked about imbalance engendered by the BITs.<sup>36</sup>

## **B. Lack of Flexibility to Support State Policy Objectives**

BITs generally involve wide ranging commitments on the part of the host state.<sup>37</sup> These commitments are couched as rights of the investors and investments of the host states. A cursory look at these commitments may reveal no harm. However, their effect becomes

<sup>31</sup> Sheffer (2011) 492.

<sup>32</sup> South Africa Department of Trade and Industry (2009) Link 8.

<sup>33</sup> Leandi Kolver (2013) Link 9. Some other developing countries outside of Africa have also either taken steps to terminate BITs entered with several countries or have already done so. See for instance, Ben Bland and Shawn Donnan (2014) Link 10.

<sup>34</sup> Chalamish (2009) 317 (suggesting that the surge of FDI to jurisdictions with low standards may force the loosening of regulatory standards, creating a so-called race to the bottom).

<sup>35</sup> Human Rights Council (2017) Link 11 'capital importers that lacked significant market power felt increasingly pressured to compete with one another for investments by accepting ever-more expansive provisions, constraining their policy discretion to pursue legitimate public interest objectives.'

<sup>36</sup> See Jeswald and Salacuse (2010) 464.

<sup>37</sup> Kaushal (2009) 498.

more glaring in the context of Less Developed Countries (LDCs) or developing countries as they seek to forge policies aimed at sustainable development and promoting domestic development strategies. The standard of treatment clause helps to appreciate the policy constraints which LDCs and their developing counterparts face. Typically, standard BITs require that the host-state afford the investors and investments of the counterparty national treatment. This means that the same treatment that the host state provides its nationals should be afforded investors from the counterparty state. For many African countries still grappling with developing their local industries and their small and medium scale enterprises (SMEs), some level of discrimination is not only desirable but imperative, in order to give locals a chance to compete or to help a particularly disadvantaged section of society.<sup>38</sup> Commenting on the invasive nature of traditional BITs, the South African Department of Trade and Policy pointed out that:

BITs extend far into developing countries' policy space, imposing damaging binding investment rules with far-reaching consequences for sustainable development. New investment rules in BITs prevent developing country governments from requiring foreign companies to transfer technology, train local workers, or source inputs locally. Under such conditions, investment fails to encourage or enhance sustainable development.<sup>39</sup>

A breach of such provisions on national treatment may render government policies in this direction liable to attack by foreign investors. This realization has led developing countries to rethink the national treatment provision. Typical south-south BITs either do away with the concept of national treatment for FDI<sup>40</sup> or provide exceptions which for instance, accommodate steps by host countries to empower their local industries.<sup>41</sup>

### **C. Issues in Dispute Resolution Between the State and Investor**

Many BITs provide for the settlement of investor-state disputes through the use of arbitration. When BITs provide for investor-state arbitration, it affords private investors from the state parties to the BIT to seek remedy for injuries they purportedly suffer, arising from the acts of the host state that are in breach of the substantive provisions of the BIT.<sup>42</sup> The acts of the hoststate which ground the remedy sought may be of general application or may be specifically designed to promote a public policy goal of the host state. The foregoing has led to challenges to the way disputes between the host state and investors are resolved. Some of these problems are highlighted below.

<sup>38</sup> Salgado (2006) 1040 'As drafted, the national treatment provision does not recognize a state's right to grant preferential treatment or reward its citizenry as a means of furthering legitimate policy objectives, such as environmental protection, employment stability, and infant industry development, just to name a few.'

<sup>39</sup> See South African Department of Trade and Industry (2017) Link 8.

<sup>40</sup> See for instance, the Egypt-Zambia BIT (2017) Link 12.

<sup>41</sup> See for instance, Article 2(4) Nigeria-Egypt BIT (2000) Link 13. (It provides that: 'Notwithstanding the provisions of paragraphs (2) and (3) of this Article, either Contracting Party may grant within the framework of its development policy to its own nationals and companies special incentives in order to stimulate the creation of local industries, provided that they do not significantly affect the investment and activities of nationals and companies of the other Contracting Party.')

<sup>42</sup> VanDuzer (2007) 684.

### *1. Arbitration as Means of Dispute Resolution*

BITs typically relied on international arbitration as a means of settling disputes which arose from investment. As a result, local courts were bypassed and international arbitration tribunals were vested with jurisdiction over the disputes. The worry for developing states stemmed from the tendency of large multinationals to pursue the settlement of disputes through the international arbitration tribunals provided for in the BITs, to the detriment of economy of the host states and the capacity of the host states to provide public goods for their citizens. A vast number of investor-state dispute claims are initiated annually.<sup>43</sup> The costs and awards against host-states, as well as the use of the dispute settlement mechanism provided for in the BITs to challenge the provision of public goods by host states have been particularly troubling for developing countries. As a result, states are beginning to reconsider the inclusion of investor-state disputes resolution in the form of international arbitration in the negotiation of BITs.<sup>44</sup>

### *2. Lack of Transparency and Openness to Third Party Participation in Dispute Resolution*

In the light of the public interest dimension of investor-state disputes, the case has been made for an increased public access to the dispute resolution process,<sup>45</sup> as it will 'ensure public acceptance of the result and the democratic accountability of the process.'<sup>46</sup> The lack of transparency or participation by third parties to the BITs stems from the nature of international commercial arbitration, on which investment-state arbitrations are originally modelled. A key advantage touted in favour of international commercial arbitration is confidentiality. This confidentiality does not generally sit well with the interests of state parties, who beyond the commerciality of the transaction still have to cater to a broad range of public policy issues as well as the judicious allocation of tax payers' monies.<sup>47</sup>

The International Centre for The Settlement of Investment Dispute (ICSID) and the United Nations Commission on Trade Law (UNCITRAL) have taken steps towards ensuring transparency. In the case of ICSID for instance, information which includes the names of the parties, the subject matter of the dispute, and the names of the arbitrators are now accessible to the public. However, more substantial information such as the argument

<sup>43</sup> Between 2011 to 2016, an average of 61 cases were initiated through the International Centre for The Settlement of Investment Dispute (ICSID). ICSID (2017) Link 14.

<sup>44</sup> For instance, in 2016, the South African President signed into law, the Promotion and Protection of Investment Act, 2015 (2017) Link 15. The Act in sum prescribes the use of mediation, and then the use of the domestic legal process in investment dispute resolution. Although the state may accede to arbitration, this follows after the exhaustion of domestic remedies and is between states. The Act is publicly available.

<sup>45</sup> One author has rhetorically questioned whether 'the far-reaching penetration of foreign investment guarantees into areas of national regulation of public interests should not be counterbalanced by corresponding opportunities for access to justice and the availability of remedies for civil society in the host State of foreign investments.' Francioni (2009) 729–47 (abstract).

<sup>46</sup> VanDuzer (2007) at 685.

<sup>47</sup> See for instance, Seznec (2004) 211 ('The extent to which transactions are not to be treated as ordinary commercial transactions but as important matters of public policy and national sovereignty cripples the international dispute resolution system as a whole because the underlying interests of the parties are so fundamentally different.')



of the parties, the minutes and records of proceedings are not accessible.<sup>48</sup> The parties may agree to the confidentiality of the final award of the tribunal, in addition to the inaccessibility of the arbitration proceedings to the public, unless the parties before the tribunal agree otherwise.<sup>49</sup>

The UNCITRAL Rules and Convention on Transparency<sup>50</sup> have now gone a step further to do more towards providing for access and transparency in the process of investor-state arbitration.<sup>51</sup> The challenge however posed by the Rules is that it does not apply to the investment treaties which came into effect prior to 1 April 2014, the effective date of the Rules, unless the parties to the investment treaty agree to its applicability. The challenge is made significant with the realization that there already exist over 3000 investment treaties which will require the parties to agree on the applicability of the Rules to disputes arising from the treaties. Although the Mauritius Convention on Transparency has been adopted, providing the possibility for the application of the UNCITRAL Transparency Rule to arbitration commenced under the UNCITRAL Arbitration Rules or other rules of arbitration, there is still the possibility for parties to the Convention, to make reservations or exclude treaties from the purview of the Convention.<sup>52</sup> To avoid undercutting the transparency drive, it has been argued that the default rule of investment arbitration be changed from confidentiality to transparency.<sup>53</sup> A futuristic argument can be made to the effect that states contemplating signing BITs may expressly provide for transparency in the arbitration clause of their dispute settlement provision. This takes care of any transparency worries *ab initio*.

### 3. CHINESE BILATERAL INVESTMENT TREATIES – ANOTHER SLIPPERY SLOPE FOR AFRICA?

Understanding the current trend of Chinese investment in Africa is important. Colonialism and the attendant exploitation of the natural resources of countries in Africa, amongst other factors, have been blamed for the weak institutions in many states in Africa as well as the persistent underdevelopment of the continent.<sup>54</sup> Chinese investment in Africa is often in the nature of natural resource extraction and has informed the cautionary tale of some form of neo-colonialism and its capacity to continue to further underdevelopment on the

<sup>48</sup> Sheffer (2011) 494–95.

<sup>49</sup> Sheffer (2011) 494–95 (author argues further that ICSID stakeholders have opposed steps towards greater transparency in ICSID).

<sup>50</sup> The Rules were adopted on 16 December 2013 and came into effect on 1 April 2014. See generally UNCITRAL Transparency Rules (2017) Link 16.

<sup>51</sup> These measures include the public availability of parties to the dispute, the economic sector involved, and the treaty on which the claim is based; public access to hearings and; third party and non-disputing party submissions to the tribunal.

<sup>52</sup> See generally, Article 3 of the UN Convention on Transparency in Treaty-based Investor-State Arbitration (2107) 17.

<sup>53</sup> See Billiet (2016) 46.

<sup>54</sup> See for instance Nunn (2007) 157–75 (developed a model to explain why colonial rule contributed to underdevelopment in Africa and even though it has ended, it continues to matter in Africa's underdevelopment).

Acemoglu et al, (2001) 1369–1401 (showing that in previous colonies where the policy of the colonial masters was focused on resource extraction, weak private property institutions were established and such institutions continued even after independence).

continent.<sup>55</sup> Furthermore, like the case with most of the developed nations of the global North, investment, in most cases, is, unidirectional, so that the benefits that the protections afforded by BITs still favour the capital exporting country. Against this background, the Chinese BIT with Tanzania is examined, to see if, and how it has deviated from the standard BIT.

The China-Tanzania BIT is not a template of all other existing BITs between African states and China but, being the latest BIT with an African state, it may well represent the evolved approach of China in its BIT engagement with African states.

### A. Flexibility in Standards of Treatment

If African 'owned' businesses will ever have a chance of survival or growth, it is imperative that the BITs negotiated between African states and China allows for flexibility around certain core provisions that feature prominently in the BITs. It cannot be denied that the business terrain in many an African state could be incredibly difficult given the lack of both physical and legal infrastructure. The Chinese have shown grit in weathering the terrain.<sup>56</sup> Consequently, a national treatment provision for instance, may prove to be detrimental to the interest of local businesses. This provision like in many BITs between China and African states feature in the China-Tanzania BIT. The China-Tanzania BIT does however accommodate flexibility in respect of its national treatment provision by subjecting national treatment to the national laws and regulations of the host-state, relating to the 'operation, management, maintenance, use, enjoyment, sale or disposition of the investment' within the host-state.<sup>57</sup>

With the above provision, it may be difficult to fit into these criteria, policy objectives of the host state that seeks to bolster local industries, and provide a chance against the very competitive Chinese businesses. Hence, the BIT provides that pursuant to national laws and regulations, the contracting parties are at liberty to

... 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 of the other Contracting Party.<sup>58</sup>

This provision very much mirrors south-south BIT provision on national treatment. This provision ensures the flexibility of the host-state in driving policy relating to local

<sup>55</sup> Reuters (2011) Link 18; see also Lamido Sanusi (2013) Link 19 (the author, a former Governor of Nigeria's Central Bank opined as follows: '[s]o China takes our primary goods and sells us manufactured ones. This was also the essence of colonialism. The British went to Africa and India to secure raw materials and markets. Africa is now willingly opening itself up to a new form of imperialism.')

<sup>56</sup> See Gu (2009) 578 ('When asked about their perception of the investment climate in Africa in general, there is even a saying among the Chinese investors that "Despite the strong wind and wild waves, the deepwater still has fish to be found."')

<sup>57</sup> Article 3(1) of the China-Tanzania BIT provides that '[w]ithout prejudice to its applicable laws and regulations, with respect to the operation, management, maintenance, use, enjoyment, sale or disposition of the investments in its territory, each Contracting Party shall accord to investors of the other Contracting Party and their associated investments treatment no less favourable than that accorded to its own investors and associated investments in like circumstances.'

<sup>58</sup> Article 3(2) China-Tanzania BIT.

businesses and also balances protection for investors and investment of capital exporting state. While a significant impairment of the investors and investment of the capital exporting state is not expressly defined, it may well be determined on a case by case basis depending on the industry; the effect on returns on capital invested; and whether the investor has been apprised of the policy of the host-state to incentivize or prefer its local industries at the point of admitting the investment.

## **B. Dispute Resolution in the China-Tanzania BIT**

Interestingly, China as a host-state for FDI notably did not elaborately provide for investor-state dispute resolution, or where such provisions existed, they were very much limited.<sup>59</sup> More directly, in order to protect China as a host state, the BITs had provisions which allowed China the right to agree on the resolution of disputes on the basis of each individual case. The China-Tanzania BIT does reflect this form of protection too. The BIT first advocates recourse to alternative dispute resolution (ADR) methods for the resolution of investor-state disputes. When the ADR procedure cannot resolve the conflict between the parties, the investor may then initiate formal dispute settlement procedures 6 months from the initiation of ADR.<sup>60</sup> Given this provision under the BIT, it is clear that ADR must necessarily precede the commencement of formal settlement of investor-state dispute. This may be regarded as an improvement for those Global South countries who are particularly concerned about the immediate recourse to arbitration. This period may help the investor and state reach an amicable resolution of the dispute.

After the 6-month period, the investor may pursue domestic litigation, arbitration submitted to ICSID under the Convention on the Settlement of Disputes between States and Nationals of Other States; or under the arbitration rules of UNCITRAL; or to any other institutional or ad hoc tribunal agreed upon by the disputing parties.

There is no mention of transparency and accessibility of the arbitration procedure by interested third parties in the BIT. Although ICSID and UNCITRAL Rules (recognized in the BIT) have taken steps to ensure transparency and accessibility, the inherent limitations of these steps still pose some already identified challenges. It will therefore be important that clear and unambiguous provision is made for transparency and access, especially by relevant interest groups where investor-state disputes are to be resolved by arbitration. In the African context where it is not altogether impossible for collusion between government officials and (not necessarily foreign) investors, transparency and public access through the participation of non-governmental organizations and advocacy groups can play a critical role, by offering perspectives to investment disputes that may possibly arise, which neither the state nor the investors may avert their minds.<sup>61</sup>

## **C. Promotion of Sustainable Development in Host States**

It has been already mentioned that part of the drive for Chinese investment in Africa is due to the natural resources required by China's resource-intensive growth model.<sup>62</sup> In addition, China is engaged in a flurry of infrastructural development projects and Chinese companies are setting up businesses in different parts of the continent. This has come with continuing

<sup>59</sup> Article 3(2) China-Tanzania BIT.

<sup>60</sup> Article 13(1) and (2) China-Tanzania BIT.

<sup>61</sup> VanDuzer (2007) 685.

<sup>62</sup> Dollar (2016) xiii.

environmental<sup>63</sup> and social costs.<sup>64</sup> A concrete approach to ensuring sustainable development is still lacking despite the China-Tanzania BIT meeting several of the concerns expressed by countries of the Global South in respect of standard BITs.

The China-Tanzania BIT sets out the objectives of promoting 'healthy, stable and sustainable economic development and to improve the standard of living of nationals'<sup>65</sup> but there are no substantive provisions in the treaty which are directed towards the attainment of these objectives.<sup>66</sup> The closest the BIT comes to addressing possible sustainability concerns is in respect of reasonable measures taken by the host state in the interest of sustainable development concerns.<sup>67</sup> This is not very helpful as it only deals with cases where expropriation is in issue, without the imposition of any direct and active duty on the investor to incorporate sustainability in its investment.

China and many other Asian countries once had the reputation of providing manufacturers with cheap labor. However, the rising Chinese labor costs may mean that Africa is the next manufacturing frontier,<sup>68</sup> given its favourable tariffs and the accessibility to the EU and US markets.<sup>69</sup> It becomes very important that the BITs protect as much as possible, labor rights, environmental rights and many other considerations which will ensure that African economies do not isolate sustainability in their growth trajectory. Now, given that host states in Africa may not necessarily have an adequate protection or enforcement regime, obligating Chinese investors to undertake social and environmental assessment before undertaking projects may be a starting point.

#### 4. CONCLUSIONS

This paper has examined the burgeoning interest of China on the African continent. This relationship as the paper points out has seen huge capital and infrastructural investment on the continent, both by Chinese SOEs as well as private investors in the form of SMEs. The paper narrowed down its examination of the growing relationship to the BITs between African states and China. The aim was to see how these BITs may have evolved, in the light of several misgivings expressed by countries of the Global South against standard BITs, often negotiated between these countries and developed ones. Using the China-Tanzania BIT as the measuring stick, this paper admits that some of the misgivings have been dealt

<sup>63</sup> See for instance, Tife Owolabi (2016) Link 20.

<sup>64</sup> See for instance, Amnesty International (2017) Link 21.

<sup>65</sup> See preamble to China-Tanzania BIT.

<sup>66</sup> Kidane (2016) 164.

<sup>67</sup> Article 6(3) of the China-Tanzania BIT provides that:

Except in rare circumstances, such as where the measures adopted substantially exceed the measures necessary for maintaining reasonable public welfare, legitimate regulatory measures adopted by one Contracting Party for the purpose of protecting public health, safety and the environment, and that are for the public welfare and are non-discriminatory, do not constitute indirect expropriation.

<sup>68</sup> See for instance, WitsJournalism (2017) Link 22.

<sup>69</sup> See for instance the US African Growth and Opportunity Act (AGOA) (Title I, Trade and Development Act of 2000; P.L. 106–200). The Act removes barriers and other obstacles to trade between the sub-Saharan Africa and the US and generally enhances trade preferences in favour of the former. The AGOA (2000) Link 23. There is also the Economic Partnership Agreements (EPAs) negotiated between the EU and the countries of Africa, the Caribbean and the Pacific. The aim of the EPAs is to promote trade and thereby engender sustainable development and the alleviation of poverty.

with and it has made a case for strengthening sustainable development considerations in the BITs. Previous engagement with developed countries and the social and environmental impacts of such engagements serve as a cautionary tale for Chinese investment in Africa, especially given the sectors where they operate. Accommodating sustainable development in future BITs, it is believed, will provide some balance, so that whilst protecting investors, host African states attain meaningful development.

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