

## China's Bilateral Investment Treaties with African States in Comparative Context

Won Kidane

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# China's Bilateral Investment Treaties with African States in Comparative Context

Won Kidanef†

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## Introduction

As China's investment in Africa continues to show unprecedented growth,<sup>1</sup> questions are being raised about many aspects of it,<sup>2</sup> including

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† Associate Professor, Seattle University School of Law.

1. Detailed information on the growth of China-Africa economic relations is available on the official website of the Forum on China-Africa Cooperation (FOCAC) at <http://www.focac.org/eng/>.

2. A growing body of academic literature addresses various aspects of the relatively new but robust economic relations between China and Africa. Some relatively recent writings include: CHRIS ALDREN, *CHINA IN AFRICA: PARTNER, COMPETITOR, OR HEGEMON?* (2007); DEBORAH BRAUTIGAM, *THE DRAGON'S GIFT: THE REAL STORY OF CHINA IN AFRICA* (2009); WON KIDANE, *CHINA-AFRICA DISPUTE SETTLEMENT: THE LAW, ECONOMICS AND CULTURE OF ARBITRATION* (2011); SARAH RAINE, *CHINA'S AFRICAN CHALLENGES* (2009); ROBERT I. 49 CORNELL INT'L L.J. 141 (2016)

the adequacy of the legal infrastructure for the ordering of economic relations.<sup>3</sup> The principal legal instruments that govern China-Africa investment relations are Bilateral Investment Treaties (BITs).<sup>4</sup> So far, China has signed BITs with thirty-five African States,<sup>5</sup> and sixteen of these agreements have already come into force.<sup>6</sup> The BITs are divided into roughly three prior generations, with an emerging fourth.<sup>7</sup> This Article provides a comparative analysis of select China-Africa BITs in light of the China-Canada BIT that came into effect on October 1, 2014.<sup>8</sup> The China-Canada BIT is selected for comparison not only because it is the most recent Chinese BIT with a non-African state, but also because the text of the BIT—as well as the debate surrounding its ratification—provide contemporary context for the assessment of the nature, the stages of development, and the general state of the China-Africa BITs regime.

Part I outlines the evolution of three prior China-Africa BIT generations. Part II provides an overview of the China-Canada BIT followed by the China-Tanzania BIT, the most recent China-Africa BIT. Part III assesses the implications of the China-Canada BIT for future China-Africa BITs. Part IV engages the policy debate in light of the comparisons in Part II. Part V offers conclusions.

## I. China-Africa BITs in Comparative Context

The remarkable transformation of the Chinese economy over the last three decades puts China in a unique position in modern history: it is a

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ROTBURG, CHINA INTO AFRICA: TRADE, AID, AND INFLUENCE (2008); IAN TAYLOR, CHINA AND AFRICA: ENGAGEMENT AND COMPROMISE (2006); CHINA RETURNS TO AFRICA: A RISING POWER AND A CONTINENT EMBRACE (Chris Alden et al. eds., 2008). See most recently, DAVID H. SHINN & JOSHUA EISENMAN, CHINA AND AFRICA: A CENTURY OF ENGAGEMENT (2012).

3. See generally KIDANE, *supra* note 2 (outlining the legal regimes that govern China-Africa trade, investment, and commercial relations, and raising questions about the adequacy of these regimes in ordering growing economic relations).

4. L. Yves Fortier, *The Canadian Approach to Investment Protection: How Far We have Come!*, in INTERNATIONAL INVESTMENT LAW FOR THE 21ST CENTURY: ESSAYS IN HONOUR OF CHRISTOPH SCHREUER 525, 528 (Christina Bender et al. eds., 2009) (“BITs emerged as a tool in the Cold War period to promote FDI in developing countries.”).

5. China is a party to a total of 145 BITs. The list and texts of most are available on the official website of UNCTAD at <http://investmentpolicyhub.unctad.org/IIA/CountryBits/42?type=c#iiaInnerMenu>.

6. The sixteen African countries are Algeria, Cape Verde, Egypt, Ethiopia, Gabon, Ghana, Madagascar, Mali, Morocco, Mauritius, Mozambique, Nigeria, South Africa, Sudan, Tunisia, and Zimbabwe. The BITs that are signed but yet to come into effect are with Benin, Botswana, Chad, Congo, Democratic Republic of Congo, Cote d'Ivoire, Djibouti, Equatorial Guinea, Guinea, Kenya, Libya, Namibia, Seychelles, Sierra Leone, Uganda, and Zambia. Comprehensive information about and copies of all of the BITs that have come into effect are available on the official website of the Ministry of Commerce of China at <http://tfs.mofcom.gov.cn/article/Nocategory/201111/20111107819474.shtml>. Information about the BITs is also available on the official website of UNCTAD at [http://unctad.org/Sections/dite\\_pcbb/docs/bits\\_china.pdf](http://unctad.org/Sections/dite_pcbb/docs/bits_china.pdf).

7. See NORAH GALLAGHER & WENHUA SHAN, CHINESE INVESTMENT TREATIES 35 (2009).

8. The Agreement and background information are available at <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/china-chine.aspx?lang=eng>. See *infra* note 68 and accompanying text.

developing country that is both the largest recipient of foreign investment and the second largest exporter of capital. Since China adopted its open-door policy in 1978, it has made considerable efforts to order its trade and investment relations with the rest of the world by law.<sup>9</sup> This is significant because, as James Zimmerman puts it, “During the Cultural Revolution, the few open law schools were closed and the law faculty sent to labor camps. The law libraries and books were destroyed by the Red Guard.”<sup>10</sup> The ideological and historical factors that contributed to the advent and sustenance from 1956 to 1978 of the Cultural Revolution had a significant impact on Chinese approach to foreign investment.<sup>11</sup> Ideologically, Marxism and its disfavor for private ownership of the means of production had a profound impact on China’s approach to the protection of private property, and therefore foreign investment.<sup>12</sup> Historically, China’s treatment by Western powers, including the extraterritorial application of their laws, appears to have delayed its acceptance of international legal principles that emerged in the West.<sup>13</sup> Once it opened up to the external world in 1978, however, China began embracing international norms, despite suspicions and misgivings.<sup>14</sup>

The international legal regime for the protection of foreign investment, dominated by BITs,<sup>15</sup> is essentially designed to protect the investments of the developed world in the developing world.<sup>16</sup> As Professor Salacuse puts it, the political answer as to why a trade-like multilateral investment regime failed to emerge is that “given the asymmetric nature of bilateral negotiations between a strong, developed country, and a usually much weaker developing country, the bilateral setting allows the developed country to use its power more effectively than does a multilateral setting, where the power may be much diluted.”<sup>17</sup> In essence, what sustains the bilateral arrangements is the imbalance that favors investors of the developed world in the developing world. The imbalance comes from the implicit understanding that although the promises and concessions are theoretically reciprocal, in practice, virtually no investors of the developing country invest in the developed country.<sup>18</sup>

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9. See GALLAGHER & SHAN, *supra* note 7, at 6.

10. JAMES ZIMMERMAN, *CHINA LAW DESKBOOK: A LEGAL GUIDE FOR FOREIGN-INVESTED ENTERPRISES* 53 (3d ed. 2010) (citing J. SPENCE, *THE SEARCH FOR MODERN CHINA* 602-17 (1990)).

11. See KIDANE, *supra* note 2, at 172-73.

12. *Id.*

13. *Id.*

14. *Id.*

15. See ANDREAS F. LOWENFELD, *INTERNATIONAL ECONOMIC LAW* 554-55 (2d ed. 2008).

16. The United States for example is a party to forty-seven BITs as of this writing and none of them is with a country that could be legitimately classified as developed. The list and texts of the BITs are available at <http://investmentpolicyhub.unctad.org/IIA/CountryBits/223#iialnnerMenu>.

17. Jeswald W. Salacuse, *The Emerging Global Regime for Investment*, 51 HARV. INT'L L.J. 427, 464 (2010).

18. See *id.*

This understanding encourages developed countries to enter into bilateral investment treaties. It also explains BITs, such as the U.S.-Rwanda BITs, which are in theory—but not in practice—reciprocal. No matter what their terms, BITs are also attractive to the developing country, as they signal a willingness to open up doors for foreign investment.<sup>19</sup> The parties to these BITs almost invariably have differing motives. Hence, more than a mere element of self-deception almost always underpins the great majority of the North-South BITs.

China's position as both a major importer and exporter of capital puts it in a serious theoretical dilemma as to the aforementioned rationale. As a recipient of capital, it has all the incentives of a developing country to be protective; while as an exporter of capital, it has all the incentives to seek the most expansive rights for its nationals. This Part traces the evolution of Chinese BITs with African states to see how they have changed alongside China's own economic and ideological transformation.

#### A. Chinese BITs in the 1980s

Temporally, the first generation Chinese BITs roughly correspond to the period between China's adoption of its open door policy in 1978 and the beginning of the 1990s.<sup>20</sup> The BITs signed during this period were primarily with European countries that, at the time, wanted to invest in China. The first one was concluded with Sweden.<sup>21</sup> Of the approximately thirty BITs that China signed during this period, only one BIT is with an African state: Ghana.<sup>22</sup>

While there are some notable differences between the China-Sweden and China-Ghana BITs, there are some common defining features. For example, the China-Sweden and China-Ghana BITs define the term "investment" in more or less identical terms:

- (1) The term "investment" shall comprise every kind of asset invested by investors of one Contracting State in the territory of the other Contracting State in accordance with the laws and regulations of that State, and more particularly, though not exclusively,
  - (a) movable and immovable property as well as any other rights *in rem*, such as mortgage, lien, pledge, usufruct, and similar rights;
  - (b) shares or other kinds of interest in companies;
  - (c) title to money or any performance having an economic value;
  - (d) copyrights, industrial property rights, technical processes, trade-names, and good-will; and
  - (e) such business-concessions under public law or under contract, including concessions regarding the prospecting for, or the extraction or winning

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19. The idea that BITs or any types of investment treaties increase foreign investment has in recent times been called into question. *See, e.g.,* THE EFFECT OF TREATIES ON FOREIGN DIRECT INVESTMENT: BILATERAL INVESTMENT TREATIES, DOUBLE TAXATION TREATIES, AND INVESTMENT FLOWS (Karl P. Sauvant & Lisa E. Sachs eds., 2009).

20. GALLAGHER & SHAN, *supra* note 7, at 4-5.

21. *See id.* at 417.

22. *China-International Investment Agreements*, INV. POL'Y HUB, <http://investmentpolicyhub.unctad.org/IIA/CountryBits/42?type=c#iialnnerMenu> (last visited Nov. 4, 2015).

of natural resources, as give to their holder a legal position of some duration.<sup>23</sup>

It is notable that both BITs regard title to money or a claim to money as investment. Some later BITs and other prominent treaties, such as NAFTA, expressly exclude money owed for the sale of goods.<sup>24</sup>

On the other hand, the China-Sweden and China-Ghana BITs adopt a radically different definition of “investor” as it relates to the Chinese side. The China-Sweden BIT defines a Chinese investor as “any company, other legal person or citizen of China authorized by the Chinese Government to make an investment.”<sup>25</sup> The China-Ghana BIT, however, contains no requirement for government authorization.<sup>26</sup> It protects Chinese investment in Ghana by any Chinese nationals or legal entities established under the laws of China.<sup>27</sup> The government authorization requirement in the China-Sweden BIT is both curious and uncommon. It limits protection only to those authorized by the Chinese Government to invest in Sweden. Chinese nationals or legal persons who invest in Ghana on the other hand, would benefit from the protection of the BIT regardless of prior authorization to invest in Ghana. The reason for the limited protection to those with government authorization is unclear. In any case, it appears that Sweden is one of the preferred European destinations for Chinese investment.<sup>28</sup>

With respect to the treatment of investment, both BITs provide for fair and equitable treatment and most favored nation (MFN) treatment, but they differ on the exceptions. While the China-Sweden BIT excepts Free Trade Areas (FTAs), Customs Unions (CUs), as well as preexisting privileges, the China-Ghana BIT excepts only FTAs and CUs.<sup>29</sup>

The next important substantive prescription relates to expropriation. The China-Sweden BIT appears more traditional. It provides:

(1) Neither Contracting State shall expropriate or nationalize, or take any other similar measure in regard to, an investment made in its territory by an investor of the other Contracting State, except in the public interest, under due process of law and against compensation, the purpose of which shall be to place the investor in the same financial position as that in which the investor would have been if the expropriation or nationalization had not taken

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23. Agreement on the Mutual Protection of Investments, China-Swed., Mar. 29, 1983, 1350 U.N.T.S. 256 [hereinafter China-Sweden BIT].

24. KIDANE, *supra* note 2, at 136-37.

25. China-Sweden BIT, *supra* note 23, at art. 1(2).

26. See Agreement Concerning the Encouragement and Reciprocal Protection of Investments, China-Ghana, Oct. 12, 1989 [hereinafter China-Ghana BIT].

27. See *id.* at art. 1(b).

28. Countries that have a structured approach to Chinese investors, such as Germany, Sweden, and the United Kingdom, have been successful in attracting investment. This is amplified when the host country has a large market, and has resulted in the concentration of foreign direct investment in a few leading European Union Member States. See JEREMY CLEGG & HINRICH VOSS, EUROPE CHINA RESEARCH AND ADVICE NETWORK, CHINESE OVERSEAS DIRECT INVESTMENT IN THE EUROPEAN UNION (2009), [https://www.chathamhouse.org/sites/files/chathamhouse/public/Research/Asia/0912ecran\\_cleggvooss.pdf](https://www.chathamhouse.org/sites/files/chathamhouse/public/Research/Asia/0912ecran_cleggvooss.pdf).

29. See China-Sweden BIT, *supra* note 23; China-Ghana BIT, *supra* note 26, at art. 3.

place. The expropriation or nationalization shall not be discriminatory and the compensation shall be paid without unreasonable delay and shall be convertible and freely transferable between the territories of the Contracting States.

(2) The provisions of paragraph (1) shall also apply to the current income from an investment as well as, in the event of liquidation, to the proceeds from the liquidation.<sup>30</sup>

Some of the basic principles are clear, such as the principle of non-discrimination for public purpose under due process of law, and what is presumably a requirement of adequate compensation, stated in nontraditional terms.

The formulation under the China-Ghana BIT is slightly different. First, it begins by permitting expropriation only for a public purpose. In other words, it does not make it the exception. It reads:

Either contracting state may, for the national security or public interest expropriate, nationalize or take similar measures (hereinafter referred to as “expropriation”) against investment of investors of the other Contracting State in its territory, but subject to the following conditions:

- (a) Under domestic legal procedure
- (b) Without discrimination.<sup>31</sup>

In addition to the different formulations, this provision adds national security as a ground for expropriation. The validity of the expropriation is tested against domestic legal procedures, but substantively the only limitation seems to be the absence of discrimination.

These substantive provisions are sufficient to conclude that the China-Sweden and China-Ghana BITs, which basically fall under the first generation Chinese BITs, do not suggest any logical North-South or South-South<sup>32</sup> pattern. If anything, it appears that the China-Ghana BIT may be less protective than the China-Sweden BIT. This, in turn, indicates that China may not have pursued a systematic BIT policy under preconceived BIT models in the way the United States has. This suggestion, and the possibility that it continues to this day, will be explored further throughout this Article in relation to subsequent periods.

The most notable difference between the China-Sweden and China-Ghana BITs relates to dispute settlement. While both contain a similar provision on the settlement of disputes between the contracting parties, only the China-Ghana BIT contains a provision on the resolution of disputes between an investor from one contracting state and the other contracting

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30. See China-Sweden BIT, *supra* note 23, at art. 3.

31. See China-Ghana BIT, *supra* note 26, at art. 4.

32. In development discourse and throughout this Article, “North” refers to developed countries and “South” refers to developing countries. All African countries and China are considered developing countries of the South. See e.g., U.N. Conference on Trade & Development, *Economic Development in Africa Report 2010: South-South Cooperation—Africa and the New Forms of Development Partnership*, 24–25, U.N. Doc. UNCTAD/ALDC/AFRICA/2010, U.N. Sales No. E.10.II.D.13 (June 18, 2010), [http://unctad.org/en/Docs/aldafrica2010\\_en.pdf](http://unctad.org/en/Docs/aldafrica2010_en.pdf).

state.<sup>33</sup> Even that provision is limited to granting access to international arbitration to the investor of one contracting state in the other on the quantum of compensation for expropriation.<sup>34</sup> The particular international arbitration that the BIT allows is ad hoc with the default appointing authority residing in the Chairman of the International Arbitration Institute of the Stockholm Chamber of Commerce.<sup>35</sup> The BIT gives the arbitral tribunal the authority to adopt its own procedural rules with due reference to the Rules of the International Center for the Settlement of Investment Disputes (ICSID).<sup>36</sup> It selects the substantive laws of the respondent state and general principles of international law recognized by both parties as the rules of decision.<sup>37</sup>

It is quite remarkable, perhaps even ironic, that the China-Sweden BIT, which is presumably still valid, does not contain an investor state dispute resolution provision, while the China-Ghana BIT selects the International Arbitration Institute of the Stockholm Chamber of Commerce as the appointing authority. A possible explanation for that difference relates to the fact that the China-Ghana BIT, a first generation BIT that came into force in October 1989, is temporally closer to the second generation BITs of the 1990s than the China-Sweden BIT that took effect in March 1982.

## B. Chinese BITs in the 1990s

Chinese BITs that are considered second generation BITs are those signed between 1992 and 2000.<sup>38</sup> This generation of BITs also has certain defining characteristics. Interestingly, China signed no BITs with developed economies of the Global North during this period, with the exception of Greece and Iceland, but did sign many BITs with developing economies in South Asia and Africa.<sup>39</sup> A look at the China-Egypt and China-Iceland BITs is useful to highlight the defining features of the second generation Chinese BITs, and puts them in the South-South and North-South context.

The definitions of investment offered by these BITs do not substantially differ from one another, or from those found in the first generation of BITs. They do, however, contain slight variations in the way that the term “claims to money” is defined. In the China-Egypt BIT, the definition reads: “claims to money or to any other performance under contract having economic value associated with investment.”<sup>40</sup> The China-Iceland BIT defines it as: “returns reinvested or claims to money or to any performance having

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33. China-Ghana BIT, *supra* note 26, at art. 10(1).

34. *Id.*

35. *Id.* at art. 10(3).

36. *Id.*

37. *Id.* at art. 10(5).

38. See GALLAGHER & SHAN, *supra* note 7, at 419.

39. See *China-International Investment Agreements*, *supra* note 22.

40. Agreement Concerning the Encouragement and Reciprocal Protection of Investments, China-Egypt, art. 1(1)(c), Apr. 21, 1994 [hereinafter China-Egypt BIT], <http://investmentpolicyhub.unctad.org/Download/TreatyFile/730>.

financial value.”<sup>41</sup> As indicated above, some contemporary treaties like NAFTA exclude claims to money unassociated with investment from protection. Similarly, the China-Egypt treaty appears to follow that trend, while the China-Iceland treaty makes no such restriction. As to the definition of investor, both treaties protect the investments of natural persons who are citizens of the contracting states, as well as their juridical entities. The only difference is that the China-Egypt BIT requires juridical persons of the contracting states to be domiciliaries of the relevant contracting party to receive the privileges of the treaty.<sup>42</sup> The China-Iceland BIT imposes no such condition.<sup>43</sup>

As far as the treatment of investment is concerned, while both accord fair and equitable and MFN treatment, the China-Iceland BIT adds what could be termed an optional or quasi-national treatment provision. It reads in pertinent part:

In addition to the provisions of paragraphs 1 and 2 of this [fair and equitable treatment Article] either Contracting Party shall, to the extent possible, accord treatment in accordance with the stipulations of its laws and regulations, to the investments of the investors of the other Contracting Party the same as that accorded to its own investor.<sup>44</sup>

Although the expropriation provisions are stated quite differently, the substantive prescriptions are more or less the same.<sup>45</sup> Expropriation must be for public purpose, accord due process, and the investor must be offered reasonable compensation without unreasonable delay.<sup>46</sup> The China-Iceland BIT, however, allows for a domestic review process not present in the China-Egypt BIT.<sup>47</sup> Overall, though, the differences are unremarkable.<sup>48</sup>

Substantively, the only significant difference between the Chinese BITs of the 1980s and the 1990s appears to be the move towards according conditional or optional National Treatment in some instances, as exemplified by the China-Iceland BIT. The greatest difference relates to the dispute settlement provisions. It is important to note that China had signed the ICSID Convention by February 1990 although it did not ratify it until January 7, 1993.<sup>49</sup> As discussed above, some of the 1980s BITs make reference to

41. Agreement Concerning the Promotion and Reciprocal Protection of Investments, China-Ice., art. 1(3)(c), Mar. 31, 1994 [hereinafter China-Iceland BIT], <http://investmentpolicyhub.unctad.org/Download/TreatyFile/741>.

42. China-Egypt BIT, *supra* note 40, at art. 1(2)(b).

43. China-Iceland BIT, *supra* note 41, at art. 1(2).

44. *Id.* at art. 3(3).

45. Compare China-Egypt BIT, *supra* note 40, at art. 4, with China-Iceland BIT, *supra* note 41, at art. 4.

46. China-Egypt BIT, *supra* note 40, at art. 4.

47. China-Iceland BIT, *supra* note 41, at art. 4.

48. Compare China-Egypt BIT, *supra* note 40, at art. 4, with China-Iceland BIT, *supra* note 41, at art. 4(3)(c).

49. INT'L CTR. FOR SETTLEMENT OF INV. DISPUTES, LIST OF CONTRACTING STATES AND OTHER SIGNATORIES TO THE CONVENTION (2015), <https://icsid.worldbank.org/apps/ICSIDWEB/icsiddocs/Documents/List%20of%20Contracting%20States%20and%20Other%20Signatories%20of%20the%20Convention%20-%20Latest.pdf> (last visited Apr. 8, 2016).

ICSID, but only in relation to the use of its rules of procedure as guidance for ad hoc tribunals authorized to adopt their own rules of procedure.<sup>50</sup> The 1990s BITs, as exemplified by the China-Egypt and China-Iceland BITs, contain a more prominent mention of ICSID. For example, while the principal dispute settlement mechanism that the China-Egypt BIT contains is court litigation,<sup>51</sup> it also allows the investor to submit a claim on the quantum of compensation to ad hoc arbitration.<sup>52</sup> It also gives the Secretary General of ICSID the default authority to appoint the chair of the tribunal.<sup>53</sup> The China-Iceland BIT gives ICSID further prominence: it allows either party to submit a claim on the quantum of compensation to ad hoc or ICSID arbitration at the choice of the moving party.<sup>54</sup> This is in addition to the reference to ICSID as the default appointing authority and ICSID procedural rules as a guidance.<sup>55</sup> Similar to the 1980s BITs, Chinese BITs from the 1990s do not demonstrate any discernable China-North or China-South patterns, apart from being primarily China-South BITs. To the extent there are any differences, they are quite unremarkable.

### C. Chinese BITs in the 2000s

The third generation Chinese BITs are those signed in the 2000s. Continuing the same methodology as above, one China-North and one China-South are profiled below. These are China-Germany (2003) and China-Uganda (2004), respectively. The definition of investment in both is almost identical. It requires that claims to money be associated with investment.<sup>56</sup> The definition of investor is also identical: nationals and juridical persons of the respective country.<sup>57</sup>

The two BITs also state the required treatment for investments made by the other contracting nation's investors in almost identical terms as follows:

#### Treatment of Investment

(1) Investments of investors of each Contracting Party shall at all times be accorded fair and equitable treatment in the territory of the other Contracting Party.

(2) Each Contracting Party shall accord to investments and activities associated with such investments by the investors of the other Contracting Party treatment not less favourable than that accorded to the investments and associated activities by its own investors.

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50. See, e.g., China-Ghana BIT, *supra* note 26, at art. 10(3).

51. *Id.* at art. 9(2).

52. *Id.* at art. 9(3).

53. *Id.* at art. 9(4).

54. China-Iceland BIT, *supra* note 41, at art. 9(3).

55. See *id.* at art. 9(6).

56. Agreement on the Encouragement and Reciprocal Protection of Investments, China-Ger., art. 1(1)(c), Dec. 1, 2003, 2362 U.N.T.S. 253 [hereinafter China-Germany BIT]; Agreement on the Reciprocal Promotion and Protection of Investments, China-Uganda, art. 1(1)(c), May 27, 2004 [hereinafter China-Uganda BIT], <http://investmentpolicyhub.unctad.org/Download/TreatyFile/790>.

57. China-Germany BIT, *supra* note 56, at art. 1(2); China-Uganda BIT, *supra* note 56, at art. 1(2).

(3) Neither Contracting Party shall subject investments and activities associated with such investments by the investors of the other Contracting Party to treatment less favourable than that accorded to the investments and associated activities by the investors of any third State.

(4) The provisions of Paragraphs 1 to 3 of this Article shall not be construed so as to oblige one Contracting Party to extend to the investors of the other Contracting Party the benefit of any treatment, preference or privilege by virtue of

(a) any membership or association with any existing or future customs union, free trade zone, economic union, common market;

(b) any double taxation agreement or other agreement regarding matters of taxation.<sup>58</sup>

The treatment of investment provisions, along with the dispute settlement provision discussed below, is the hallmark of the third generation Chinese BIT. It officially and expressly grants National Treatment on top of MFN. This provision reciprocally benefits all four beneficiaries in exactly the same way: German investors in China, Chinese investors in Germany, Ugandan investors in China, and Chinese investors in Uganda. In practice, there are Chinese investors in Germany and German investors in China. There are also Chinese investors in Uganda, but few if any Ugandan investors in China. The critical inquiry thus continues to be whether the paucity of African investment interests in China has dictated qualitative differences anywhere in the three generations of Chinese BIT models. This question will be explored further.

The expropriation provision is also almost identical. It prohibits the expropriation of the investments of investors unless for public purpose and without discrimination, and expressly outlines the Hull Rule<sup>59</sup> of prompt, effective, and adequate compensation.<sup>60</sup> Although there were traces of this

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58. China-Germany BIT, *supra* note 56, at art. 3. See also China-Uganda BIT, *supra* note 56, at art. 3 (containing slight, inconsequential phraseological variation on the exceptions).

59. See Frank G. Dawson & Burns H. Weston, "Prompt, Adequate, and Effective": A Universal Standard of Compensation?, 30 *FORDHAM L. REV.* 727, 733-34 (1962).

60. China-Germany BIT, *supra* note 56, at art. 4:

Expropriation and Compensation

(1) Investments by investors of either Contracting Party shall enjoy full protection and security in the territory of the other Contracting Party.

(2) Investments by investors of either Contracting Party shall not directly or indirectly be expropriated, nationalized or subjected to any other measure the effects of which would be tantamount to expropriation or nationalization in the territory of the other Contracting Party (hereinafter referred to as expropriation) except for the public benefit and against compensation. Such compensation shall be equivalent to the value of the investment immediately before the expropriation is taken or the threatening expropriation has become publicly known, whichever is earlier. The compensation shall be paid without delay and shall carry interest at the prevailing commercial rate until the time of payment; it shall be effectively realizable and freely transferable. Precautions shall have been made in an appropriate manner at or prior to the time of expropriation for the determination and payment of such compensation. At the request of the investor the legality of any such expropriation and the amount of compensation shall be subject to review by national courts, notwithstanding the provisions of Article 9.

rule in prior generations, the third generation BITs outline the rule more precisely. There are no notable differences in the way that the Hull Rule is stated in the China-Germany and China-Uganda BITs except the addition of MFN in the China-Germany BIT in relation to expropriation.<sup>61</sup> The addition of MFN in the expropriation provision appears unusual, given the general lack of a coherent strategy in China's BITs.

Dispute settlement is another area where the third generation makes a notable change from the previous generation because it provides investors access to ICSID arbitration. Interestingly, the China-Germany and China-Uganda BITs contain differing formulations. Comparing the texts is useful. The dispute settlement provision of the China-Germany BIT states in whole:

Settlement of Disputes between Investors and one Contracting Party

(1) Any dispute concerning investments between a Contracting Party and an investor of the other Contracting Party should as far as possible be settled amicably between the parties in dispute.

(2) If the dispute cannot be settled within six months of the date when it has been raised by one of the parties in dispute, it shall, at the request of the investor of the other Contracting State, be submitted for arbitration.

(3) The dispute shall be submitted for arbitration under the Convention of 18 March 1965 on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID), unless the parties in dispute agree on an ad-hoc arbitral tribunal to be established under the Arbitration Rules of the United Nations Commission on the International Trade Law (UNCITRAL) or other arbitration rules.

(4) Any award by an ad-hoc tribunal shall be final and binding. Any award under the procedures of the said Convention shall be binding and subject only to those appeals or remedies provided for in this Convention. The awards shall be enforced in accordance with domestic law.<sup>62</sup>

The China-Uganda BIT put it this way:

Settlement of disputes between an investor and a Contracting Party

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(3) Investors of either Contracting Party shall enjoy most-favoured-nation treatment in the territory of the other Contracting Party in respect of the matters provided for in this Article.

61. See China-Uganda BIT, *supra* note 56, at art. 4:

Expropriation

1. Neither Contracting Party shall take any measures of expropriation or nationalization or any other measures having the effect of dispossession, direct or indirect, of investors of the other Contracting Party of their investments in territory, except for the public interest, without discrimination and against compensation.

2. Any measures of dispossession which might be taken shall give rise to prompt compensation, the amount of which shall be equivalent to the real value of the investments immediately before the expropriation is taken or the impending expropriation becomes public knowledge, whichever is earlier.

3. The said compensation shall be set not later than the date of dispossession. The compensation shall include interest at a normal commercial rate from the date of expropriation until the date of payment. The compensation shall also be made without delay, be effectively realizable and freely transferable.

62. China-Germany BIT, *supra* note 56, at art. 9.

1. Any legal dispute between an investor of one Contracting Party and the other Contracting Party in connection with an investment in the territory of the other Contracting Party shall, as far as possible, be settled amicably through negotiations between the parties to the dispute.
2. If the dispute cannot be settled through negotiations within six months from the date it has been raised by either party to the dispute, it shall be submitted by the choice of the investor:
  - (a) to the competent court of the Contracting Party that is a party to the dispute;
  - (b) to International Center for Settlement of Investment Disputes (ICSID) under the Convention on the Settlement of Disputes between States and Nationals of Other States, done at Washington on March 18, 1965, provided that the Contracting Party involved in the dispute may require the investor concerned to go through the domestic administrative review procedures specified by the laws and regulations of that Contracting Party before the submission to the ICSID. Once the investor has submitted the dispute to the competent court of the Contracting Party concerned or to the ICSID, the choice of one of the two procedures shall be final.
3. The arbitration award shall be based on the law of the Contracting Party to the dispute including its rules on the conflict of laws the provisions of this Agreement as well as the universally accepted principles of international law.
4. The arbitration award shall be final and binding upon both parties to the dispute. Both Contracting Parties shall commit themselves to the enforcement of the award. Each party to the dispute shall bear the costs of its appointed arbitrator and of its representation in arbitral proceedings. The relevant costs of the Chairman and tribunal shall be borne in equal parts by the parties to the dispute. The tribunal may in its award direct that a higher proportion of the costs be borne by one of the parties to the dispute.<sup>63</sup>

The default rule under the China-Germany BIT is ICSID arbitration unless both parties agree to resort to ad hoc arbitration under the UNCITRAL Rules.<sup>64</sup> The China-Uganda BIT gives the investor more options including resort to domestic court litigation in the host country or ICSID arbitration, but it also allows the host state to require the investor to exhaust domestic administrative remedies.<sup>65</sup> Theoretically, under the ICSID Convention, the exhaustion of local administrative remedies may be interpreted as a condition on the consent provided by the BIT to subject the host state to the jurisdiction of ICSID tribunals. In any case, such a requirement is a significant impediment to accessing the ICSID arbitration system. The China-Uganda BIT also makes no other provision for UNCITRAL or other ad hoc arbitration.

It is remarkable that while China (at least at the time the China-Germany BIT was signed) was principally the recipient of investment and would theoretically have more incentives to limit the investor's choices on international procedural remedies, and seek expansive international procedural remedies vis-à-vis Uganda in which it is investor not recipient, the dispute settlement provisions in the respective BITs appear to be informed

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63. China-Uganda BIT, *supra* note 56, at art. 8.

64. China-Germany BIT, *supra* note 56, at art. 9(3).

65. China-Uganda BIT, *supra* note 56, at art. 8(2).

by the opposite theoretical assumptions. This may not be a result of well thought out and systematic policy on the part of China, or it may be that China, unlike many developed economies, was not overly concerned about the availability of international procedural remedies for its investors during the time period that it signed the third generation BITs. The next Part explores the salient features of the most contemporary Chinese BITs to see if China is increasingly acting like the more mature and developed economies of the North, or if it is developing its own formulations custom-made for its various needs and interests.

## II. The Salient Features of the Contemporary Chinese BITs

The China-Canada BIT is selected for analysis, not only because it is the most contemporary Chinese BIT, but also because it provides perspective on China's approach to investment protection vis-à-vis the developed economies of the North. The analysis also shows how the China-Canada BIT informs or should inform its approach to investment protection in Africa. The China-Tanzania BIT (March 2013) is selected simply because it is the latest China-Africa BIT signed. It was signed within months of the China-Canada BIT (signed September 2012), making them the same generation.<sup>66</sup>

### A. The China-Canada BIT

The China-Canada BIT came into force on October 1, 2014.<sup>67</sup> As of this writing, it is the most recent Chinese BIT with demonstrably more contemporary features. Just on its face, the China-Canada BIT is significantly longer, with thirty-five articles and many annexes covering many more substantive areas than the previous Chinese BIT models, and including an extraordinary level of detail on the subject of dispute settlement.<sup>68</sup>

#### 1. *Substantive Rights and Obligations*

Protected investment is defined more broadly than in the previous model BITs. In fact, the definition resembles the definition contained in NAFTA Chapter 11 to the point where it could be concluded that it was clearly informed by the NAFTA definition, if not completely taken verbatim. It reads:

- For the purpose of this Agreement,
1. "investment" means:
    - (a) an enterprise;
    - (b) shares, stocks and other forms of equity participation in an enterprise;

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66. See *International Investment Agreements Navigator: China*, INV. POL'Y HUB (Nov. 2, 2015), <http://investmentpolicyhub.unctad.org/IIA/CountryBits/42#iiaInnerMenu> (showing signature status).

67. See *id.*

68. 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, Can.-China, Sept. 9, 2012 [hereinafter China-Canada BIT], <http://investmentpolicyhub.unctad.org/Download/TreatyFile/3476>.

- (c) bonds, debentures, and other debt instruments of an enterprise;
- (d) a loan to an enterprise
  - (i) where the enterprise is an affiliate of the investor, or
  - (ii) where the original maturity of the loan is at least three years;
- (e) notwithstanding sub-paragraphs (c) and (d) above, a loan to or debt security issued by a financial institution is an investment only where the loan or debt security is treated as regulatory capital by the Contracting Party in whose territory the financial institution is located;
- (f) an interest in an enterprise that entitles the owner to share in the income or profits of the enterprise;
- (g) an interest in an enterprise that entitles the owner to share in the assets of that enterprise on dissolution;
- (h) interests arising from the commitment of capital or other resources in the territory of a Contracting Party to economic activity in such territory, such as under
  - (i) contracts involving the presence of an investor's property in the territory of the Contracting Party, including turnkey or construction contracts, or concessions to search for and extract oil and other natural resources, or
  - (ii) contracts where remuneration depends substantially on the production, revenue or profits of an enterprise;
- (i) intellectual property rights; and
- (j) any other tangible or intangible, moveable or immovable, property and related property rights acquired or used for business purposes.<sup>69</sup>

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69. Compare *id.* at art. 1(1), with North American Free Trade Agreement, Can.-Mex.-U.S., ch. 11, Dec. 17, 1992, 32 I.L.M. 289 (1993) [hereinafter NAFTA] (defining investment as:

- (a) an enterprise;
  - (b) an equity security of an enterprise;
  - (c) a debt security of an enterprise
    - (i) where the enterprise is an affiliate of the investor, or
    - (ii) where the original maturity of the debt security is at least three years, but does not include a debt security, regardless of original maturity, of a state enterprise;
  - (d) a loan to an enterprise
    - (i) where the enterprise is an affiliate of the investor, or
    - (ii) where the original maturity of the loan is at least three years, but does not include a loan, regardless of original maturity, to a state enterprise;
  - (e) an interest in an enterprise that entitles the owner to share in income or profits of the enterprise;
  - (f) an interest in an enterprise that entitles the owner to share in the assets of that enterprise on dissolution, other than a debt security or a loan excluded from subparagraph (c) or (d);
  - (g) real estate or other property, tangible or intangible, acquired in the expectation or used for the purpose of economic benefit or other business purposes; and
  - (h) interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory, such as under
    - (i) contracts involving the presence of an investor's property in the territory of the Party, including turnkey or construction contracts, or concessions, or
    - (ii) contracts where remuneration depends substantially on the production, revenues or profits of an enterprise;
- but investment does not mean,
- (i) claims to money that arise solely from

This definition, apart from elaborating what constitutes investment, also expresses what does not constitute investment, namely,

- claims to money that arise solely from
- (i) commercial contracts for the sale of goods or services, or
  - (ii) the extension of credit in connection with a commercial transaction, such as trade financing, other than a loan covered by sub-paragraph (d); or
  - (l) any other claims to money, that do not involve the kinds of interests set out in sub-paragraphs (a) to (j).<sup>70</sup>

This definition of investment is basically an elaboration of the notion contained in the previous BIT models that links a claim to money to investment. This elaboration, informed by cases and controversies that arose out of models in North America, does not seem to make the kind of difference that the addition of so much text would otherwise suggest. In any case, the definition is clearly not one that China has used in any Africa BITs. It will be interesting to see if the same definition is used in the highly anticipated China-U.S. BIT.

The term “investor” is also defined better than in the previous models. It includes not only citizens but also permanent residents of the contracting parties.<sup>71</sup> This is particularly important to Canada where the foreign-born population with permanent residency status is very high.<sup>72</sup> The definition excludes those who may have the citizenship of the other contracting state.<sup>73</sup> In other words, dual nationals of the parties would not be considered investors, but interestingly, an investor of one who has permanent residency of the other would be considered an investor for purposes of the BIT. An example of this would be a Chinese citizen who has permanent residence status in Canada. He would be considered an investor within the meaning of the BIT and will be entitled to all the protections to the extent that his permanent residency does not accord better rights. The exclusion of dual citizens from the protection regime would seem to deny rare benefits or incentives to citizens that the host country might wish to accord to foreign investors. This is also not a very common formulation in any of the other Chinese BITs.

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- (i) commercial contracts for the sale of goods or services by a national or enterprise in the territory of a Party to an enterprise in the territory of another Party, or
  - (ii) the extension of credit in connection with a commercial transaction, such as trade financing, other than a loan covered by subparagraph (d); or
  - (j) any other claims to money, that do not involve the kinds of interests set out in subparagraphs (a) through (h) . . . .).

70. China-Canada BIT, *supra* note 68, at art. 1(1).

71. *Id.* at art. 1(2).

72. *See id.* The definition reads in particular:

“[I]nvestor” means with regard to either Contracting Party:

- (a) any natural person who has the citizenship or status of permanent resident of that Contracting Party in accordance with its laws and who does not possess the citizenship of the other Contracting Party; (b) any enterprise as defined in paragraph 10(a) of this Article; that seeks to make, is making or has made a covered investment.

73. *See id.*

A notable provision that the China-Canada BIT adds is a brief provision on admission.<sup>74</sup> Given the importance of admission decisions, the provision that the contracting parties decided to insert is quite remarkable in its brevity. It reads: "Each Contracting Party shall encourage investors of the other Contracting Party to make investments in its territory and admit such investments in accordance with its laws, regulations and rules."<sup>75</sup> It is clear from this provision that the contacting parties could not agree on a common standard of admission, but its inclusion perhaps serves as a place holder for future compromises on the perpetually contentious issue of admission. This has been the case since the first generation BIT.<sup>76</sup>

The China-Canada BIT also includes a separate provision for fair and equitable treatment, linking it to international law and, in particular, state practice.<sup>77</sup> Given the contentious nature of the specific standards under customary international law, the parties' decision to word it so simply is indicative of the difficulty of agreeing on more concrete standards even with growing maturity of the jurisprudence in this area.

Fundamental principles such as fair and equitable treatment, MFN, and National Treatment (ordinarily merged into one or two paragraphs in the previous model BITs) are elaborated in separate provisions in the China-Canada BIT. The fair and equitable provision cited above is contained in an article titled Minimum Standard of Treatment.<sup>78</sup> The previous models link MFN to fair and equitable treatment—in other words, minimum treatment.<sup>79</sup> The provision in this BIT goes a little further and accords benefits of its own. It reads in full:

1. Each Contracting Party shall accord to investors of the other Contracting Party treatment no less favourable than that it accords, in like circumstances, to investors of a non-Contracting Party with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments in its territory.
2. Each Contracting Party shall accord to covered investments treatment no less favourable than that it accords, in like circumstances, to investments of investors of a non-Contracting Party with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments in its territory.

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74. *Id.* at art. 3.

75. *Id.*

76. *See, e.g.,* China-Ghana BIT, *supra* note 26, at art. 3.

77. China-Canada BIT, *supra* note 68, at art. 4. It reads in full:

1. Each Contracting Party shall accord to covered investments fair and equitable treatment and full protection and security, in accordance with international law.

2. The concepts of "fair and equitable treatment" and "full protection and security" in paragraph 1 do not require treatment in addition to or beyond that which is required by the international law minimum standard of treatment of aliens as evidenced by general State practice accepted as law.

3. A determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article.

78. *Id.*

79. *See, e.g.,* China-Ghana BIT, *supra* note 26, at art. 3.

3. For greater certainty, the “treatment” referred to in paragraphs 1 and 2 of this Article does not encompass the dispute resolution mechanisms, such as those in Part C, in other international investment treaties and other trade agreements.<sup>80</sup>

This provision states the obligations in more precise terms as including treatment in respect of establishment and conduct in general. As indicated above, the previous generations linked MFN to the minimum standards of treatment.<sup>81</sup> It is also remarkable that the MFN provision expressly excluded the dispute settlement provision.<sup>82</sup> This is clearly informed by recent arguments about whether dispute settlement provisions would be imputed on the basis of MFN.<sup>83</sup> That argument never gained popularity but was one that needed to be addressed on a case-by-case basis, and evidently China and Canada decided to err on the side of expressly excluding it. This makes sense given the visible effort that they have made to customize the dispute settlement provision (discussed below) to their own specific needs.

The National Treatment provision is also notable for its clarity. It states:

1. Each Contracting Party shall accord to investors of the other Contracting Party treatment no less favourable than that it accords, in like circumstances, to its own investors with respect to the expansion, management, conduct, operation and sale or other disposition of investments in its territory.
2. Each Contracting Party shall accord to covered investments treatment no less favourable than that it accords, in like circumstances, to investments of its own investors with respect to the expansion, management, conduct, operation and sale or other disposition of investments in its territory.
3. The concept of “expansion” in this Article applies only with respect to sectors not subject to a prior approval process under the relevant sectoral guidelines and applicable laws, regulations and rules in force at the time of expansion. The expansion may be subject to prescribed formalities and other information requirements.<sup>84</sup>

Note specifically the express statement regarding the permissibility of prescribing formalities and information requirements—measures that could be confused with regulatory restrictions that may infringe upon the substantive rights granted to the investor under the BIT.

In addition to elaborating and clarifying the abovementioned standard substantive provisions, the China-Canada BIT contains some new substantive provisions. Their coverage ranges from details such as nationality requirements in executive and board positions, to immigration regulations.<sup>85</sup> Some of these are important details that the previous BIT models

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80. China-Canada BIT, *supra* note 68, at art. 5.

81. See, e.g., China-Ghana BIT, *supra* note 26, at art. 3.

82. China-Canada BIT, *supra* note 68, at art. 5(3).

83. See Nartnirun Junngam, *An MFN Clause and BIT Dispute Settlement: A Host State's Implied Consent to Arbitration by Reference*, 15 UCLA J. INT'L L. & FOREIGN AFF. 399, 408 (2010).

84. China-Canada BIT, *supra* note 68, at art. 6.

85. For example, Article 7(3) states:

did not contain. In terms of performance requirements, the China-Canada BIT incorporates the World Trade Organization (WTO) Agreement on Trade Related Investment Measures (TRIMs) by reference.<sup>86</sup> This not only ensures WTO compatibility, but also subjects the parties to already agreed upon and familiar rules on investment, no matter how sporadic.

The expropriation provision is almost identical to the expropriation provision found in third generation BITs.<sup>87</sup> It incorporates the Hull Rule on compensation without going into the details of how valuation should be conducted. It thus preserves the old rule and does not shed any additional light. In effect, if a controversy arises with respect to an expropriated investment, this BIT provides no better guidance than the previous models, which is somewhat surprising. On measures of expropriation, however, the parties have agreed to add an indeterminate provision at the end registering their common understanding on what might constitute an indirect expropriation.<sup>88</sup> This addition is as much an expression of their willingness to demur on difficult questions as it is of their inability to agree on a definition of indirect expropriation.

The China-Canada BIT contains detailed provisions on subrogation,<sup>89</sup> transfers,<sup>90</sup> taxation,<sup>91</sup> denial of benefits,<sup>92</sup> transparency of laws and regulations,<sup>93</sup> and dispute settlement.<sup>94</sup> The dispute settlement provision is discussed in some detail below. Before addressing that, however, it is important to highlight the denial of benefits provision because such a provision does not typically feature in Chinese BITs. It reads in full:

1. A Contracting Party may, at any time including after the institution of arbitration proceedings in accordance with Part C, deny the benefits of this Agreement to an investor of the other Contracting Party that is an enterprise of that other Contracting Party and to covered investments of that investor:
  - (a) if investors of a non-Contracting Party own or control the enterprise; and
  - (b) the denying Contracting Party adopts or maintains measures with respect to the non-Contracting Party:

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Subject to its laws, regulations and policies relating to the entry and sojourn of non-citizens, a Contracting Party shall permit natural persons who have the citizenship or status of permanent resident of the other Contracting Party and are employed by any enterprise that is a covered investment of an investor, or a subsidiary or affiliate thereof, to enter and remain temporarily in its territory in a capacity that is managerial, executive or that requires specialized knowledge. China-Canada BIT, *supra* note 68, at art. 7(3).

86. *Id.* at art. 9 (“The Contracting Parties reaffirm their obligations under the WTO Agreement on Trade-Related Investment Measures (TRIMs), as amended from time to time. Article 2 and the Annex of the TRIMs are incorporated into and made part of this Agreement.”).

87. Compare China-Germany BIT, *supra* note 56, at art. 4(2) (illustrating the expropriation provision of a third generation BIT), with China-Canada BIT, *supra* note 68, at art. 10(1) (illustrating the contemporary BIT expropriation provision).

88. See China-Canada BIT, *supra* note 68, at Annex B.10(2).

89. *Id.* at art. 13.

90. *Id.* at art. 12.

91. *Id.* at art. 14.

92. *Id.* at art. 16.

93. *Id.* at art. 17.

94. *Id.* at art. 19-32.

§(i) that prohibit transactions with the enterprise; or  
§(ii) that would be violated or circumvented if the benefits of this Agreement were accorded to the enterprise or to its covered investments.

2. A Contracting Party may, at any time including after the institution of arbitration proceedings in accordance with Part C, deny the benefits of this Agreement to an investor of the other Contracting Party that is an enterprise of that other Contracting Party and to covered investments of that investor if investors of a non-Contracting Party or of the denying Contracting Party own or control the enterprise and the enterprise has no substantial business activities in the territory of the other Contracting Party under whose law it is constituted or organized.

3. For greater certainty, a Contracting Party may deny the benefits of this Agreement pursuant to paragraphs 1 and 2 at any time, including after the initiation of arbitration proceedings in accordance with Part C.<sup>95</sup>

The benefits rule appears to be analogous to the origin rule in trade and is designed to prevent investors of non-contracting states from misusing the BIT's benefits through arrangements that circumvent the eligibility requirements. The rule can even deny benefits after the commencement of arbitral proceedings. This provision is a new addition in any Chinese BIT and is likely to be a source of dispute, much like the fair and equitable provision of most BITs, because of the increasing complexity and usage of corporate shells around the world.

## 2. *Dispute Settlement*

By far the most significant change that the China-Canada BIT introduces pertains to the unusually elaborate investor-state dispute settlement provision.<sup>96</sup> It not only commits the parties to arbitrate in very specific ways under very specific procedures.<sup>97</sup> The dispute settlement provision comprises Articles 19 through 32,<sup>98</sup> and covers almost all aspects of the process in unusual detail, down to rules of procedure.

The first noteworthy aspect of the provision is that it sets up a unique dispute settlement mechanism for the financial sector embedded within the main dispute settlement mechanism.<sup>99</sup> The mechanism is international arbitration under ICSID Rules or ICSID Additional Facilities, or UNCITRAL Rules as modified by the BIT rules.<sup>100</sup> The inclusion of the Additional Facilities has, of course, become redundant by virtue of Canada's ratification of the ICSID Convention on December 1, 2013.<sup>101</sup> That the China-Canada BIT was signed before Canada's ratification of the ICSID

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95. *Id.* at art. 16.

96. *Id.* at art. 19-32.

97. *See id.*

98. *Id.*

99. *Id.* at art. 22.

100. *Id.* at art. 22(1)(a)-(c).

101. INT'L CTR. FOR SETTLEMENT OF INV. DISPUTES, LIST OF CONTRACTING STATES AND OTHER SIGNATORIES OF THE CONVENTION (2015), <https://icsid.worldbank.org/apps/ICSIDWEB/icsiddocs/Documents/List%20of%20Contracting%20States%20and%20Other%20Signatories%20of%20the%20Convention%20-%20Latest.pdf> [last visited Apr. 8, 2016]. China ratified the Convention on January 7, 1993.

Convention explains the redundancy and even suggests that Canada was unsure about ratifying the ICSID Convention until at least the signing of the BIT on September 12, 2012.

In any case, the choice of whether to submit a claim for arbitration and under what rules remains that of the investor.<sup>102</sup> This BIT, though contemporary, does not depart from the traditional rule that the investor may initiate arbitration while the host state may not.<sup>103</sup> Certain models, such as the investment treaty model of the International Institute for Sustainable Development (IISD), a Canadian non-governmental organization, provide for the host state's right to proceed against the investor for the investor's breach of its obligations in arbitration.<sup>104</sup> The IISD Model defines the investor's obligations in great detail in separate provisions.<sup>105</sup> As a contemporary agreement, the China-Canada BIT could have been expected to contain at least some of these investor responsibility provisions, but evidently the parties either could not agree on the principles or did not see the need to add such provisions to this BIT.

Be that as it may, the new mechanism relative to the financial sector is significant. It combines state-to-state arbitration with investor-state arbitration whereby proceedings of one inform or even control the other.<sup>106</sup> When the subject matter of the dispute pertains to reasonable measures that one of the parties has taken relative to the following items, the state may raise a defense against an investor's claims on the basis of these measures:<sup>107</sup>

102. See China-Canada BIT, *supra* note 68, at art. 22(1).

103. See *id.* at art. 20-23.

104. See HOWARD MANN ET AL., INT'L INST. FOR SUSTAINABLE DEV., IISD MODEL INTERNATIONAL AGREEMENT ON INVESTMENT FOR SUSTAINABLE DEVELOPMENT, at Annex A, art. 2(1) (2005), [http://www.iisd.org/pdf/2005/investment\\_model\\_int\\_agreement.pdf](http://www.iisd.org/pdf/2005/investment_model_int_agreement.pdf). It reads:

(1) In the event that a disputing party considers that a dispute cannot be settled by alternative means, and all other pre-conditions for such a dispute as required by the Agreement have been fulfilled:

- a) the investment, on its own behalf, may submit to arbitration under this Agreement a claim that the respondent host State has breached an obligation under this Agreement and that the investment has incurred loss or damage by reason of, or arising out of, that breach;
- b) the investor, on its own or on behalf of the investment if it is the controlling investor, may submit to arbitration under this Agreement a claim that the respondent has breached an obligation under this Agreement, and that the claimant has incurred loss or damage by reason of, or arising out of, that breach;
- c) a State Party may submit a claim to arbitration under this Agreement as claimant against another State party; and
- d) a State Party may submit a claim to arbitration as claimant against an investor or investment.

105. See *id.* at art. 11-18 (Obligations of Investors and Investments—Article 11: General obligations; Article 12: Pre-establishment impact assessment; Article 13: Anti-corruption; Article 14: Post-establishment obligations; Article 15: Corporate governance and practices; Article 16: Corporate social responsibility; Article 17: Investor liability; Article 18: Relation of this Part to dispute settlement).

106. See China-Canada BIT, *supra* note 68, at art. 20(2)(a)-(c).

107. *Id.*

- (a) the protection of depositors, financial market participants and investors, policyholders, policy-claimants, or persons to whom a fiduciary duty is owed by a financial institution;
- (b) the maintenance of the safety, soundness, integrity or financial responsibility of financial institutions; and
- (c) ensuring the integrity and stability of a Contracting Party's financial system.<sup>108</sup>

In that case, the investor-state tribunal must defer the decision on whether such measures qualify as a defense to a different process.<sup>109</sup> First, under Article 20, the tribunal must seek a report from the contracting parties' financial services authorities.<sup>110</sup> If they agree on the matter and write a report, that report binds the tribunal on whether the defense under Article 33(3) is valid.<sup>111</sup> If the authorities do not agree, the parties could set up a state-to-state tribunal to determine that particular issue, which would bind the investor-state tribunal.<sup>112</sup> This system integrates the state-to-state and investor-state arbitral processes in a unique way. The recent financial crisis appears to have informed this formulation.

The second notable feature of the dispute settlement mechanism set up by the China-Canada BIT is the depth of the rules on the selection, qualification, and appointment of arbitrators.<sup>113</sup> It covers such areas as required subject matter-specific expertise and remuneration, and bestows the default appointment authority on the Secretary General of ICSID.<sup>114</sup>

In a third feature, the BIT also has detailed provisions on procedural matters that are ordinarily left for institutional rules, for instance on the consolidation of cases,<sup>115</sup> on third-party participation,<sup>116</sup> and on interim measures of preservation.<sup>117</sup> It also contains detailed rules on public access to information about the proceedings and awards.<sup>118</sup>

The BIT adopts the default rule that the awards and the proceedings shall be public but with broad exceptions for confidential information.<sup>119</sup> Nevertheless, if the host state determines that it is in the public interest to make not only the awards but all the submissions public, they will be made public, though with confidential information redacted.<sup>120</sup> The BIT leaves the authority to determine what constitutes public interest to the host state,<sup>121</sup> while giving the tribunal the authority to determine what consti-

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108. *Id.* at art. 33(3)(a)-(c).

109. *See id.* at art. 20(2)(a).

110. *Id.*

111. *Id.* at art. 20(2).

112. *Id.* at art. 20(2)(c).

113. *See id.* at art. 24.

114. *Id.*

115. *Id.* at art. 26.

116. *Id.* at art. 27.

117. *Id.* at art. 31.

118. *Id.* at art. 28.

119. *Id.* at art. 28(1).

120. *Id.*

121. *Id.*

tutes confidential information.<sup>122</sup> Interestingly, if and when the tribunal's decision on confidentiality conflicts with the host state's freedom of information laws, the BIT accords such laws primacy.<sup>123</sup> This is significant in view of the recent debate about the legitimacy of investor-state arbitration that often focuses on the confidentiality or secrecy of proceedings of public importance.<sup>124</sup>

The fourth notable feature pertains to permission for submissions by interested third parties.<sup>125</sup> In fact, the China-Canada BIT adds an elaborate annex to the dispute resolution rule.<sup>126</sup> This is undoubtedly a response to the recent backlash against investor-state arbitration because of the perceived impact on public interest and the desire by non-profit advocacy groups to submit amicus briefs on matters they consider important, such as the environment, labor and employment standards, corporate social responsibility, and corruption.

A fifth feature relates to the governing substantive law. In a significant departure from the traditional BITs that select the host state's laws as the rule of decision, the China-Canada BIT expressly selects international law as the rule of decision.<sup>127</sup> It states in particular:

1. A Tribunal established under this Part shall decide the issues in dispute in accordance with this Agreement, and applicable rules of international law, and where relevant and as appropriate, take into consideration the law of the host Contracting Party. An interpretation by the Contracting Parties of a provision of this Agreement shall be binding on a Tribunal established under this Part, and any award under this Part shall be consistent with such interpretation.<sup>128</sup>

Hence, the application of the laws of the host state is ancillary and supplemental. The China-Canada BIT thus reverses the roles that international and domestic law play in the traditional BIT models, including the various generations of Chinese BITs. In fact, the China-Canada BIT does more than place international law above domestic law; it reduces the application of domestic law to a merely informational role. Given the unending controversy on the exact prescriptions of customary international law in the area of international investment, this choice of law rule is sure to add to the complexity of arbitral decision-making.

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122. See *id.* at art. 28(5).

123. *Id.* ("5. To the extent that a Tribunal's confidentiality order designates information as confidential and a Contracting Party's law on access to information requires public access to that information, the Contracting Party's law on access to information shall prevail. However, a Contracting Party should endeavour to apply its law on access to information so as to protect information designated confidential by the Tribunal.")

124. Many writings address the contemporary debate about the legitimacy of the investor-state arbitral regime. A notable contribution in this regard is a collection of essays contained in *THE BACKLASH AGAINST INVESTMENT ARBITRATION: PERCEPTIONS AND REALITY* (Michael Waibel et al. eds., 2010). See GUS VAN HARTEN, *INVESTMENT TREATY ARBITRATION AND PUBLIC LAW* 150-51 (2007).

125. China-Canada BIT, *supra* note 68, at art. 29.

126. *Id.* at Annex C.29.

127. *Id.* at art. 30(1).

128. *Id.*

Finally, the China-Canada BIT excepts a fair amount of matters from the application of the treaty.<sup>129</sup> In particular, the China-Canada BIT incorporates matters pertaining to “cultural industries,” defined to include matters that are ordinarily considered to relate to freedom of speech;<sup>130</sup> measures pertaining to the environment;<sup>131</sup> certain financial regulation;<sup>132</sup> monetary, credit, and exchange rate polices;<sup>133</sup> and matters relating to national security,<sup>134</sup> as well as those pertaining to the state’s ability to regulate access to information.<sup>135</sup>

### 3. *The Salient Features Recapped*

As of this writing, the China-Canada BIT is the most contemporary BIT in the world. It is significant not only because it is temporally the latest to come into effect, but also because it has been duly negotiated between a developed economy of the North and the world’s second largest economy, albeit one technically still considered a developing economy. It also elaborates the fundamental principles and adds clarification as discussed above.

The China-Canada BIT, however, is not a Chinese model BIT; it is a Canadian model BIT.<sup>136</sup> It is perhaps the first such elaborate BIT and might even signal what the U.S.-China BIT might look like because China seems to have accepted many of the standard Canadian provisions, including the definition of investment and investors. The China-Canada BIT also contains elaborate exceptions suggesting compromises on many areas including the state’s right to regulate financial markets and the environment. It also makes provisions for transparency, attempts to define the standards for indirect expropriation, and revamps the dispute settlement provisions in an unprecedented way. Moreover, because it is a BIT that is negotiated arguably between equals with a legitimate expectation of the promotion and reciprocal protection of investment, and with due regard to sustainability,<sup>137</sup> the China-Canada BIT is a model that China should consider adopting vis-à-vis African states with certain modifications on a case-by-case basis. The following section discusses the implications for Africa.

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129. *Id.* at art. 33.

130. *Id.* at art. 33(1).

131. *Id.* at art. 33(2).

132. *Id.* at art. 33(3).

133. *Id.* at art. 33(4).

134. *Id.* at art. 33(5).

135. *Id.* at art. 33(6).

136. For example, Canada’s BIT with Nigeria is almost identical to the China-Canada BIT. Compare China-Canada BIT, *supra* note 68, with Agreement Between Canada and the Federal Republic of Nigeria for the Promotion and Protection of Investments, Can.-Nigeria, May 6, 2014, <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/nigeria-agreement-nigerie.aspx?lang=eng>. See Agreement Between Canada and Mali for the Promotion and Protection of Investments, Can.-Mali, Nov. 28, 2014, <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/mali-agreement.aspx?lang=eng>. See generally Fortier, *supra* note 4, at 525-43 (discussing Canadian BITs).

137. See China-Canada BIT, *supra* note 68, at pmbl.

## B. China-Tanzania BIT (2013)

The China-Tanzania BIT is the most recent China-Africa BIT, having been signed on March 24, 2013.<sup>138</sup> It little resembles the China-Canada BIT; rather it looks much more like the third generation BITs that China signed in the 2000s. There are, however, some notable differences in defining the objectives, substantive obligations, and dispute settlement. They are discussed below.

### 1. Substantive Obligations

The China-Tanzania BIT puts the policy objectives in its preamble as follows:

The Government of the People's Republic of China and the Government of The United Republic of Tanzania (hereinafter referred to as the Contracting Parties);

Intending to create favourable conditions for investment by investors of one Contracting Party in the territory of the other Contracting Party;

Recognizing that the reciprocal encouragement, promotion and protection of such investment on the basis of equality and mutual benefit will be conducive to stimulating the business initiative of the investors and will increase economic prosperity in both States;

Respecting the economic sovereignty of both States;

Encouraging investors to respect corporate social responsibilities; and

Desiring to intensify the cooperation between both States, to promote healthy, stable and sustainable economic development, and to improve the standard of living of nationals.<sup>139</sup>

There are certain additions to this BIT in comparison to the China-Canada BIT, most notably the part that says “to promote healthy, stable and sustainable economic development, and to improve the standard of living of nationals.”<sup>140</sup> Although the policy objective is stated this way, as discussed below, there are no considerable changes in the BIT that would allow for the conclusion that substantive changes were made to existing BIT models to achieve the newly stated objectives. It is also important to note, despite the statement that that the main policy underpinning this is the “reciprocal encouragement, promotion and protection” of investment,<sup>141</sup> the flow of investment is still, as in North-Africa relations, one-way.

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138. For signature statuses, see *International Investment Agreements Navigator*, INV. POL'Y HUB, <http://investmentpolicyhub.unctad.org/IIA/CountryBits/42#iialInnerMenu> (last visited Nov. 23, 2015). See also 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-Tanz., Mar. 24, 2013 [hereinafter China-Tanzania BIT], <http://images.mofcom.gov.cn/tfs/201409/20140928170911164.doc>.

139. China-Tanzania BIT, *supra* note 138, at pmbl.

140. Compare *id.*, with China-Canada BIT, *supra* note 68.

141. China-Tanzania BIT, *supra* note 138, at pmbl.

The definition of investment is essentially taken from the old Chinese BITs<sup>142</sup> with one notable elaboration on claims to money<sup>143</sup>:

For the avoidance of doubt, claims to money in Paragraph 1(c) of this Article does not include (a) claims to money that arise solely from commercial contracts for the sale of goods or services by a national or enterprise in the territory of the other Contracting Party; or (b) claims to money that arise from marriage or inheritance and that have no characteristics of an investment.<sup>144</sup>

The rule under subsection (a) that expressly excludes claims to money from purely commercial sales of goods is a common rule enshrined in the China-Canada BIT and other BITs, as well as other investment treaties like NAFTA.<sup>145</sup> The rules under subsection (b) on marriage and inheritance are fairly new, however, and are perhaps peculiar to China-Tanzania relations. It would be interesting to examine whether it is a growing phenomenon signaling significant people-to-people relations to the point where such issues are deserving of particular mention in treaties.

The China-Tanzania BIT defines the term “investor” in the same manner as older generation BITs.<sup>146</sup> Unlike the China-Canada BIT, the China-Tanzania BIT, by limiting the definition to nationals only, does not include permanent residents of the contracting parties.<sup>147</sup>

In terms of treatment, while the content appears to be more or less the same as the third generation model discussed above (China-Uganda or China-Germany), the China-Tanzania BIT adds an exception with the potential to swallow the rule.<sup>148</sup> It reads:

1. Without 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.
2. Each Contracting Party, in accordance with its laws and regulations, may 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>149</sup>

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142. Compare China-Tanzania BIT, *supra* note 138, at art. 1(1), with China-Sweden BIT, *supra* note 23, at art. 1(1).

143. Compare China-Tanzania BIT, *supra* note 138, at art. 1(1), with China-Sweden BIT, *supra* note 23, at art. 1(1).

144. China-Tanzania BIT, *supra* note 138, at art. 1(1).

145. Compare China-Canada BIT, *supra* note 68, at art. 1(1), with NAFTA, *supra* note 69.

146. Compare China-Tanzania BIT, *supra* note 138, at art. 1(2), with China-Sweden BIT, *supra* note 23, at art. 1(2).

147. Compare China-Tanzania BIT, *supra* note 138, at art. 1(2), with China-Canada BIT, *supra* note 68, at art. 1(2).

148. China-Tanzania BIT, *supra* note 138, at art. 3.

149. *Id.*

Both subsections leave significant leeway for the host state to limit National Treatment through laws and regulations. The first subsection subjects the rule to applicable laws and regulations while the second subsection allows preferential treatment to nationals as long as such incentives “shall not significantly affect” the investor’s investments.<sup>150</sup> This is a remarkable retreat from the established National Treatment clause of the third generation Chinese BITs. There is almost no doubt that this provision was inserted to accommodate Tanzania’s demands as it is the main recipient of the investment. The fact that China agreed to this regression is remarkable because Tanzania’s concerns and desire to benefit some local industries could have been best addressed at the time of admission of the investment and through other means that follow the very well-established principle of international investment law allowing broad areas of host state discretion.

The MFN provision is standard and does not contain any notable modifications.<sup>151</sup> Consistent with the latest models, the MFN provision does not apply to dispute settlement provisions.<sup>152</sup> The fair and equitable treatment provision, however, contains some odd and unclear additions. It reads in part:

1. Each Contracting Party shall ensure that it accords to investors of the other Contracting Party and associated investments in its territory fair and equitable treatment and full protection and security.
2. “Fair and equitable treatment” means that investors of one Contracting Party shall not be denied fair judicial proceedings by the other Contracting Party or be treated with obvious discriminatory or arbitrary measures.
3. “Full protection and security” requires that Contracting Parties take reasonable and necessary police measures when performing the duty of ensuring investment protection and security. However, it does not mean, under any circumstances, that investors shall be accorded treatment more favourable than nationals of the Contracting Party in whose territory the investment has been made.<sup>153</sup>

The meaning that the China-Tanzania BIT gives to “fair and equitable treatment” and “full protection and security” appears unusual and very specific to this particular BIT. It categorically links the definition of fair and equitable treatment to fair judicial proceedings. This is especially odd considering that the only time disputes could go to judicial proceedings is if the investor chooses to do so under the dispute settlement provisions discussed below.<sup>154</sup>

The definition of full protection and security also appears to be very literal because it limits the meaning to physical protection and security.<sup>155</sup> It is a provision clearly negotiated for specific concerns—most likely concerns of physical security of Chinese operations in Tanzania. That the

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150. *Id.*

151. *Id.* at art. 4.

152. *Id.*

153. *Id.* at art. 5.

154. *Id.* at art. 13.

155. *Id.* at art. 5.

clause purports to equalize protection and security to nationals is doubly odd, though it is clearly a result of political compromise.

The China-Canada BIT, on the other hand, articulates the concept of fair and equitable treatment in simple terms as follows:

1. Each Contracting Party shall accord to covered investments fair and equitable treatment and full protection and security, in accordance with international law.
2. The concepts of "fair and equitable treatment" and "full protection and security" in paragraph 1 do not require treatment in addition to or beyond that which is required by the international law minimum standard of treatment of aliens as evidenced by general State practice accepted as law.<sup>156</sup>

This is generally understood to mean full protection and security, but the China-Tanzania BIT's fair and equitable treatment provision makes no reference to international standards and limits it to physical protection by linking it to police action.<sup>157</sup> It seems to be unique in that sense. The expropriation provision<sup>158</sup> is unremarkable, except for its addition of a modern definition of indirect expropriation, a definition similar to the China-Canada BIT's definition of indirect expropriation.<sup>159</sup>

One notable addition to the third generation BIT is a provision on health and environment.<sup>160</sup> Its formulation has a striking resemblance with the latest U.S. Model BIT. It reads in relevant part:

1. The Contracting Parties recognize that it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures. Accordingly, a Contracting Party should not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such measures as an encouragement for the establishment, acquisition, expansion or retention in its territory of an investment of an investor.
2. Provided that such measures are not applied in an arbitrary or unjustifiable manner, or do not constitute a disguised restriction on international investment, nothing in this 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.<sup>161</sup>

It is a very weak formulation as far as protection of the environment is concerned because it uses terms such as "it is inappropriate," rather than mandatory language. Similarly, the second provision replaces mandatory language with the term "unjustifiable." Indeed, it appears that this formulation is partly informed by the 2004 U.S. Model BIT.<sup>162</sup> Regardless, given

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156. China-Canada BIT, *supra* note 68, at art. 4.

157. China-Tanzania BIT, *supra* note 138, at art. 5.

158. *Id.* at art. 6.

159. Compare China-Canada BIT, *supra* note 68, at Annex B.10, with China-Tanzania BIT, *supra* note 138, at art. 6(2).

160. China-Tanzania BIT, *supra* note 138, at art. 10.

161. *Id.*

162. See, e.g., 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, Rwanda-U.S., art. 12, Feb. 19, 2008, <http://investmentpolicyhub.unctad.org/Download/TreatyFile/2241>.

the absence of any mention of the environment in the previous Chinese BIT models, this is a step forward.

## 2. *Dispute Settlement*

The dispute settlement provision is also unremarkable. It gives the investor four options: domestic court litigation in the host state, ICSID arbitration, ad hoc arbitration under UNCITRAL Rules, and ad hoc arbitration under any other agreed rules.<sup>163</sup> The host state retains the right to require the exhaustion of local administrative remedies before the investor can exercise the right to resort to international arbitration.<sup>164</sup>

The choice of substantive law provision is important to highlight. With one exception, the provisions of the BIT and rules of international law govern.<sup>165</sup> The exception relates to contractual commitments. It reads in part: "Each Contracting Party shall observe any written commitments in the form of agreement or contract it may have entered into with the investors of the other Contracting Party with regard to their investments."<sup>166</sup> Disputes relating to written commitments are subject to

- (a) the rules of law as may be agreed by the disputing parties; or (b) if the rules of law have not been agreed: (i) the law of the Contracting Party where the investment has been made, including its rules on the conflict of laws; and (ii) such rules of international law as may be applicable.<sup>167</sup>

The only conceivable way that this exception would have meaning is if the investor chooses to bring a treaty action rather than a contract action for breach of contract or perhaps both, if it makes sense under the circumstances. In any case, the default choice is international law with the exception of contract claims.<sup>168</sup>

The remedies provision is notable for its imprecision. It reads:

Unless the disputing parties agree otherwise, where an award affirms that a Contracting Party has breached its obligations under this Agreement, the tribunal may only award, separately or in combination:

- (a) monetary damages and any applicable interest;
- (b) restitution of property, in which case the award may specify monetary damages and corresponding interest in lieu of restitution.<sup>169</sup>

The remedies are damages and/or restitution.<sup>170</sup> The restitution provision is indeterminate. It gives the decision maker the discretion to award damages in lieu of restitution.<sup>171</sup> It may be construed as allowing specific or forced performance against the host state unless the decision maker

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163. China-Tanzania BIT, *supra* note 138, at art. 13(2).

164. *Id.*

165. *Id.* at art. 13(6).

166. *Id.* at art. 14(2).

167. *Id.* at art. 13(6).

168. *Id.*

169. *Id.* at art. 13(7).

170. *Id.*

171. *Id.*

chooses to award damages instead. This is also not a very common formulation.

### 3. *Salient Features Recapped*

As of this writing, the China-Tanzania BIT is the most recent BIT that China has signed with an African state. Although it contains some contemporary provisions on such issues as indirect expropriation and environmental regulations, it remains decidedly consistent with the model China used in the 2000s. The peculiar characteristics, which are not especially significant, include:

- A focus on sustainable development in the preamble but not in the text in any significant way;
- A relatively broad definition of investment excluding claims for money for the sale of goods and claims for money from marriages and inheritance, which is very peculiar;
- A watered down version of National Treatment allowing preferential treatment of nationals for the purpose of encouraging local entrepreneurs;
- A fair and equitable treatment provision that limits the application to fair judicial proceedings;
- A protection and security provision that limits the meaning to police protection of physical investment;
- An elaborate definition of indirect expropriation; and
- A dispute settlement provision that offers the investor four options and allows for damages as well as restitution as discretionary remedies.

The above analysis suggests that it is difficult to classify the China-Tanzania BIT as North-South or South-South. Although China is evidently the stronger party, it does not appear that it took advantage of its superior economic standing in the BIT with Tanzania. If anything, it seems like some of the added provisions were not carefully considered. In fact, there might even be some mechanical deficiencies in, for example, the definition of fair and equitable treatment as well as in the protection and security provisions.

### III. *The China-Canada BIT's Implications for Africa*

As indicated above, the China-Canada BIT is a Canadian model, not a Chinese model. China's adoption of the Canadian BIT model signals at least two developments: (1) recognition of the inadequacies of the various BIT modes that it used in the past, and (2) its willingness to make compromises on certain matters, including the definition of investment and investor, access to information, and dispute settlement. The China-Canada BIT, however, appears to be as much about the parties' willingness to defer agreement on certain matters as it is about their actual agreements. This view finds support in the numerous exceptions and exclusions in areas such as "cultural industries"; the environment; financial regulation; monetary, credit, and exchange rate polices; national security; and access to information.

On the other hand, China and Canada were able to agree on such areas as the definition of investment; standards of treatment, including expropriation standards and what constitutes indirect expropriation; standards of compensation; and, most importantly, elaborate mechanisms of dispute settlement. China has shown its willingness to subscribe to these principles, at least with respect to its relations with Canada. Technically, henceforth, there will be no impediments to applying these principles vis-à-vis African states to the extent that the old BITs need to be renewed and new BITs need to be entered into. Because China has not strictly used any of its models with any degree of notable consistency, however, it is difficult to say with any certainty whether the BIT with Canada is a new model that China is willing to use in its relations with other states or whether it is one-of-a-kind. Then again, China's agreement on certain matters, such as international law as a substantive rule of decision, signals a decision to accept the concepts of international law, at least in principle.

Whether the Canadian model is a good model for Africa is, however, questionable for several reasons. Although it has sustainable development as its theoretical underpinning, its formulation of rules that propel that objective further is not satisfying. Given the time at which it was signed and ratified, it appears to be a rejection of more progressive models, such as the IISD Model, which contains many more provisions designed to foster sustainable development. Although the China-Canada model could serve as a good starting point for future China-Africa BITs or modification of the existing ones, some important provisions that are not covered in the China-Canada BIT need to be considered. These are best articulated in the IISD Model. Some of the necessary provisions are discussed in brief below.

#### A. Environmental Protection

The current state of the economic relations between China and Africa appears to mirror the relationship between the United States and China over the past three to four decades, which was characterized by the relocation of environmentally sensitive manufacturing industries to China. With Chinese attainment of immense economic progress, which raised the living standards of its population, the trend now seems to be for the relocation of environmentally sensitive manufacturing industries from China to Africa.

Although the relocation of any industries to Africa represents positive development for Africa, provisions in investment treaties could be used to minimize the adverse environmental impacts thereof. The China-Canada BIT retreated to domestic laws without either suggesting common standards or even prescribing minimum standards. For China and Africa, it is important to agree on certain fundamental environmental standards that investors must respect in the host country. A good model in this regard is the IISD Model.

There are several important provisions that should be considered for inclusion. They include:

- Investors and investments shall strive, through their management policies and practices, to contribute to the development objectives of the host states and the local levels of government where the investment is located.<sup>172</sup>
- On all occasions, the investor or investment shall comply with the minimum standards on environmental impact assessment and screening that the Parties shall adopt at the first meeting of the Parties, to the extent these are applicable to the investment in question.<sup>173</sup>
- Investors, their investment and host state authorities shall apply the precautionary principle to their environmental impact assessment and to decisions taken in relation to a proposed investment, including any necessary mitigating or alternative approaches to the investment, or precluding the investment if necessary.<sup>174</sup>
- Investments shall, in keeping with good practice requirements relating to the size and nature of the investment, maintain an environmental management system. Companies with over [250][500] employees, or in areas of resource exploitation or high-risk industrial enterprises, shall maintain a current certification to ISO 14001 or an equivalent environmental management standard: Emergency response and decommissioning plans shall be included in the environmental management system process.<sup>175</sup>

## B. Labor Standards

One of the competitive advantages of Africa, which is a draw to Chinese companies, is the cost of labor. By default, the kinds of industries that China sets up in Africa are labor-intensive.<sup>176</sup> The management of labor relations is key for the success of the investment. Provisions for common labor standards are very useful. An example of such standards is again provided in the IISD Model. It incorporates matured international labor standards in the following terms: "Investors and investments shall act in accordance with core labor standards as required by the ILO Declaration on Fundamental Principles and Rights of Work, 1998."<sup>177</sup> Agreeing on minimum labor standards is essential especially for Africa because of the states of economic development and labor conditions in many of its countries.

## C. Corporate Social Responsibility

Chinese companies in Africa come in different shapes and sizes. Moreover, shell companies with nominal or no relation to China could claim to be Chinese companies and attempt to gain inappropriate eco-

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172. MANN, *supra* note 104, at art. 11(C).

173. *See id.* at art. 12(A).

174. *Id.* at art. 12(D).

175. *Id.* at art. 14(A). Bracketed language allows contracting parties to tailor the agreement to their specific needs through negotiation.

176. HARRY G. BROADMAN, SEPARATING FACT FROM FICTION IN THE CHINA-AFRICA RELATIONSHIP 3 (2013), <http://www.pwc.com/gx/en/psrc/pdf/pwc-gridlines-separating-fact-from-fiction-in-the-china-africa-relationship.pdf>.

177. MANN, *supra* note 104, at art. 14(C).

conomic advantages.<sup>178</sup> The temptation to take advantage of vulnerable and economically disadvantaged populations is also very high. For these and related reasons, it is essential to prescribe certain minimum standards for corporate social responsibility. Again, relevant provisions in the IISD Model are instructive. Some are reproduced below.

(A) Investments shall meet or exceed national and internationally accepted standards of corporate governance for the sector involved, in particular for transparency and accounting practices.

(B) Investors and investments shall make available to the public any investment contract or agreement with the host state government(s) involved in the investment authorization process, subject to the redaction of confidential business information. Investors or investments shall publish all information relating to payments made to host state public authorities, including taxes, royalties, surcharges, fees and all other payments.

(C) Investments shall establish and maintain, where appropriate, local community liaison processes, in accordance with internationally accepted standards when available.

(D) Where relevant internationally accepted standards of the type described in this Article are not available or have been developed without the participation of developing countries, the Conference of the Parties may establish such standards.<sup>179</sup>

Sub-paragraph D is most likely to be the case in any China-Africa BIT negotiations. This would allow the parties the opportunity to incorporate principles that are most suitable for them even when it means lowering the minimum standards when absolutely necessary to serve more important and compelling societal needs that may not be appreciated in the developed world.

#### D. Corruption

Corruption is a serious problem in China as well as in many African countries. There are now defined legal standards common to China and Africa. These standards are incorporated in the United Nations Convention against Corruption.<sup>180</sup> It is important that investment treaties make reference to these universally agreed principles with due regard to the specific circumstances of each contracting party. Guidance could also be sought from the African Union Convention on Preventing and Combatting Corruption<sup>181</sup> and the domestic laws of the contracting parties.

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178. The corporate shell concept is used in innumerable contexts around the world, and the problem seems particularly acute in China given restrictions on foreign ownership of certain interests. See, e.g., *Alibaba's Political Risk*, WALL ST. J. (Sept. 19, 2014), <http://www.wsj.com/articles/alibabas-political-risk-1411059836>.

179. MANN, *supra* note 104, at art. 15.

180. G.A. Res. 58/4, U.N. Convention against Corruption (Oct. 31, 2003).

181. African Union Convention on Preventing and Combatting Corruption (July 11, 2003), [http://www.au.int/en/sites/default/files/treaties/7786-file-african\\_union\\_convention\\_preventing\\_combating\\_corruption.pdf](http://www.au.int/en/sites/default/files/treaties/7786-file-african_union_convention_preventing_combating_corruption.pdf).

### E. Dispute Settlement and Host State Standing

Traditionally, investor-state dispute settlement is a mechanism essentially designed to offer the investor the opportunity to challenge the legality of host actions or seek compensation for compensable breaches. Such international legal recourse is deemed to be necessary because of the suspicion that domestic legal process would be inadequate or unfair to the investor.<sup>182</sup> In other words, more developed Northern economies have always insisted on a mechanism of international dispute settlement because of the perceived deficiencies of domestic courts in developing countries, often considered corrupt, biased, inefficient, or dependent on the executive.<sup>183</sup> This philosophy underestimates the powers of Northern corporations and overestimates the powers and discretions of governments of developing countries.

The dispute settlement provisions contained in most BITs essentially shift the burden of perceived domestic court problems, especially the assumed bias problem, onto the host state by creating an international mechanism that structurally limits the host state's ability to pursue a legal process. Without detailing the issues of bias that developing host states regularly face in international arbitral fora, denial of access or standing is a key feature of the traditional BITs. China and its various African counterparts have also adopted a system that offers one of the parties access to arbitration, while denying it to the other. The IISD Model addresses this problem. The relevant provision in the IISD Model is exemplary. It reads in pertinent part:

In the event of a dispute between a Party and an investor or investment relating to the abrogation of said investor's or investment's rights under Article 18 of this Agreement, and such dispute has not been resolved pursuant to good faith efforts in accordance with Article 42, a Party may initiate an arbitration in accordance with the rules in this Agreement, including Annex A of this Agreement, applying them *mutatis mutandis* to the context of a state-investor/investment dispute.<sup>184</sup>

The IISD Model rightfully assumes that rights and obligations are reciprocal and that the investor's abrogation of its obligations is equally actionable. The host state's access to international arbitration has more than theoretical importance because of the arguably better enforceability of international arbitral awards compared to domestic court judgments, whether through the ICSID Convention, the New York Convention, or some other arrangement. In any case, international contracts involving foreign investors often provide for international arbitration without limiting access to only one of the parties. Limiting access to the investor ignores reciprocal obligations and the benefits of international arbitration to host states. In this regard the dispute settlement provisions contained in the traditional BITs are outdated.

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182. MANN, *supra* note 104, at art. 45.

183. *See id.* at art. 45(B).

184. *Id.* at art. 44(A).

#### IV. Policy Underpinnings: Is China Resolving the Dilemma by Silence?

China does not yet seem to have appreciated its position as the second largest economy in the world, or perhaps it is treating its ascendance with caution. Although the various Chinese BIT models are now being talked about as if China had followed a systematic model-based BIT policy, this does not appear to comport with reality. A close examination of the various generations of BITs suggests some level of conscious progression over the decades, from merely receiving investment and worrying about investor excesses, to having some sensitivity to investor rights as China continues to send immense capital abroad. But, again, China's policy directions do not appear to be as cogently and intentionally articulated as those of the United States.

The United States articulates its BIT policy in the following terms:

- The U.S. bilateral investment treaty (BIT) program helps to protect private investment, to develop market-oriented policies in partner countries, and to promote U.S. exports.
- The BIT program's basic aims are:
  - to protect investment abroad in countries where investor rights are not already protected through existing agreements (such as modern treaties of friendship, commerce, and navigation, or free trade agreements);
  - to encourage the adoption of market-oriented domestic policies that treat private investment in an open, transparent, and non-discriminatory way; and
  - to support the development of international law standards consistent with these objectives.
- U.S. BITs provide investors with six core benefits:
  - U.S. BITs require that investors and their "covered investments" (that is, investments of a national or company of one BIT party in the territory of the other party) be treated as favorably as the host party treats its own investors and their investments or investors and investments from any third country. The BIT generally affords the better of National Treatment or most-favored-nation treatment for the full life-cycle of investment—from establishment or acquisition, through management, operation, and expansion, to disposition.
  - BITs establish clear limits on the expropriation of investments and provide for payment of prompt, adequate, and effective compensation when expropriation takes place.
  - BITs provide for the transferability of investment-related funds into and out of a host country without delay and using a market rate of exchange.
  - BITs restrict the imposition of performance requirements, such as local content targets or export quotas, as a condition for the establishment, acquisition, expansion, management, conduct, or operation of an investment.
  - BITs give covered investors the right to engage the top managerial personnel of their choice, regardless of nationality.
  - BITs give investors from each party the right to submit an investment dispute with the government of the other party to international arbitration.
- There is no requirement to use that country's domestic courts.

- The United States negotiates BITs on the basis of a model text.<sup>185</sup>

China is now in a position to say what it wants to say, but it is not saying it. Although part of that is cultural, part of it is a serious philosophical dilemma that is difficult to resolve in the real world. First, China has to reconcile its position as the world's number one recipient of foreign direct investment<sup>186</sup> with its capacity as the world's second largest exporter of capital.<sup>187</sup> It is conflicted between protecting its home industries and its desire to have its investors succeed in foreign domains. No country has previously faced this dilemma to such an extent. It is a real dilemma that needs resolution but, so far, China seems to have chosen to resolve it by complicity, one BIT at a time—that is, by continuing to sign BITs with no coherent policy underpinnings. The most recent ratification of the Canadian Model BIT and the signing of the China-Tanzania BIT, which could not be more different in both structure and content, are demonstrations of that.

The second dilemma relates to managing perception. This is equally serious. So far, there is no sufficient evidence that China is systematically using BITs for one-way protection of its economic interests vis-à-vis Africa.<sup>188</sup> In fact, it appears that China is resolving the dilemma by silence. 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. The older BITs, such as China-Sweden and China-Ghana, and China-Iceland and China-Egypt, and China-Germany and China-Uganda, do not tell a coherent story. The recent China-Canada BIT is just a Canadian model that China accepted with some notable additions that China might have proposed. It is thus fair to conclude that with respect to modernizing its BITs with Africa, China's silence is conspicuous.

## Conclusion

China's rapid but inadequate progress is confusing traditional classifications and traditional classifiers who look for patterns. While still considered a developing country, China has more economic power than most developed countries. In the area of investment law, China's rapid ascent coupled with its unique ideological past appears to have deprived it of the opportunity to deliberate on options, refine theory, and pursue a systematic BIT program like that of the United States. The reality is that today's China-Africa BIT regime is sporadic, outdated, uninformed by recent devel-

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185. *Bilateral Investment Treaties*, OFF. OF THE U.S. TRADE REPRESENTATIVE (2005), <http://www.ustr.gov/trade-agreements/bilateral-investment-treaties>.

186. Uche Ewelukwa Ofodile, *Africa-China Bilateral Investment Treaties: A Critique*, 35 MICH. J. INT'L L. 131, 153 (2013).

187. *Id.* at 150.

188. *But see, e.g., id.* at 205–06. Professor Ofodile appears to be of the opinion that there is some coherence and systematic employment of BITs by China. The author of this Article sees no evidence of that. The comparative analysis of the China-Sweden and China-Ghana BITs does not suggest any particular North-South or South-South pattern.

opments, incoherent, and even purposeless, as can be seen from the examples profiled above.

Although some recent BITs show traces of North-South characteristics, the evidence is insufficient to conclude that China is purposefully attempting to mimic Africa's traditional Northern partners. If anything, China's BIT program appears to be a simple, benign, and convenient replication of existing text.

In any case, the existing China-Africa BITs do not appear to be serving any meaningful purpose at the moment. China and African states need to consider renegotiating all three previous BITs as well as the latest generation ones. The negotiation must be informed by existing models, including the most recent Canadian BIT model for context, and, more importantly, the IISD Model BIT as it pertains to both the substantive and the dispute settlement provisions. As Chinese investment in Africa increases in scale and complexity, and as some African states also consider investing in China, or at least in Chinese interests, refining the investment regime is key in growing enterprise and achieving the desired objective of sustainable development both in China and in Africa.

## Appendix 1

Partner	Signature	Entry Into Force	Language	National Treatment	MFN	ICSID
<b>Chinese BIT Generation I</b>						
Ghana	12-Oct-89	22-Nov-91	English		Yes	No*
<b>Chinese BIT Generation II</b>						
Egypt	21-Apr-94	1-Apr-96	English		Yes	
Morocco	27-Mar-95	27-Nov-99	French	Yes	Yes	
Mauritius	4-May-96	8-Jun-97	English		Yes	No*
Zimbabwe	21-May-96	1-Mar-98	English		Yes	No*
Zambia	21-Jun-96		English		Yes	No*
Algeria	17-Oct-96	28-Jan-03	French English		Yes	
Gabon	9-May-97	16-Feb-09	English	Yes	Yes	Yes
Cameroon	10-Sep-97		French	Yes	Yes	
Sudan	30-May-97	1-Jul-98	English		Yes	No*
Nigeria (Abolished)	12-May-97			Yes	Yes	
Congo, DR	18-Dec-97				Yes	
South Africa	30-Dec-97	1-Apr-98	English	Yes	Yes	No*
<b>Chinese BIT Generation III &amp; IV</b>						
Cape Verde	21-Apr-98	1-Jan-01	English	Yes	Yes	No*
Ethiopia	11-May-98	1-May-00	English		Yes	Yes
Congo	20-Mar-00			Yes	Yes	
Botswana	12-Jun-00		English	Yes	Yes	Yes
Sierra Leone	16-May-01		English	Yes	Yes	Yes
Mozambique	10-Jul-01	26-Feb-02	English	Yes	Yes	Yes
Kenya	16-Jul-01			Yes	Yes	
Nigeria (Re-signature)	27-Aug-01	18-Feb-01	English	Yes	Yes	No*
Cote d'Ivoire	30-Sep-02		English	Yes	Yes	Yes
Djibouti	18-Aug-03		English	Yes	Yes	Yes
Benin	18-Feb-04		English	Yes	Yes	Yes
Uganda	27-May-04		English	Yes	Yes	Yes
Tunisia	21-Jun-04	1-Jul-06	English	Yes	Yes	Yes
Equatorial Guinea	20-Oct-05	15-Nov-06	English		Yes	Yes
Namibia	17-Nov-05		English		Yes	No
Guinea	18-Nov-05				Yes	
Madagascar	21-Nov-05	1-Jun-07	English French	Yes	Yes	Yes
Seychelles	10-Feb-07		English	Yes	Yes	Yes
Mali	12-Feb-09	16-Jul-09	French		Yes	
Chad	26-Apr-10				Yes	
Libya (Libyan Arab Jamahiriya)	4-Aug-10				Yes	
Democratic Republic of Congo	11-Aug-11				Yes	
Tanzania	24-Mar-13		English	Yes	Yes	Yes

## NOTES:

National Treatment: GALLAGHER & SHAN, *supra* note 7, at 135 n.102.

MFN: "More precisely all of them [Chinese BITs] have an MFN clause, whilst fewer than half of them also have an NT clause." GALLAGHER & SHAN, *supra* note 7, at 140.

ICSID: No\* -but does include reference to ICSID (for procedural rules or arbitrator nomination)

